Self-Determination, Custodianship, and Synthesis:
Telic Behavior in Contemporary Treaty Succession

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Abstract

This dissertation examines treaty succession, the extent to which new states take on treaties signed by their predecessor political entities. The last twenty years have witnessed the emergence of complex inheritance of international obligations by new countries, which have often invoked the practice of postcolonial and post-Soviet governments when either accepting or renouncing preexisting legal ties. Although international lawyers have perennially provided prescriptions to solve attendant predicaments in this area, the topic has rarely been addressed by international relations theorists. Through historical research, this dissertation tracks the development of and interaction between two competing telic behaviors among nascent states confronted by vexing questions about the inheritance of international obligations since the end of the Second World War. Its central findings are that, (1) during decolonization, states renounced many preexisting treaties according to notions of self-determination, aimed at autonomously defining their relationship to the international community; whereas, (2) amid the dissolution of the Soviet Union, quite divergent state behavior emerged, namely that states developed a competing approach based on custodianship to existing international legal relations. Finally, in a third period leading up to 2014, this study documents the interplay between these two purposeful forms of inheritance of international obligations, illustrating that their underlying conceptions may sometimes serve as complementary forces. Empirical research proceeds by examining dominant understandings of relevant law as well as the practice of states in three distinct periods. The conduct of states is evaluated in aggregate and through case studies. This dissertation advances a critique of recent scholarship suggesting that the practice of post-colonial states and the 1978 Vienna Convention on Succession of States in respect of Treaties have become largely irrelevant to contemporary treaty succession.

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Chapter 1

Introduction: Legal Contradictions and Codes of Conduct

In July, 2010, supporters of the Republic of Kosovo awaited an advisory opinion of the International Court of Justice on the legitimacy of the unilateral Declaration of Independence of what was then the world's youngest country. A Security Council Resolution recognizing the new state had been withdrawn for fear of a Russian veto, and the case before the ICJ had been referred by the United Nations (UN) General Assembly at the request of Serbia, which sought to sustain its "territorial integrity" by ascribing illegality to its province's bid for secession, sovereignty, and complete self-government.[1] In a vote of 10 to 4 in favor, the ICJ resoundingly declared that Kosovo's statehood accorded with international law, preparing a lengthy and intricate opinion with a range of legal argumentation to support this overarching conclusion. Forty-one of the 108 states that have recognized Kosovo did so only after the outcome of the case was established, with the largest spate of recognitions since independence occurring within one year of the opinion's release.[2] Despite the ICJ's emphatic denial that it had established any precedent for a general "positive entitlement" to secession,[3] the 74 abstentions in the UN General Assembly's original vote referring the case perhaps

[1] See Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo, Advisory Opinion, ICJ REP 1.4, 1. July 22, 2010. available at: http://www.icj-cij.org/docket/files/141/15987.pdf [hereafter referred to as "ICJ Kosovo Advisory Opinion"]

[2] In alphabetical order, the states that have recognized Kosovo since the ICJ's opinion was released are: Andorra, Benin, Brunei, Burundi, Central African Republic, Chad, Djibouti, Dominica, Egypt, El Salvador, Fiji, Gabon, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Ivory Coast, Kiribati, Kuwait, Lesotho, Libya, Niger, Oman, Pakistan, Papua New Guinea, Qatar, Saint Kitts and Nevis, Saint Lucia, São Tomé and Príncipe, Solomon Islands, Somalia, Tanzania, Thailand, Timor-Leste, Togo, Tonga, Tuvalu, and Yemen.

[3] A majority of the Judges argued in their opinion: "the Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it." ICJ Kosovo Advisory Opinion, ICJ REP 1.4, 56.

foretold its potential unforeseen impact, as Kosovo's legal victory has been invoked in subsequent separatist campaigns and dubious incidents of secession.[4]

Curious among the ICJ's numerous claims legitimating Kosovo's independence was its repeated invocation of paragraphs 9 and 12 of the country's 2008 Declaration of Independence. These sections affirm the new government's succession to international legal obligations signed by its predecessor political entities, namely the Socialist Federal Republic of Yugoslavia and the United Nations Interim Administration Mission in Kosovo (UNMIK). Counting these paragraphs among the "operative" clauses of the Declaration, the Court responded to the Kosovar government's multiple "Written Contributions" submitted before the outcome of the case, which not only documented progress in succession to treaties, but which also asserted these steps as means of consolidating Kosovo's international legitimacy.[5] The ICJ specifically cited paragraphs 9 and 12 to demonstrate that the representatives of the Kosovar people who had collectively affirmed the Declaration of Independence "did not seek to act within the standard framework of interim self-administration of Kosovo, but aimed at establishing Kosovo 'as an independent and sovereign State.'"[6] This latter point proved crucial to undermine the principle argument of Serbia that the Declaration represented a deviation from the prescribed constitutional powers of local government created by UNMIK.[7]

This aspect of the ICJ's advisory opinion raises vexing questions about the evolution of state practice with regard to a largely uncelebrated area of international law, which has thus far rarely been addressed by international relations theory: the succession of states to treaties. Embedded in the Court's decision was an atypical characterization of the relationship

[4] Rein Mullerson, "Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia," *Chinese Journal of International Law*, 2009, 2-25.
[5] In written arguments submitted intermittently to the Court, Kosovo consistently presented the progress it had achieved in treaty relations. For examples, see "Written Contribution of the Republic of Kosovo," April 17, 2009, 1 2.40, available at: http://www.icjcij.org/docket/files/141/15678.pdf; "Further Written Contribution of the Republic of Kosovo," 17 July 2009, 2.17, available at http://www.icj-cij.org/docket/files/141/15708.pdf.
[6] "ICJ Kosovo Advisory Opinion," ICJ REP 1.4, 105. July 22, 2010.
[7] Ibid, 106.

between the arrival of statehood and the decisions of a state to accept inherited obligations. In the case of Kosovo, the Court's majority concurred with the respondent, arguing the latter partially justified the former, whereas preceding accounts of treaty succession have predominantly centered on the responsibilities and rights of new states to succeed to or renounce treaties after they have gained independence. When asked whether Kosovo's succession behavior followed existing international law, Judge James Crawford, member of the ICJ, stated in July, 2015: "understanding cases like Kosovo requires an appreciation of the historical gaps between what states have done and what the law has required—this story begins after the Second World War." He added "when one evaluates those inconsistencies between de jure and de facto succession, the confusion of today becomes less confusing."[8]

Through an historical examination of interpretations of the law of succession and how states have responded to it, this thesis will advance an argument about what guides states in the inheritance of international obligations. Very few authors have followed the winding story of de jure and de facto treaty succession. Even fewer have connected themes that tie together intermittent attempts to establish enduring legal principles in this area with an evaluation of state practice as it has unfolded. By analyzing three consequential episodes of succession, this study identifies two codes of conduct that have emerged to guide state behavior in these areas. It is argued here that from the period 1945 to 1967, states emerging from decolonization contradicted prevailing interpretations of succession law and chose to inherit treaties according to notions of self-determination, reflecting their will to autonomously define their relationship to the international community. In the period from 1968 to 1996, states once again deviated from a newly established legal paradigm, developing a code of conduct based around a conception of custodianship requiring the

[8] Judge James Crawford, "Questions Session for Students," 17 July, 2015, Auditorium of the Hague Academy of International Law, Netherlands: the Hague.

continuance of existing international legal relations. Finally, by analyzing the period from 1996 to 2014, this thesis argues that newly-independent states have sought to synthesize these two codes of conduct, engaging in treaty succession that fuses aspects of each.

An Empty Antiphon: De Jure and De Facto Treaty Succession

Despite significant recurrences of treaty succession in the last century, Ian Brownlie's admonition that it remains a "domain of great uncertainty and controversy"[9] remains as true today as it did when he compiled the first exhaustive reference entry on treaty succession in the fourth edition of *Principles of Public International Law*. Contemporary authors directly addressing the topic often begin their articles, as Jean D'Aspremont does, with an acknowledgement along the lines that "the international law of [treaty] succession has always been portrayed as being in a state of crisis."[10] This common characterization has deep roots in the sequence of, on the one hand, historical attempts to consolidate or codify customary international law regarding treaty succession and, on the other hand, trends in state practice during the sweeping multiplications of newly-sovereign states entailed by decolonization and the dissolution of the Soviet Union. In these interwoven developments, a historical pattern of contradiction emerged between de jure and de facto treaty succession. Even a cursory reprise of these events illuminates a perplexing cycle, which reflects and has itself inspired persistent debate.

Many accounts begin at the high noon of decolonization, in the 1960s, when a strident doctrinal struggle began. It centered on the qualification of an old paradigm of treaty

[9] Ian Brownlie, *Principles of Public International Law, 4th Edition*, (Oxford: Oxford University Press, 1990, 655.

[10] Jean D'Aspremont, "Decolonization and the International Law of Succession: Between Regime Exhaustion and Paradigmatic Inconclusiveness," *Chinese Journal of International Law*, 2013, 321. Other authors have made similar statements. See G Hafner and E. Kornfeind, "The Recent Austrian Practice of State Succession: Does the Clean Slate Still Exist?," ARIEL 1996/1, 1, 2; Verzijl, J., *International Law in Historical Perspective*, 1974, 17; O'Connell, D.P., "Recent Problems of State Succession in Relation to New States," 130 Hague Recueil, 1970, 95; M. Koskenniemi and P Eisemann, *State Succession: Codification Tested against the Facts*, (The Hague: Peace Palace Library, 1996), 65.

succession, known as "universal succession," which avers that it is the responsibility of successor states to undertake the vast majority, if not all of the obligations signed by their predecessor entities. Unsurprisingly, this approach became associated with the will of departing colonial powers. Universal succession was developed as early as the seventeenth century by foundational thinkers in international law—Gentili, Grotius, and Pufendorf—on the basis of Roman notions of inheritance in civil law.[11] When former European dominions gained independence, twentieth century standard-bearers of this customary conception of treaty succession, such as Daniel Patrick O'Connell, sought to elaborate existing prescriptions for universal succession as it had been understood in earlier epochs.[12]

Post-colonial governments—then the newest subjects of international law—objected. When confronted with decisions regarding the inheritance of treaties, they blatantly deviated from dominant legal prescriptions during the period they gained independence. In response, international lawyers harboring anti-imperial sentiments sought to restate an alternate, competing doctrine based on principles of self-determination and emancipation. Emblematic progressive international lawyers, like Mohammed Bedjaoui, articulated the need for a framework for inherited treaties that became known colloquially as the "clean-slate." This doctrine proposes that states are not automatically obligated to succeed to binding agreements to which their predecessors became parties, especially when the party expected to succeed contracted the relevant treaties in the course of colonial dependence. Casting universal succession as a reactionary means of maintaining an unjust existing political order, partisans

[11] Claude Emanuelli, "State Succession, Then and New, with Special Reference to the Louisiana Purchase (1803)," *Louisiana Law Rev*, 63, 2002, 1280.
[12] D. P. Connell, *State Succession in Municipal Law and International Law*, (Cambridge: Cambridge U.P., 1967); D. P. Connell, *The Law of State Succession: Documents En Appendice*, (Cambridge: Cambridge University Press, 1956).

for the clean-slate proposed a fundamental restructuring of treaty succession with the destruction of systemic colonial legal structures as a central, overriding consideration.[13]

From the late 1960s through the late 1970s, a sustained effort was made to settle this doctrinal dissonance. International lawyers deliberated at significant length about how the codification of treaty succession should modify, incorporate, or discard one or the other existing antagonistic models for the inheritance of international obligations. After nine years of fact-finding and debate, the clean-slate appeared to have triumphed, with two documents codifying its central principles in certain domains: first, the 1978 Vienna Convention on State Succession in Respect of Treaties; and second, the 1983 Vienna Convention on State Succession in Respect of Property, Archives and Debt. Although numerous points of controversy were left unresolved—most notably the fate of international delicts,[14] policies on nationality,[15] and the inheritance of membership in international organizations[16]—the conventions came to signify the hopeful ascendance of a modern regime of treaty succession which enshrined the demise of imperialism in the field of succession law by equipping new states with means to throw off colonialist legal relations.[17]

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[13] Mohammed Bedjaoui, "Problèmes récents de succession d'états dans les états nouveaux," 130 Recueil des cours, 1970-II, 454; Mohammed Bedjaoui, "Succession of States and Governments: Succession in Respect of Matters other than Treaties," UN Doc. A/CN4/216/Rev. 1, YB of the ILC (1963), Vol. II, 69.

[14] Michael Volkovitsch, "Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts," *Columbia Law Review*, 1992, 2162.

[15] In the years following the 1978 Convention, numerous authors discussed the continued ambiguities in international legal questions pertaining to nationality that remained and were in some cases exacerbated by the codification. See Onuma Yasuaki, "Nationality and Territorial Change: In Search of the State of the Law," *Yale Journal of World Public Order*, VIII , no.1, 1981, 1981; Ruth Donner, *The Regulation of Nationality in International Law*, 2nd ed., (Irvington-on-Hudson, N.Y.: Transnational Publications, 1994); Vaclav Mikulka, "First Report on State Succession and its Impact on the Nationality of Natural and Legal Persons," CN4/467, Yearbook of the International Law Commission 1995, II; the "Second" (1996), "Third" (1997), and "Fourth Report" (1998) on this matter highlighted the development of issues discussed in the initial report and also brought up other subsequent difficulties; Tanel Kerikmäe (acting as Rapporteur), "Consequences of State Succession for Nationality" (also referred to as "The Estonian Report"), European Commission for Democracy Through Law of the Council of Europe, 10 February 1997.

[16] Konrad G. Bühler, *State succession and membership in international organizations: legal theories versus political pragmatism*, Vol. 38, (Leiden: Martinus Nijhoff Publishers, 2001).

[17] The text of the 1978 Convention allows new states to consider treaties signed by their predecessors to be provisionally binding, and further provides for them to withdrawal with an explicit notification to their partner signatories. The original bilateral partners to treaties with a new state's predecessor are not accorded that right. All parties to multilateral treaties may also resolve that they prefer not to remain signatories to such obligations

Yet despite this seeming resolution to the ambiguities raised by decolonization, state practice after the dissolution of the Union of Soviet Socialist Republics (USSR) appeared to make these documents obsolescent even before they were scheduled to come into force in the late 1990s. States formerly under the dominion of the Soviet Union did not act from a comparable legal position to that taken on by the post-colonial states that gained independence just decades before.[18] These new governments joined with old powers in ignoring the two Vienna Conventions, with varieties of universal succession once again appearing to inhere in practice. Rather than producing clarity on previous hotly-debated legal divides, this turn from an emphasis on consent—codified by the conventions—to the self-conscious exercise of universal succession in the 1990s introduced further ambiguity and contestation. These realities were reflected subsequently in the ad hoc nature of succession acknowledged by European states, and in the ICJ's strong aversion to addressing crucial questions of succession in the years immediately following the seeming de facto resurgence of universal succession.[19]

This perplexing decades-long prologue to the role of treaty succession in Kosovo's independence demands a comprehensive examination that confronts existing accounts of the periods and contradictions in question, and which incorporates the apparent new relationships suggested by contemporary states and the ICJ to exist among treaty succession, self-determination, and statehood. The ICJ's inversion of the logics of treaty succession—that it partially establishes rather than merely follows the statehood of a newly-independent

with a new state. The Convention crucially requires no reasons or justifications be provided in these cases, and it.

[18] For a comprehensive summary of the legal justifications an drawn on this issue, see Brigitte Stern, La Succession d'*é*tats, 262 Recueil des cours, 2000, (especially pages) 223-224.

[19] See the ICJ's rulings in the following cases, with reference to the behavior member states of the European Community. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ, 26 Feb 2007; Legality of the Use of Force (Serbia and Montenegro v Belgium) Preliminary Objections, ICJ, 2004; Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ, 2003.

country—adds yet another twist to the storied relationship between universal succession and the clean-slate, as well as between the maintenance of international order and precepts of anti-colonialism and self-determination. So too does this history shed light on the function and character of attempts to codify international law and the will of states to respect or disregard these efforts.

The Decolonization Thesis

Of the many scholars who have addressed treaty succession either at distinct moments or over bounded periods among those briefly mentioned above, Matthew Craven has advanced the most innovative set of claims. His seminal text, *The Decolonization of International*, focusses on distinct historical aspects of treaty succession to forge an ambitious contribution to arguments attempting to sever contemporary international law from its colonial and European heritage.[20] To support his claims, he constructs a guiding comparison between the debates in the International Law Commission (ILC) regarding the composition of the 1978 Convention and the practice of treaty succession that began just over a decade later with the disintegration of the Soviet Union and the former Yugoslavia, as well as the reunification of Germany. Chief among Craven's conclusions are that decolonization represented an aberrative moment, resulting in its major international legal precipitate with regard to treaty succession, the 1978 Convention, being rendered largely extraneous in subsequent cases. The practice of the 1990s, Craven asserts, illustrates that universal succession has resumed its rightful, dominant position.[21]

[20] In his introduction to *The Decolonization of International Law*, Matthew Craven delineates the scope of his investigation of treaty succession, which is echoed in the structure and focus of this study: "from here, the choice seemed to be to focus either on property and debt (the 1983 Vienna Convention) or treaties (the 1978 Vienna Convention), and my choice of the latter resulted from a sense that the arguments were, in many respects, more variegated and of broader relevance given the wide range of matters that fell within the compass of treaty law. By the same token, it was also clear that since part of my argument was about the relationship between the ideas of 'status' and 'autonomy' this could be best explored in the context of treaty relations, as I hope will become clear." Craven, 2009, 6.
[21] Craven, 2009, 231-233.

Among this text's leitmotivs is the author's repeated support for James Crawford's anticipatory call for a return to continuity in treaty succession for the sake of international order. In 1992, Crawford argued:

> …the international community cannot allow the negation of the extensive body of legal relations built up over time. It cannot allow communities simply to opt out of obligations and responsibilities, even by so fundamental and difficult a process as dissolution of or secession from a State.[22]

This presents the reader with a stirring paradox. Craven professes to harbor strong objections to several succession practices arising during decolonization, especially assertions by former colonizers of burdensome duties borne by new states to accept preceding contractual relations.[23] Yet he also argues that the question of consent in the inheritance of treaties has largely given way to a general acceptance of succession as an essential means of preserving international order and security, what he describes occasionally as "public order." Craven argues that the international community has come to understand succession in such a way that it need not tolerate renunciations of treaties by nascent governments that would interrupt international order. He insists that the Soviet Union's dissolution, followed by the willful and explicit sustenance of existing human rights and non-proliferation treaties by new states illustrates that the international legal community will no longer "sanction lawless disrespect for existing engagements."[24] In reflection on the results of the 1990s, he argues that, by incorporating a problem-solving approach,[25] treaty succession has itself been liberated from

[22] Expanded quotation taken from James Crawford, *ASIL Proceedings*, 15, 1992, 21. For Craven's citation and treatment of the quotation, see: Craven, 2009, 233.
[23] In a rare moment of disapproval of O'Connell's reasoning, Craven asserts that the scholar's argument at the height of colonial conquest against Britain's acceptance of public debt agreements with African nations is in fact inconsistent with the claim that the same colonies must remain bound to treaty arrangements that imperialist powers preferred to keep intact. See: Craven, 2009, 45, 51.
[24] Craven, 2009, 214–215.
[25] In the 1990s, Craven's argues, the approach turned to one that "would involve focusing somewhat less on the nature of the events giving rise to the issues, or to the character and form of the wide relations in which the 'problem' is located and would place correspondingly greater emphasis on the nature of the legal relations in question." Craven, 2009, 214.

arguments about emancipation, specifically what Craven refers to as "the faddish insistence upon the necessity of consent."[26]

More broadly, from this particular disconnect between codification and practice, he makes an inference regarding the totality of international law, namely that it has been, as his title suggests, "decolonized." This overarching thesis would appear aimed at a cadre of well-known scholars from the tradition of critical legal theory, who have provided accounts of international law's previous support for and current complicity with colonialism. But the major contributors to this field, such as Martti Koskenniemi, Nathaniel Berman, and Anthony Anghie, are cited so rarely and their ideas explored with so little depth, that it is difficult to ascertain whether it is truly their assertions and ambivalences about the structure of contemporary international law that Craven seeks to challenge. What is clear is Craven's belief that treaty succession, as a cornerstone of international legal order, is also a prism to understand the fate and progress of international law in general. By an extraordinary syllogism, if one accepts Craven's portrayal of the 1978 Convention's abandonment, then he would also have his readers believe that the implicit distinction drawn in the 1970s, between metropolitan powers and former colonies, has suffered a necessary and fundamental "amputation" from international law.[27]

Such an expansive set of claims requires careful examination for three reasons. First, both in chronological breadth and depth, the bifurcation drawn by Craven between decolonization and the arrival of his purported end of history in international law should be scrutinized for accuracy. In terms of historical breadth, it is important to note that Craven's careful comparison between post-colonial codification and post-Soviet practice deemphasizes significant preceding and proceeding episodes of treaty succession which, as a result, play

[26] Craven, 2009, 233, 236.
[27] Craven, 2009, 217.

only tangential roles in the two main empirical components of his study. One significant episode preceded the periods he compares: before the International Law Commission began to consider the inheritance of treaties in the late 1960s, there was a succession interface between earlier waves of newly-independent states and the then largely doctrinally-unchallenged proponents of universal succession. In order to understand how the relationship between de jure and de facto treaty succession has evolved, the pattern by which this earlier generation of post-colonial states accepted and renounced previous obligations before the central, celebrated debate got underway should be examined with equal interest. By the same token, a smaller, but no less consequential episode of practice has taken place after the comparison that Craven discusses. Two decades have transpired since the wave of post-Soviet practice at the heart of the author's analysis, and the jurisprudence surrounding Kosovo's independence suggests that there is another, more recent chapter of treaty succession which should be analyzed in its own right, as it may be rich with insights about the aftermaths of the comparison Craven chronicles.[28]

With regard to historical depth, the author's intentional abstention from comprehensive analyses of the practice by any particular state or smaller sampling of states allows significant questions to linger about the influence of the international forces he argues guided treaty succession en masse. Neither during the 1990s, when he focusses on practice in aggregate, nor in the midst of decolonization, when he discusses the formulation of the 1978 Convention, does Craven utilize thorough case studies to confirm the effects of systemic

[28] In their article on theory and practice of treaty succession in Kosovo's independence, Qerim Qerimi and Suzana Krasniqi conclude tentatively, pointing to the need for research that integrates contemporary episodes of succession: "Overall, this article reveals that the relevant existing practice in the case of Kosovo confirms the tendency toward the application of the universal succession doctrine, except perhaps certain treaties that, owing to special circumstances…may not be applicable automatically or without further bilateral agreement…practice nonetheless appears to contradict the main thrust of Article 9 of the 1978 Vienna Convention." See Qerim Qerimi and Suzana Krasniqi, "Theories and Practice of State Succession to Bilateral Treaties: The Recent Experience of Kosovo," *German Law Journal*, 14, 2013, 1659.

changes in de jure and de facto treaty succession as he understands them.[29] This is perhaps a justifiable attempt to avoid being bogged down in opinio juris drawn from any period, sampling, or particular case. But given that Craven abjures examining the specific trade-offs or consequences brought on for new states in either period he compares, such an analysis, if conducted with consistent case-selection, could serve to verify his account of what caused the apparent discord between the 1978 Vienna Convention and the significant wave of practice that followed in the 1990s. Did post-colonial states renounce treaties solely to satisfy resentments only understood in the period they gained sovereignty? Did the newly-independent states of the 1990s mutually agree with their treaty partners to affirm the integrity of past agreements largely for the sake of sustaining international order? These questions can only be scrupulously addressed by means of case studies situated in the context of practice during their period, which accentuate the minutiae of diplomatic relations, thereby probing whether these forces do in fact bear significant explanatory power.

The second major reason for reexamining Craven's thesis, and to do so through broader empirical means, is to more robustly analyze the actual relationship between de jure and de facto treaty succession within specific periods. Others have persuasively argued that the comparison underlying Craven's analysis takes the legal codification directly following decolonization, and sets it with little contextualization against the wave of practice following the fall of the Soviet Union, avoiding any extended discussion of post-colonial or anti-

[29] An illustrative example of the potential weakness of Craven's aspecific account is the lack of discussion of the controversial question of the applicability of the European Court of Human Rights to new states in the 1990s. A similar issue arises when he discusses the belief of certain international lawyers in the appropriateness of automatic succession by new states in Europe to the Nuclear Non Proliferation Treaty (NPT) in the same period. He is careful to note that declarations of adhesion were considered functionally the same as practical succession, and he accepts that this behavior was not automatic succession per what might be required by an extreme version of universal succession. Throughout this discussion, little light is cast on the security decisions made by states that had inherited nuclear assets such that succession to the NPT would require significant action as well as willful abandonment of nuclear deterrence that might have ensured their security. Craven, 2009, 250-251.

colonial doctrine from the 1990s.[30] Examining his concept of the "decolonization of international law" through a schema of periodization, which discusses the breadth of debates on treaty succession in separate chronological episodes, could present a clearer explanation of how and why so much dissonance has followed attempts to lay down exhaustive legal principles in this area. Such an exercise would cast more light on the purported disconnect at the center of Craven's analysis, between codification and practice, by examining the associated tensions in both preceding and proceeding periods.

The third important impetus for reassessing Craven's account is to engage it fully with the insights of his largely unanswered interlocutors, who have attempted to explain the relevance of colonial enterprises and experiences in contemporary international law. To understand this purpose, it is important to note that two crucial questions linger throughout Craven's comparison. Were the conditions of the 1990s comparable to decolonization as it occurred in the 1960s through the 1970s? And if not, how can Craven's comparison necessarily mean that the codification of treaty succession which derived from decolonization has now become defunct? Oddly, Craven takes the analytical tack of accepting Koskenniemi's characterization of post-Soviet governments as undergoing a largely internal ideological change away from communism to market-based, liberal democracy. He eschews arguments by scholars like Rein Müllerson, an Estonian who claims that the fall of the USSR and the former Yugoslavia should be understood as another stage of decolonization.[31] But this raises another particularly troubling paradox in Craven's analysis: how can the 1978 Vienna Convention be considered irrelevant because it was not applied to circumstances in the 1990s that Craven himself avows were profoundly dissimilar from decolonization? Such a conclusion seems only sustainable if one accepts the empirical premise that current and future

[30] Anthony Carty, "International Law and the Spirit of Anti-Colonialism: Europe Fights Back," *The Modern Law Review*, 74.1, 2011, 142.
[31] Craven, 2009, 210, 211.

patterns of separation, secession, unification, and dissolution of states are now and shall remain fundamentally different from decolonization, that breaches of international order do not now and shall not in the future spur similar anti-colonial ethos which he claims marked succession behavior by post-colonial states. Analyzing the role of the 1978 Convention in a broader empirical context could help to resolve this apparent dislocation of reasoning.

This of course also relates to the second looming question about whether the 1978 Convention—and its codification of consent—can thus be considered inapt outside the historical context of decolonization. Importantly, near the end of his text, Craven introduces a key distinction he sees between post-colonial transitions and the arrival of newly-independent states in the 1990s. In the former, he argues that political entities in the "third world" moved from pre-modern to modern statehood, whereas, in the latter, mostly European governments merely transitioned from one version of the modern state to another.[32] He couples this distinction with an invocation of Carl Schmitt, who famously described legal differences between the continent of Europe and outposts of empire, which proved permissive for imperial powers that did not need to worry about applications of the periphery's brutal rules at home.[33] Craven suggests that these arguments about separate standards of international law, once used to sanction colonialism itself, can explain how the practices in the 1990s were less contentious because international lawyers did not need to reconcile law and practice with simmering postcolonial perceptions.[34] Even if one grants the implied empirical premise mentioned in the previous paragraph, this argument may not take sufficient account of the central critiques of scholars like Berman, Koskenniemi, and particularly Anghie, who claim that the problems for international law generated by decolonization itself remain largely unanswered, undergirding and tainting international legal order, notwithstanding the

[32] Craven, 2009, 266, 267.
[33] Craven, 2009, 264.
[34] Ibid.

significance international lawyers might assign to aspects of colonialism from one period to the next.[35] Regardless of the utility one might ascribe to these characterizations of postcolonial contractual relations, these underlying issues should be put fully in dialogue with Craven's thesis of decolonization in treaty succession, especially if shifts in this area are presumed to indicate broader changes in international law.

Theoretical and Policy Significance: The Legacy of Post-Colonial Succession Practice

Attempting to discern what has guided states in the conduct of treaty succession since the end of the Second World War, and evaluating the validity of Craven's thesis serves two broader purposes. First, doing so illustrates the limitations on the conceptual resources of legal positivism to explain how states have chosen to engage in treaty succession from one period to the next. Under common theories of legal positivism, the rules of international law are defined by the will of states, subsequently directed by states among themselves to uphold these rules. On two counts, the investigation undertaken in this thesis suggests that this approach falters in describing the role of international law in treaty succession. First, the repeated cycle of contradiction between consensus on the law of succession and what states have actually done in the first two periods under examination suggests that the formulation of international legal principles by lawyers claiming to represent the will of states have failed to

[35] Nathaniel Berman did not produce a single, totalized monograph on these issues but he provided several crucial essays for texts like the following: *Passions et Ambivalences, Le colonialisme, le nationalisme et le droit international* (Paris: Pendone, 2008), "Les Ambivalences Impériales" in H. Ruiz and E. Jouannet (eds), *Droit international et impérialisme en Europe et aux Etats-Unis* (Paris: UMR de Droit Compare, 2007); Martti Koskenniemi, *The Gentle Civilizer of Nations*, (Cambridge: Cambridge University Press, 2002);A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge: Cambridge University Press, 2004).

As a specific example, take Anghie's emphasis on the properties of consent to international contracts and treaties. Craven perhaps overlooks how authors like Anghie argue that the continuing problematic redolence of colonialism in international law can be traced by examining the validity ascribed to old treaties created from positions of extreme inequality and coercion by the more powerful, metropolitan party. Anghie draws insights from the debates about the regime of acquired rights, relations between post-colonial states with private foreign parties, as well as disputes regarding sovereignty over natural resources that rived camps of western and developing states in the UN General Assembly from 1962 to 1974. In this analysis, the parties insisting on their own consent to relinquish rights acquired during colonial treaty relations were themselves bearers of colonial legacies rather than the new governments of their former territories. Anghie, 2004, 111, 211, 235.

produce legal documents and doctrine that conform to will theories of legal positivism. The second, deeper conceptual limitation arising from this study relates to the disagreement among international lawyers about whether positivist understandings of international law allow for the presumption that treaties can and should be inherited. The evaluation of contentious debates about the law of succession in the first two empirical chapters suggest that what united advocates for both universal succession and the clean-slate was fealty to legal positivism.[36] These scholars, jurists, and diplomats largely agreed that treaties implied agreement by the parties involved, and only under those conditions could they be considered to apply to states. While many also agreed that new states are obliged to accept basic rules of international law, they also avowed that these states are participating in these rules on the basis of their consent to them. While many anti-colonial attorneys claimed that international law needed to incorporate special rules to emancipate former colonies, positivist conceptions of when treaties applied could not in any case explain how these new states had automatically succeeded to treaties, and thus could not take sides on the issue of whether these states needed special rights to throw off preexisting legal relations. The absence of some independent concept of legal personality within positivism produced tensions in the central debate over whether former colonies were to be bound by bilateral treaties previously applying to their lands because it required that they explicitly consent to them. This central struggle during the legal transitions taking place following decolonization are explored at the end of this thesis.

[36] Among the many scholars cited in Craven's analysis who clung to positivist principles were Daniel O'Connell and Mohamed Bedjaoui, fierce intellectual opponents, and Humphrey Waldock the Rapporteur for the International Law Commission who began the reevaluation of succession law through a series of reports named after him. It is also important to note that Craven himself subscribes to positivist legal theory.

The second and broader purpose served by this thesis is to evaluate the contemporary influence and relevance of both of post-colonial succession practice and the 1978 Vienna Convention. The seemingly abrupt transition in the practice of states in the 1990s, briefly described above and documented in the fourth chapter, has been described by authors like Craven to have had significant consequences for the future of treaty succession. If states emerging from the dissolution of the Soviet Union did not follow the previous pattern of inheriting international obligations, it is important to evaluate whether these trends in post-colonial practice bear any relevance to the succession quandaries faced by states up until the present. This thesis provides the empirical bases for arguing that in fact the practice of post-colonial states has and will continue to influence subsequent state behavior. The development of a code of conduct for treaty succession during the period from 1945 to 1967 created a lasting impact on what states deem appropriate when confronted with choices about whether to accept or renounce preexisting legal relations. This conclusion also bears relevance to the fate of the 1978 Vienna Convention. Although this document did not receive wide-spread ratification and is considered to have been broadly ignored and then contradicted by states that became independent in the 1990s, it may still provide guidance to the practice of treaty succession as an expression of the will of new states to succeed to treaties based on notions of self-determination. This notion has endured and may in the future shape the orientation of new states deciding which treaties to inherit and which to cast aside. Because the 1978 Convention responded to the practice of post-colonial states, by attempting to codify a new set of procedures that conformed to their aspirations, it can be invoked by states seeking to rely on their consent in the inheritance of international obligations.

Organization of the Thesis

A brief explanation of the content of the proceeding chapters is mentioned here only to outline how the dissertation will progress. The Second Chapter will fully explain theoretical, methodological, and historical aspects of the study, providing bearings for the three empirical chapters that follow. The Third Chapter examines the period from 1945 to 1967, outlining how international lawyers and scholars developed prescriptions for qualified universal succession, then surveying practice to illustrate that post-colonial states largely abandoned these interpretations and engaged in treaty succession according to notions of self-determination. The Fourth Chapter covers the period from 1968 to 1996, discussing the development of the 1978 Vienna Convention, and illustrating how states once again avoided following dominant legal prescriptions. Their inheritance of international obligations instead followed a code formulated around ideas of custodianship. The final empirical section of the study, the Fifth Chapter, addresses the period from 1996 to 2014. It illustrates how states synthesized aspects of both preceding approaches to practice, accommodating and fusing each within their succession practices. It is worth noting from the outset that the each of the empirical chapters (numbered three, four, and five) have two major parts, which could be considered sub-chapters because they each deal with de jure and then de facto succession respectively. The length of each of the three empirical chapters reflects the duration and complexity of the data collected and analyzed. The Sixth Chapter advances two theoretical arguments about the consequences for the interpretation of treaty succession law and state practice in this area, while also discussing the relevance and the interpretation of the 1978 Vienna Convention.

Finally, before advancing further in the analysis undertaken in this thesis, it is important to note explicitly the manifold nature of this author's engagement with the work of Matthew Craven. Previously, in this introductory chapter, this author's broad critique which

forms the basis for the study has been presented. The relationship between this study and the *Decolonization of International Law*, thus, is one primarily of creative dialogue. Disputes with the overarching themes of the Craven's seminal text are sustained throughout the thesis without leading to the construction of this text as singularly or entirely a response to Craven's argument about the nature of change in treaty succession in the twentieth century. Disagreements with specific elements of his argument are noted only after the primary theoretical claims of the thesis are presented in the conclusions at the end of each empirical chapter, as well as in the conclusion of the final chapter of the dissertation.

This dialogue with a specific text, *The Decolonization of the International Law*, however, should not be taken to signify an altogether disputatious engagement with Craven's scholarly contributions in general. To the contrary, in fact, some of his conclusions in *The Decolonization of the International Law* are confirmed by this study. But more broadly, his record of academic evaluation of treaty succession, in the context of wider themes in international law, is also regularly cited when it appears outside the monograph which is being discussed. To a certain extent, this is a matter of necessity. What is made plain at the end of the forgoing chapter is brought into sharp relief in the empirical chapters, that scholarly engagement with treaty succession is in certain circumstances so sparse that Craven must be cited and dealt with in order to address evenhandedly salient historical moments of which he is one of only a handful of chroniclers. Yet this citation of and occasional reliance on his explanation of details of historical events is neither an indication of acceptance of all of his arguments about treaty succession, nor a capitulation to what is available. Wherever possible, the spirit of creative dialogue, in which the development of treaty succession in the twentieth century is reassessed, is sustained by careful examination of his scholarly accounts.

Chapter 2

Theoretical, Methodological, and Historical Diagnostics

Introduction

This chapter seeks to fulfill three objectives prior to the presentation of empirical evidence in the third, fourth, and fifth chapters. First, this chapter will fully articulate the theoretical arguments made in this study. Second, the dissertation's methodological schema will be explained. Finally, historical concerns will be answered regarding the starting point and nature of the periodization of empirical evidence.

Theoretical Arguments: Telic Behavior and a Critique of the Decolonization Thesis

De Facto Succession as Telic Behavior

This dissertation advances an argument about what has guided states in the conduct of treaty succession since the end of the Second World War. To do so, two codes of conduct—or "telic behaviors"—emerging from two separate periods of state practice are identified in the third and fourth chapters. In the third chapter, during the period 1945 to 1967, states did not follow prescriptions offered by international lawyers for qualified universal succession and instead engaged in treaty succession according to notions of self-determination aimed at autonomously defining their relationship to the international community. In the fourth chapter, during the period from 1967 to 1996, states once again contradicted developments in international law, namely the 1978 Vienna Convention. Their conduct of treaty succession constituting a discernable code formulated around ideas of custodianship to existing international legal relations. In the fifth chapter, during the period from 1996 to 2014, despite

the reemergence of doctrinal divides among international legal experts about the law of succession, states sought to synthesize the two identified codes of conduct by merging aspects of each.

The principle issue at stake in this thesis—the seeming repeated contradiction of practice following attempts to establish legal principles of treaty succession—requires a subtle framework in order to discern what has guided states in the inheritance of obligations. As noted in the introduction, the subject has suffered an absence of theoretical appraisal from academic international relations. Before elaborating the main theoretical argument above, it is important to note why other theoretical schools of thought regarding the relationship between international law and the practice of states would proffer less valuable insights. Baseline observations derived from the data collected in this study illustrate that both normative explanations and analyses based on the pursuit of self-interest would fall far short in capturing the nature of state behavior in the periods under examination. The following chapters are organized to illustrate the recurrent, significant divide between consensus on legal principles of succession and what states have actually done. If dominant interpretations offered by international lawyers have repeatedly been ignored, and if the documents they have produced on matters of succession have repeatedly failed to influence new states in two separate periods, typical normative explanations face too many empirical obstacles. Indeed, this is what is perhaps most vexing—and intriguing—about the data collected. There is a consistent repudiation of what have been clearly identified legal norms regarding treaty succession, articulated by typical normative "entrepreneurs" or "propagators" through the documents and treatises one would expect to diffuse and elaborate normative principles. States honoring these principles in the breach often provided individually-focused responses to what was then considered the law, but they did not gather to articulate static, alternate normative principles while they were engaging in the behavior of treaty succession itself.

Thus, it is difficult to make the typical normative case about a logic of appropriateness being conceived, elaborated, diffused, and then being followed. Rather than sluicing the historical record to fit such a construct, an alternate but related theoretical approach has been adopted.

Similarly, the data exposes an equally obvious divergence from what might be expected if self-help, or naked self-interest were guiding states. Evaluations of state behavior both in aggregate and in the selected case studies consistently demonstrate that states with interests in taking on treaties refused to avail themselves of succession when it was the most efficient path, not to mention the one of least resistance. Instead they renounced and acceded, while in the vast majority of cases not seeking to renegotiate terms. If self-interest were directly or predominantly motivating their behavior, why would states avoid succession and choose time-consuming procedures for renunciation and accession through diplomatic exchanges? The latter course often involved burdensome domestic and external political action. A corollary phenomenon is the scant evidence collected that demonstrates that states used succession as a bargaining tool in their relations after they gained independence. When confronted with ultimatums regarding their acceptance of preexisting treaties, states in the periods under examination would, more often than not, refuse to engage in succession in return for a specific concession, such as their recognition by a major power. For these reasons, other theoretical schools of thought have been consulted to develop an understanding of state behavior derived from state practice itself.

In this regard, Cornelia Navari has advanced a crucially helpful telic conceptualization of practice which she describes as characteristic of the English School. As opposed to the causal explanations of practice indebted to Emanual Adler, Ted Hopf, and Vincent Pouliot,[1] Navari proposes that many forms of state activity can be understood as

[1] Adler, Emanuel and Vincent Pouliot (2011), "International Practices," *International Theory*, Vol. 3, 1-36; Ted Hopf, "The Logic of Habit in International Relations," *European Journal of International Relations*, Vol. 16, 2010, 539-61; Emanuel Adler and Vincent Pouliot (eds.), *International Practices* (Cambridge: Cambridge University Press), 2011.

pursuing objectives "which [are] conceived as a result of following certain general principles of procedure."[2] In defense of this approach, she also appeals to Walter Gulick, who argues that: "a person engaging in a telic practice is *guided* by its standards rather than being *caused* to perform them in some manner, and the practice is directly accessible to empirical investigation. [emphases are author's own]"[3] Although the English School maintains no monopoly on this conceptualization,[4] Navari's emphasis on the long provenance of this thinking, with forebears like Immanuel Kant and Aristotle, provides insight into the potential explanatory power of this approach for international political theory.

Recent articles supporting the use of telic understandings of practice in international relations theory also lend credibility to the practice-centered approach of this thesis, which compares legal debates with what states have actually done. The latter component remains the primary focus in each empirical chapter. In his conference paper that attempts to expand on potential applications of telic notions that shape practice, Mikulos Fabry contends that "when seeking to identify the substance of an international norm or concept, IR scholars and international lawyers commonly look for texts that defines it [sic]…this is necessary, but not sufficient."[5] After demonstrating the usefulness of constructivist telic conceptualizations of practice with regard to "territorial integrity," he argues that "since norms/concepts cannot

[2] Cornelia Navari, "The Concept of Practice in the English School," *European Journal of International Relations*, Vol. 17, 2011, 626. [Citing Stephen Turner].
[3] Ibid, 626-627.
[4] The telic notion discussed in this thesis is also operationalized by constructivists as diverse in their thinking as Nicholas Onuf, Friedrich Kratochwil, and Oliver Kessler, as well as other IR scholars like Robert Keohane (1988: 384-385), and philosophers including John Rawls (1955: 3). See: Friedrich V. Kratochwil, "How do Norms Matter?" in Byers, Michael (ed.), *The Role of Law in International Politics* (Oxford: Oxford University Press), 2000; Nicholas Onuf, "Rules in Practice," in Kessler, Oliver, Rodney Bruce Hall, Cecelia Lynch and Nicholas Onuf (eds.), *On Rules, Politics and Knowledge* (New York: Palgrave Macmillan), 2010; Oliver Kessler, "On Norms, Communication and the problem of Practice," in Kessler, Oliver, Rodney Bruce Hall, Cecelia Lynch and Nicholas Onuf (eds.), *On Rules, Politics and Knowledge*, (New York: Palgrave Macmillan), 2010; Keohane, Robert, "International Institutions: Two Approaches," *International Studies Quarterly*, Vol. 32, 1988, 379-396; John Rawls, "Two Concepts of Rules," *The Philosophical Review*, Vol. 64, 1955, 3-32.
[5] Mikulas Fabry, "Conceptual History in International Relations: The Case of 'Territorial Integrity" (Paper for "Conceptual History in IR" panel, ECPR General Conference, Glasgow, September 4, 2014), 5.

cover every contingency and conflicts among them are not infrequent, their precise contours are determined in specific situations in which they are invoked."[6]

In organizing this study, an attempt has been made to follow the direction of this logic in analyzing differences in practice over time through diverse empirical bases. Normative thought at the center of international legal debates is contrasted with trends in state practice. More often than not, what has been prescribed by the law and its interpreters has been contradicted in practice. In attempting to understand what has guided states in these contested circumstances, telic behaviors in contemporary treaty succession have been defined as fulfilling two criteria:

1) Through decisions and actions they undertake, states exhibit general conformity to standards and procedure directed toward a specific objective;

2) The specific objective relates to a relational ideal, which guides new states in their attempts to organize their relationships to other states bilaterally and in aggregate.

It is important to note that uncovering evidence of these traits in state behavior does not rely on consistent pronouncements that justify or explain decisions or actions. Instead, the emphasis of this study is on practice itself, and theoretical arguments advanced are premised on the notion that careful evaluation of practice can provide theoretically intelligible understandings of state behavior.

[6] Ibid., 29.

Principal Theoretical Claims

With regard to unravelling the pattern of treaty succession examined in this thesis, a telic conceptualization of practice allows for the identification of two separate categories of thinking, what could be deemed "codes of conduct," that have led states to succeed to or renounce treaties, with observable implications. Specifically, it is argued here that new states have conducted treaty succession according to two predominating telic notions:

1) Self-determination: *Developed during the period from 1945 to 1967, post-colonial states sought to determine their relationships to the international community by engaging in succession behavior that demonstrated their will to define autonomously their legal relations with neighbors, former imperial powers, and other third parties with whom they had been contracted into treaties during the course of colonial dependence.*

2) Custodianship: *Orchestrated by states in the last decade between 1968 and 1995, specifically those emerging from the dissolution of the Soviet Union, this notion provides for succession behavior premised on the urgency of maintaining regional and global order. Refusing to invoke the necessity of their consent, through practice, they developed a procedure for succession which designated the inheritance of treaties as necessary for maintaining stability through the continuance of existing international legal relations.*

Far from being mutually exclusive or entirety antagonistic, during the period from 1996 to 2014, these codes of conduct coexisted. When making decisions about the inheritance of treaties states integrated these ideas, thus fusing the concept of custodianship with the process by which they defined their entry into existing legal relations. In order to clarify the nature of the telic notions described above, a very brief discussion of their origins is provided below.

Origins of Self-determination

The concept of self-determination has a long and complex history in the twentieth century. Its modern provenance can be traced to foundational arguments about the nature of global order. The Fourteen Points advocated by President Woodrow Wilson in negotiations

for peace following World War I, the Atlantic Charter of 1941, and the Charter of United Nations all served to elaborate core conceptions of this idea. Generally, it is taken to signify privileges states enjoy to equal rights and the reasonable equity they have come to expect in creating forms of sovereignty and attaining separate political statuses of their choosing. Self-determination has enjoyed continuous and deep appraisal as a cornerstone of international society.[7] The principle has been wielded to argue against the influence of empires, as well as to justify domestic forms of autonomy and federation, not to mention outright independence for distinct polities.

For the purposes of this thesis, however, the notion of self-determination is confined to the conduct of states in their relations with neighbors and other like members of the international community. This focus on the outward-looking dimensions of self-determination—how it defines relations among rather than within polities—is derived from the interstate modality of treaty succession. In this sense, the kind of self-determination documented in this thesis is most closely-associated with the articulation found in Article 1 of the International Covenant on Civil and Political Rights: "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Origins of Custodianship

Conceptualizing custodianship requires examining the rare and somewhat obscure existing usages of the term in international relations literature. In fact, it has previously been use only in the area of international security. Perhaps the clearest elaboration of the idea has

[7] For a brief exposition of how the English School has dealt with the concept of self-determination, see Roger Epp, "The English School on the frontiers of international society: A hermeneutic recollection." *Review of International Studies*, 24, 5, 1998, 47-64; Thomas Diez and Richard Whitman, "Analysing European integration: Reflecting on the English school," *JCMS: Journal of Common Market Studies*, 40, 1, 2002, 43-67; and Sheila Grader, "The English school of international relations: evidence and evaluation," *Review of International Studies*, 14, 1, 1988, 29-44.

arisen in analyses of regional conflict, in the work of Robert Stewart-Ingersoll and Derrick Frazier. Their focus on the maintenance of "security orders" led them to contrast custodianship to the much more common concept of "management." Observing that custodianship shares the "relational context" of multilateral management, they suggest that it differs from the latter in that it requires "a base level of relative capabilities and authorities" on the part of independent constituents embedded in a system of regional security.[8] Stewart-Ingersoll and Frazier suggest that "responsibilities" incumbent on custodians "imply more than simply…participation in attempts to manage particular conflicts or security issues."[9] Custodial action, in their view, centers on "the engagement in efforts to maintain and/or stabilize the current security order."[10] In global terms, custodianship has been much less thoroughly analyzed, appearing only in the scholarship of Steven Weber. In addressing questions about the fundamental, underlying impact of nuclear weapons on the international system, he argues that the United States and USSR engaged in "joint custodianship" over the whole of the international system.[11] Weber's far more general, early conceptualization rests on the causal force he ascribes to nuclear deterrence. He suggests bipolar order in the twentieth century did not descend into chaos or replicate massive conflicts of the past due to the much more severe costs of doing so in the era of nuclear arms.[12]

Custodianship as it is described in this thesis shares only some of the attributes of these existing expositions of the term. Rather than attempting to maintain conditions which decrease risks of armed conflict, the maintenance of international legal regimes, which are structured by preexisting treaties, is the aim behind custodianship in the inheritance of international obligations. This offers a more expansive horizon in which to understand the

[8] Robert Stewart-Ingersoll and Derrick Frazier, *Regional powers and security orders: a theoretical framework*, (New York: Routledge, 2012), 96.
[9] Ibid.
[10] Ibid., 97.
[11] Steven Weber, "Realism, detente, and nuclear weapons," *International Organization*, 44, 1, 1990, 55-82.
[12] Ibid.

concept. New states did not merely manage their treaty relations in many categories of political affairs, but instead had to act on their new authority and use their agency in making decisions about the acceptance of treaties. If one were to cite a political statement that encapsulated the nature of custodianship in treaty succession, President George H. W. Bush's speech of March 11, 1990, on the emergence of a "new world order" would be the best example. His remarks, which emphasized that this "new world is struggling to be born, a world quite different from the one we have known…"[13] expressed the aspirational dimension of custodianship among the nascent states that favored continuity in treaty relations. The president's emphasis on the extension and elaboration of institutions created after the Second World War—"where the rule of law… governs the conduct of nations"[14]—similarly articulated the will of new states engaging in purposeful custodial action. It is important to note, however, that the code of conduct developed by states in this period was not led or dominated by American foreign policy. Instead, evidence examined later in this dissertation illustrates their commitment to the telic notion and their sustained behavior in this regard were driven independently from the influence of great powers.

A Critique of the Decolonization Thesis

Inherent in this theoretical account is a critique of Matthew Craven's arguments about the evolution of treaty succession in the twentieth century, referred to here as the "decolonization thesis." Specifically, the account in this thesis of telic behaviors emerging from state practice conflicts with his characterization of the responses of post-colonial states to dominant legal understandings of succession after the Second World War. States emerging

[13] "Address Before a Joint Session of the Congress on the Cessation of the Persian Gulf Conflict," March 6, 1991, *Weekly Compilation of Presidential Documents*, 27, 10, March 11, 1991, 259.
[14] Ibid.

from decolonization did not renounce or succeed to inherited obligations to destroy systemic colonial legal relations. Craven's reliance on anti-colonial doctrine in the 1970s to explain their behavior does not cohere with the data collected and analyzed. This study illustrates the importance of separating the behavior of post-colonial states from the doctrinal arguments that sought to justify it after the fact. Although this study disputes Craven's explanation of state behavior before the drafting of the 1978 Vienna Convention, the analysis comes close to confirming his explanation of state behavior in the following period, from 1968 to 1996. In this period, the purposeful action on the part of states in line with a notion of custodianship matches closely his characterization of new states acting to preserve what he refers to as international "public order."

In a broader sense, this thesis offers an alternative to Craven's interpretation about what has led to the cyclical dissonance between the law of succession and what states have done over the course of the three separate periods. In Craven's account, a fundamental shift occurred in international law as a whole since the decline of European imperialism. For that reason, he argues, the succession behavior of post-colonial states—and the 1978 Vienna Convention which codified the necessity of consent in the inheritance of international obligations—have become obsolete. It follows, for Craven, that this behavior and the codification that followed are no longer relevant to states confronted by succession choices, and that this practice and its legal justification are destructive to international order. Contrary to this reading of historical developments, the arguments advanced in this thesis suggest that the practice of post-colonial states is both currently relevant to the conduct of newly-independent states, and these realities should inform the reinterpretation of the 1978 Vienna Convention. Rather than constituting an aberration in the course of succession behavior since the end of the Second World War, the behavior of post-colonial states, and the imperfect law

that attempted to codify its principles can be understood as providing a lasting contribution to states confronted with the inheritance of international obligations.

METHODOLOGY:
COMPARING LAW AND PRACTICE THROUGH CONTEXTUALIZED CASE STUDIES

The structure of this thesis follows from its two chief goals: 1) developing a theoretical understanding of what has guided states in the conduct of treaty succession across three chronological episodes in which legal principles were formulated and in which an interlude of consequential state practice followed; and 2) evaluating the so-called "decolonization thesis." It is important to note the relationship between these goals. Craven's argument provides a rudimentary theory about the dissonance between codification and practice in treaty succession, that a fundamental shift in international law can explain the inapplication of the 1978 Convention as well as the purported return of universal succession in the 1990s. Through his comparison of the drafting of the 1978 Vienna Convention and the practice of post-Soviet states, Craven provides evidence for this theoretical claim. By not merely expanding upon his empirical scope, but also by testing his theoretical claim, this study can respond to his argument about the relationship between law and practice in treaty succession, while simultaneously providing ground for additional theoretical emendations.

For these reasons, each of the three empirical chapters corresponds to successive historical periods in which dominant interpretations of the law are compared to the actual practice of states. The three empirical chapters are all divided into three subsections: one period of legal debate (Part I); followed by an evaluation of state practice in aggregate and through reviewing a case study (Part II); and finally a third section detailing conclusions arising from the information presented (Part III). In the first section of each chapter, the historical legal debates surrounding treaty succession in a clearly defined period are discussed. In the second section of each chapter, trends in practice are evaluated and a case study is thoroughly analyzed and placed in the context of those practices taking place in aggregate. In the third sections, conclusions are then conveyed about these two sections at the

end of the each chapter. This structure provides an integration of contextual factors of both law and practice in discreet intervals of time. This comprehensive approach allows for the specifics of practice to be brought to bear on the basic theoretical contribution in this area offered by Craven.

The separation of law and practice into discreet sections within each period defines the structure of this analysis for two interconnected reasons. First, it has already been noted that the most perplexing aspect of treaty succession in the twentieth century is the repeated contradiction between what international lawyers prescribed that nascent states should do, and what these new subjects of international law actually did. Juxtaposing, rather than interweaving, legal debates with the conduct of states illuminates this dissonance. If accounts of legal debates were situated within and among discussions of state practice, it would be difficult to ascertain whether states were, on the whole, abiding by or contradicting dominant legal trends. If they were in fact deviating from the law, evaluating their practice separately also allows for clearer theoretical conclusions to be drawn about the extra-legal set of decisions that they made.

Similarly, the separation of law and practice in each chapter circumvents the difficulties posed by the relationship between legal arguments and intertemporality. A review of the law of succession in the twentieth century suggests that it has in some ways come full circle from the dominance of one paradigm to the ascendance of its antithesis, and finally to a partial re-endorsement of the original framework. Specifically, advocacy for qualified universal succession became dominant in the 1950s and then reemerged in the early 2000s. This poses a particular trenchant difficulty in trying to assess what guided state practice. Were post-Soviet states, which arguably engaged in qualified universal succession, in fact following law that was formulated in the 1950s? Or were they acting on the basis of other factors? Answering these questions requires distinct, interlocking portrayals of the circular

paradigmatic struggle in the law governing the inheritance of international obligations. These depictions must remain separate from what states actually did in the analyzed periods.

Periodization

This study seeks to incorporate three periods that combined de jure and de facto treaty succession, with the specific purpose of evaluating the relationship between attempts at establishing legal principles and the wider trends in practice that followed. For this reason, the period from the end of the Second World War leading up to but not including the beginning of the International Law Commission's (ILC) proceedings to codify treaty succession in the late 1960s constitutes the first major episode under consideration in this study (1945-1967). The second major episode begins with the ILC's work on treaty succession through the entirety of the dissolution of the Soviet Union and the first round of secessions from the former Yugoslavia (1968-1995). Finally, the last chapter provides a detailed account of legal debates after the entry into force of the 1978 Vienna Convention and state practice surrounding the inheritance of obligations by new states leading up to the last consequential examples of treaty succession in the present period (1996-2014). Conceptual and historical concerns incumbent upon this scheme of periodization are discussed in full in the third section of this chapter.

Selection of "Pathway Cases"

Although this study evaluates succession behavior first in aggregate, providing context for the case studies, it also provides deeper analysis of the inheritance of treaties by three particular states. Decisions regarding which cases to evaluate have been informed largely by the basic logic of theory-testing, as the primary purpose of this thesis's case-studies lies in examining Craven's argument. Having deduced and outlined the theoretical

implications of the author's text, cases will be evaluated in order to find evidence of the validity—or invalidity—of the causal mechanism embedded in the decolonization thesis.[15] However, the analytical motive in selecting and evaluating the cases is not only to ascertain whether they provide examples of the observable implications of Craven's hypothesized causal relationship between de jure and de facto treaty succession. The cases are also probed for evidence of non-causal mechanisms, by placing the particularities of practice in each against state practice in aggregate from the periods addressed in each chapter. This approach allows for the diffusion of potentially diverse empirical observations. From these, conclusions may be derived that are sensitive to nuances of practice, and the possibility that non-causal mechanisms are at play.

The twin purposes of this study require a careful approach to case selection. So theoretically parsimonious are Craven's overarching claims, and so scant are competing theoretical claims, that the goal of process tracing is far more important than merely testing for evidence of the so-called "decolonization of international law." For this reason, it would be to limit the potential insights provided by the cases to search for "crucial cases," described by Harry Eckstein as those "that must closely fit a theory if one is to have confidence in the theory's validity, or, conversely, must not fit equally well any rule contrary to that proposed."[16] This approach would support a case selection method based solely on seeking out countries indicative in their characteristics and illustrative in their outcomes to Craven's account of treaty succession during late stages of decolonization as well as in the early 1990s. Yet because this thesis seeks to understand broader trends bound up in the contradiction

[15] Andrew Bennett, "The mother of all 'isms': Organizing political science around causal mechanisms," in *Revitalizing causality: realism about causality in philosophy and social science*, ed. Ruth Groff, 205-219, (London: Routledge, 2008); Alexander L. George and Andrew Bennett, *Case studies and Theory Development in the Social Sciences* (Cambridge Massachusetts London: MIT Press, 2005); Andrew Bennett, "Process-Tracing: A Bayesian Perspective," in *The Oxford Handbook of Political Methodology*, ed. Janet M. Box-Steffensmeier, Henry E. Brady and David Collier, 702- 721, (Oxford: Oxford University Press, 2008)
[16] Harry Eckstein, "Case studies and theory in political science," in F. I. Greenstein & N. W. Polsby (Eds.), *Handbook of political science. Political science: Scope and theory*, Vol. 7, 1975, 118.

between the law and practice of succession, its methodology of selection must instead search for cases that serve these purposes as well as the broader aim of understanding potentially non-causal mechanisms of state behavior from one period to the next.

Heeding these circumstances, John Gerring's proposal for selection by seeking "pathway cases" is more appropriate, given his emphasis that "…specifically, the [pathway] case study serves to elucidate causal mechanisms [or their absence]."[17] The conditions favorable to pursuing an analysis based on this variety of case selection appear present among the academic writings and policy papers addressing treaty succession. Gerring suggests that when "the broader cross-case relationship is known," and when "we have reason to presume that a causal factor of interest (denoted X1) is strongly associated with an outcome (Y), holding other factors (X2) constant,"[18] a researcher should "focus on a case where the causal effect of X1 on Y can be isolated from other potentially confounding factors."[19] He argues that such studies will yield "penetrating insight into causal mechanisms" when "in circumstances in which cross-case covariational patterns are well studied and in which the mechanism linking X1 and Y remains dim."[20]

The relationship among cases has been established in the middle period (1968-1995) through the lengthy compendia on practice produced by the UN catalogues of treaty succession by new states, and by international lawyers addressing the subject from the vantage of particular periods.[21] Thus, in selecting cases for this study, the object has been not only to select cases in which Craven's hypothesized causal factors would strongly suggest if

[17] John Gerring, "Is There a (Viable) Crucial-Case Method?" *Comparative Political Studies*, Volume 40, Number 3, 2007, 238. Crucially, in his footnote on this point, Gerring states: "Granted, insofar as case-study analysis provides a window into causal mechanisms and causal mechanisms are integral to a given theory, a single case may be enlisted to confirm or disconfirm a proposition. However, if the case study upholds a posited pattern of *X* and *Y* covariation and finds fault only with the stipulated causal mechanism, it would be more accurate to say that the study forces a reformulation of a given theory rather than its confirmation or disconfirmation." Ibid., 250.
[18] Ibid., 238.
[19] Ibid.
[20] Ibid., 239.
[21] See the analysis of these in Chapter 3, and their brief evaluation in Chapter 1.

not require confirmation to be sustained, but also those where an investigator would expect few intervening exogenous factors that would interfere with the mechanisms described by the decolonization thesis. Most importantly, pathway cases broaden the empirical basis for examining the actual nature of the behavior underlying a set of outcomes; although they cannot invalidate causal mechanisms writ large as strongly as they can validate them, alternate potential pathways may be uncovered. Explanations of how the three cases—Malaysia, Ukraine, and Kosovo—fit these parameters are introduced in the chapters in which each is examined.

HISTORICAL CONCERNS:
JUSTIFYING PERIODIZATION AMID CENTURIES-OLD ORIGINS

The following three chapters begin with a discussion of the international legal debates that centered on treaty succession in three periods after the Second World War. The second part of each of these chapters discusses state practice during these interludes. Before proceeding, it is important to note the limitations inherent in this approach. Crucial to this endeavor is awareness of the analytical indeterminacies created by the decision to begin and end at specific years. Justifications for the beginning and end points of the defined period must be furnished, and the significance for the identified periods of the rich history which came before them must be addressed. These tasks are undertaken here in greater depth than elsewhere in this dissertation because this chapter embarks to introduce the first periodized chapter (1945-1967). The decades it covers arrived after centuries of earlier debate and subtle transitions in international legal interpretations of the law of succession. The following preliminary discussion demonstrates that the analytical step of periodization is not artificial or arbitrary, and that starting after the Second World War is necessary.

Periodization and Contingency in the Law of Treaty Succession

Choosing bounded, historical periods in which to draw out dominant trends in thought on a topic such as treaty succession, which overlaps international relations and international law, can give rise to manifold difficulties. Dangers associated with underemphasizing important intellectual voices or with reducing or lumping together ideas for the purposes of illustrating coherences and unities over time remain ever-present. In addition to constructing an account as critical of its own limitations as the ideas explored therein, it is important to note how legal thought on treaty succession lends itself to a thorough examination in discrete periods. This is largely because this area of international law bears both a relationship to and

set of properties within, the history of interstate relations which suggest that it can be understood by examining arguments and deliberations circumscribed by dates.

For this reason, it is crucially important to address what could be referred to as the "contingent" nature of treaty succession in two senses before going on to a discussion of the first episode analyzed in the next chapter. The first sense in which significant debates regarding treaty succession turn on contingencies in the course of history relates to the tendency of the subject to be fundamentally reevaluated only when questions connected to it become widely consequential to interstate relations. Circumstances in which vast numbers of states are born through emancipation, revolution, secession, territorial resettlement, or conversely are subsumed by annexation or inter- and intracontinental subjugation arise very rarely. The number of such global, systemic episodes of change since the development of international law as it is understood today may be counted on one hand: in the nineteenth century, revolutions leading to national unification, and the wide-spread proliferation of European colonialism; in the twentieth century, the radical reorganization of European governments and borders after the First and Second World Wars, the rapid onset of European decolonization, and the dissolution of the USSR.[22] In between these periods of tremendous change, states were regularly confronted by context-specific quandaries posed by treaty succession. But these instances did not spark the kind of debate that fomented significant challenges to prevailing legal interpretations. The pyres of doctrinal struggle have been lit in fits of global fluctuation, in which treaty succession was not only bound up, but in which a great number of states heaped abundances of kindling in the form of problematic, dissonant experiences and conflicting interests.[23] Thus, rather than achieving steady, continual appraisal

[22] This association with dramatic global change was stated most clearly by Hersch Lauterpacht in 1948, when he included the law of treaty succession in a "Survey of International Law in Relation to the Work of Codification of the International Law Commission," completed at the request of the UN Secretariat. See "Survey of International Law in Relation to the Work of Codification of the International Law Commission," UN document A/CN4/1, November 5,1948. [Reissued under symbol UN doc A/CN4/1/Rev 1, February 10, 1949].
[23] Craven, 2009, 7.

by international lawyers, the law of treaty succession has largely cycled through invocation, application, reinterpretation, and ultimately alteration only in separate, disjointed episodes. This propensity is echoed in the episodic nature of scholarly discussion of the topic, which regularized the use of distinguishable, discrete "eras" in treaty succession.[24]

The second contingent dimension of the development of the law of succession results from the inherently transitional purposes it serves during moments of reinterpretation. In two ways, debate on the inheritance of obligations reflects the significant changes taking place or recently past. First, when a crisis in treaty succession unfolds, existing prescriptions for how it should take place are themselves often one of the causes of the problems that have emerged. Their insufficiency to deal with new circumstances provides the impetus for their evolution. In this sense, the fundamental reformulation of treaty succession through international legal debates is deeply connected to the arrival of systemic changes. Subsequent alterations in customary law and the major attempt at codification which arose in the second half of the twentieth century both served as responses to the problems which they partially constituted. Secondly, treaty succession in the twentieth century was regularly ascribed an ameliorating purpose in relations among states. That is to say the rules comprising it were constructed and implemented in order to return states to some version of "normalcy" after significant international upheaval. Colonial international lawyers, for example, often noted that the rules of treaty succession were not shaped with mundane, day-to-day purposes in mind. Instead, these legal operatives tended to suggest that laws of succession were supposed to return the conduct of international relations to conditions of regularity which preceded the political event for which they were initially fashioned.[25] Bearing in mind the episodic

[24] Rein Müllerson, *International law, rights and politics: developments in Eastern Europe and the CIS*, (London: Routledge, 2013), 137; also see James Crawford, "Remarks," ASIL Proceedings, 86, 1992, 15; Detlev Vagts, "State Succession: The Codifiers' View," *Virginia Journal of International Law*, 33, 1993, 276-280.
[25] This position is clearly represented in Karl Zemanek, "State Succession After Decolonization," *Hague Recueil*, III Vol. 116, 1965, 190.

historical framework in which treaty succession has often been articulated, Matthew Craven proposes that the body of rules making up the law of succession to treaties can be considered "contingently structural." He elaborates this idea by arguing they are:

> …structural in the sense that they are effectively "rules about rules" (governing the conditions for the applicability of substantive rights and obligations, but not stipulating what those rights and obligations might be); contingent in the sense that they come into operation only at the moment at which a 'succession' has taken place, but which otherwise have very little obvious everyday significance.[26]

This dual, contingent nature of debates surrounding treaty succession, combined with intermittent empirical upsurges in debate on this area of international law, further abets the deduction of de jure trends within specific periods. However, coupled with this feature of analysis of treaty succession is nearly perpetual contestation of what constitutes precedent during periods of change.[27] Lamenting this reality, Hersch Lauterpacht argued in *Private Sources and Analogies of International Law* that when discussing customary law of treaty succession, it is exceedingly difficult to ascertain whether any legal position represents a "rule" or its "exception."[28] Recalling the Peace Treaties of 1919, he simultaneously argued in the late 1920s that succession should be governed by the provisions laid out in these documents, while acknowledging there were irresolvable questions about "whether treaties providing for the taking over of obligations conform to the rule, or state an exception; or whether treaties which exclude succession do so as an exception to a generally recognised principle."[29] Discussing de jure trends in treaty succession, then, attaches itself not only

[26] Craven, 2009, 27.
[27] This propensity for contestation is often present in the occasionally tortured argumentation presented by international courts confronted by the issues at stake. Ruling on maritime delimination, the International Court of Justice claimed that the uniqueness of cases pertaining to treaty succession remains so pronounced that creating a narrative linking all or a significant portion would "preclude the possibility of those conditions arising which are necessary for the formation of principles and rules of customary international law." *Case concerning the Gulf of Maine Area (Canada/ United States)*, ICJ Rep, 12 October 1984, 290 (para 81); O'Connell, 1956, 102.
[28] Hersch Lauterpacht, *Private Sources and Analogies of International Law* (With Special Reference to International Arbitration) (London: Longman, Green and Co., 1927), 129.
[29] Ibid.

empirically but also conceptually to evaluation in discrete episodes. Where these interludes begin and end may be affixed to dates associated with systemic changes, which are intrinsically linked to the redefinition of existing law according to transitional roles which treaty succession serves.

The Second World War and Contestation of Treaty Succession

When selecting a starting point, it is crucial to recall from the outset the larger aim of this dissertation, to understand what has guided states by tracing patterns in the relationship between legal conceptions of treaty succession and actual state practice in this area from one period to the next. For three reasons, beginning at the end of the Second World War serves these larger purposes. World War II's aftermath constituted a significant moment of international change, which motivated the reconsideration of de jure conceptions of state succession to treaties. It also largely setup the circumstances that led to overarching trends in European decolonization, which provoked entrenched controversies in treaty succession. In addition to prompting these interlinked circumstances, the aftermath of the Second World War also coincided with the arrival of clearer legal distinctions between de jure and de facto treaty succession, allowing for a more decisive evaluation of the relationship between the two.

In regard to legal debates surrounding treaty succession, the Second World War delivered an inflection point. In its aftermath, the Soviet Union annexed numerous territories and converted new European states into Soviet Socialist Republics, including Czechoslovakia, Romania, Poland, Hungary, Albania, Bulgaria, and East Germany; formerly fragmented lands in the Balkans were reunited under a new Yugoslavian communist state; Japan was administered through an American occupation that fashioned a new form of government and a new regime. These are just some of the many immediate changes that

raised important questions regarding which inherited obligations new states would accept or renounce after gaining or reestablishing statehood. But in a broader sense, as Anthony Aust points out in his most recent, definitive reference volume on *Modern Treaty Law and Practice*, "when a state becomes party to a treaty, a legal nexus (connection) is established between the treaty and the territory of that state. In the years following the end of the Second World War, problems arose chiefly when colonies became independent."[30] Here Aust conveys how the conclusion of World War II served not only as a rare, systemic catalyst for discussion of treaty succession, but that its aftermath coincided with the acceleration of decolonization, which he suggests created enduring ambiguities in this area of international law. He concludes these summary remarks on state practice from a historical perspective by observing that "as a guide to today's problems of treaty succession, the value of state practice before the Second World War must now be rather doubtful."[31]

Beginning at a moment of resurgence in decolonization serves an additional important purpose in the following periodized analyses, namely that the international legal dilemmas posed by this broad and hastening process were almost universally perceived as unprecedented. After the Second World War, in most cases, the international lawyers who propagated colonial notions of universal succession that were then considered conventional and their opponents, post-colonial leaders and jurists attempting to advance reform of succession law along anti-colonial lines, could agree on very little. Yet beliefs about the uniqueness of the issues at stake and the problems they posed did appear to cocenter their disputes, providing some common ground.[32] What could be deemed as consensus on the "precedential" nature of treaty succession amid decolonization suggests that the disputes arising at that time are an appropriate place to begin.

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[30] Anthony Aust, *Modern treaty law and practice*, (Cambridge: Cambridge University Press, 2013), 320.
[31] Ibid.
[32] Craven, 2009, 28.

A third historical reason for beginning at the end of the Second World War is linked to the emergence of clearer distinctions between de jure succession and the practice of states, referred to here as "de facto succession." Though it is difficult to capture fully the significance of this development outside the context of the proceeding discussion, the refinement and recognition of definitions of the two provided a novel conceptual tool which proved useful for international lawyers. Grand theories of the nature of international obligations, the foundations of the state, and the properties of sovereignty that had accrued through the nineteenth century created numerous potential answers to concrete questions of treaty succession. Philosophical and legal constructs often required that certain assumptions about the assignment and transference of rights among political entities should actually take place, creating acute analytical problems for international lawyers attempting to address immediate concerns about the inheritance of treaties.[33] As a result, they began to articulate qualitative differences between legal decisions by states, and what one or another legal prescription might require. Before the Second World War, it was far more usual for international lawyers to emphasize some aspect of theoretical argumentation, either ignoring or incorporating preceding instances of state practice of treaty succession to support their approach. Those taking up similar questions after the Second World War explicitly acknowledged a difference between the concept of treaty succession as a series of decisions made by a new state, and the legal consequences which faced such a state according to a

[33] Several scholars have pointed out that rudimentary, early definitions of treaty succession as it related to existing international law created an unclear relationship between what the law was and what state practice was observed to be. Before the twentieth century, de jure treaty succession was often described as the legal consequences of decisions by states to succeed or renounce obligations. See Ernst H. Feilchenfeld, *Public Debts and State Succession*, (New York: Macmillan Company, 1931), 1–3, 612-614; Kelsen, Hans. *Pure theory of law*, 2nd Edition., Translated by H. Knight, Univ of California Press, 1964), 314, 325. However, as O'Connell later pointed out, the understanding of what constituted de jure succession shifted toward more prescriptive purposes. That is to say, succession law became primarily concerned with the "whether" and the "how" of succession rather than dealing predominantly with its aftermath. O'Connell, 1956, 3-5; see also Karl Zemanek, "State Succession After Decolonization," 116 *Hague Recueil* 188, III, 1956, 190.

doctrinal reading of international law.[34] Though this development may seem an insignificant clarification of the rhetorical relationship between de facto and de jure treaty succession, for the purposes of addressing divergences between the two, it clears away a great deal of ambiguity in delineating arguments, and relating them to the empirical realities to which they were applied.

Classical Conceptions of Universal Succession

A very brief summary of those ideas which governed conceptions of treaty succession before the conclusion of the Second World War provides context for the ensuing chapters. The purpose in this limited overview is not to provide an exhaustive account, but to illustrate that the debates which followed were not cut from whole cloth. To scholars focusing on the intellectual history surrounding the state and sovereignty, the following summary will undoubtedly seem terse. But the account provided below is a product of the obscure place treaty succession ordinarily occupies in international law. Records of its evolution thus to do not always reflect the subtle changes in nuanced philosophy regarding foundational elements of the international system. In fact, much of the intermittent debate surrounding treaty succession before the twentieth century centered chiefly on the application and contestation of a domestic analogy derived from a conception of inheritance in Roman Civil law. This analogy held that when a civil successor undertakes the place of his or her predecessor, he or she accepts the rights and obligations as if he or she had become the predecessor. In moments of succession, states and their sovereigns were classically conceived as Roman "heres"

[34] Matthew Craven underscores the significance of the arrival of this increased sophistication of definitions pertaining to treaty succession, pointing out that "the distinction between what has become known as succession de facto, and succession *de iure*…was a means by which international lawyers might circumvent or displace their evident ambivalence as to whether succession was an issue that international law could effectively regulate at all." Craven, 2009, 38.

[heirs].[35] A.M. Prichard summarized the cluster of ideas underlying this analogy which were fully formulated in the Justinianic period:

> The universal successor assumes the whole of the legal clothing of the person to whom he succeeds; steps, as it were, into his shoes. He takes over his rights and liabilities of every kind; his property (*res singulae*) and *iura in re aliena*, the debts and other obligations (such as rights of action for damages for breach of contract) owing to him, and the debts and obligations which he owes [italicization is author's own].[36]

As nineteenth century critics of the analogy drawn from this idea observed, generally strict compliance to it prevailed continuously through the end of the eighteenth century.[37] Princes, monarchs, and emperors who established some change in sovereignty over lands or a state were expected to serve as an heir would in civil law to preexisting international obligations of many varieties.[38] Even when contractarian philosophers intervened to attempt to solve contradictions in the application of these principles, treaties were considered to apply to successors through "the medium of the state."[39] This version of totalized obligation to inherited treaties was expressed in varying degrees in the works of legal scholars and jurists credited with establishing the foundations of international law, including Gentili,[40] de

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[35] The distinction between this idea and contemporary legal understandings of heirs is spelled out in Herbert Felix Jolowicz, *Historical introduction to the study of Roman law*, (Cambridge: CUP Archive, 1954) 127; M Huber, *Die Staatensuccession* (1898), 18-19. Translation provided by Westlake, 17 LQR (1901) 392, 396.
Commentators pointing out the lasting role of this concept in succession theorization include Max Huber, *Die staatensuccession, Völkerrechtliche und staatsrechtliche Praxis im XIX Jahrhundert,* (Berlin-Steglitz: Duncker & Humblot, 1898), 17-19 [translation provided]; Leon Lariviere, "Des Consequences Des Transformations Territoriales Des Etats Sur Les Traites Anterieurs," doctoral thesis, 1892.

[36] Leage, R. W., and A. M. Prichard, *Leage's Roman Private Law, Founded on the Institutes of Gaius and Justinian*. 3d ed. (London: Macmillan, 1961), 233;

[37] Huber, 1898, 18-19; Addressed further in John Westlake, *International law: Part I Peace,* (Cambridge: University Press, 1904), 396.

[38] Huber, 1898, 20.

[39] This axiom, which summarizes early modern thinking on treaty succession, can be found in Matthew Craven, 2009, 31. Despite Craven's account, however, the most significant textual basis for this reading appears in the following texts: Alberico Gentili, *De jure belli libri tres*, (Oceana, 1964), Vol. 2. No. 16, Bk III, c xxii, 413-416; Samuel von Pufendorf, *De jure naturae et gentium libri octo*, Vol. 2., Translated by CH Oldfather and WA Oldfather (Oxford: Clarendon Press, 1934), VIII, x, 8. However, as Craven suggests, there are important references to this subject in Georg Friedrich von Martens, Charles-Henri Vergé, and Silvestre Pinheiro Ferreira. *Précis du droit des gens moderne de l'Europe*. (Paris: Guillaumin, 1858), II, ii, 60–61; Hugo Grotius, *The Law of War and Peace (De Jure Belli Ac Pacis),* (New York: Published for the Classics Club, 1949), II, xiv, 10; Emer de Vattel, *The Law of Nations*, Translated by Joseph Chitty, 1863, Bk II, c xii, 204-208; Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum:* Translated by Joseph Horace Drake (originally in 1934). Vol. 2. No. 13., (Oxford: Oceana, 1964), IV, 216-218; 412-420.

[40] Gentili, 1964, III, xxii.

Vattel,[41] Grotius,[42] and Pufendorf.[43] They maintained that nearly all rights and duties were upheld ipso jure for a successor sovereign taking the place of his or her predecessor, including in circumstances of annexation or the formulation of a new regime. This conception became known loosely as "universal succession." Mikulas Fabry, a scholar of state recognition, claims that this extreme form of succession reemerged in cases when colonial questions were concerned up until the second half of the nineteenth century.[44] Official proceedings at events like the Congress of Berlin occasionally evince this claim, for example when figures like Otto von Bismarck, in his role as president of the congress, made apparently uncontested arguments in support of the supposition that it was "a matter of general right that a province separated from a state should not be able to emancipate itself from treaties by which it had been hitherto bound."[45]

In the wake of enlightenment philosophy's "volonté générale," the prolonged and interrelated intellectual developments that prompted attempts to discredit or revise this brand of succession drawn from private civil law grew out of two categories of philosophical objections. One questioned early characterizations of sovereignty and the other its relationship to the state. Conceptions of popular sovereignty led to the idea that sovereignty itself embodied a corporate will, separate from any ruler's will and from the individual wills

[41] de Vattel above, 1863, 172.
[42] Grotius, 1949, II, ix, 8, 9, 10-12.
[43] Pufendorf, 1932, VIII, at xii, 1–9.
[44] Mikulas Fabry, *International society and the establishment of new states: the practice of state recognition in the era of national self-determination*, Dissertation at University of British Columbia, 2005, 135. See also his subsequent published book on this subject: *Recognizing States: International Society and the Establishment of New States since 1776*, (London: Oxford University Press, 2010). Other scholars pointing out this same late historical influence of this approach include Travers Twiss, *The Law of Nations Considered as Independent Political Communities*, Vol. 2., 1863, 20; Henry Wheaton, *Elements of International Law* (1886), Translated by Richard Henry Dana, 8th edition, Oxford: Oceana, 1964), I, 29; Robert Phillimore, *Commentaries on International Law. Vol. 1.* (Philadelphia: T and JW Johnson: 1854), 168; Alphonse Rivier, "Principes du droit des gens, 2 Bde," 1896, 65.
[45] The Congress of Berlin, 28 June 1878, Protocol 8, Vol. 83, House of Commons Parliamentary Papers, 513.
David Barchard, a noted Ottomanist affiliated with Bilkent University in Ankara notes that "this was the case for Ottoman provinces being separated from the Empire, e.g. Crete. They were still expected to observe the Capitulations though if the successor state was Christian, that seems to have been [occasionally contradicted]." Written correspondence, May 16, 2016.

of members of a polity.[46] These notions impacted philosophers whose ideas influenced understandings of international law. The connection between popular expression and sovereignty as corporate will eventually emerged in the writings of Otto Friedrich von Gierke[47] and, to a lesser degree, in the arguments of G. W. F. Hegel,[48] spurring later philosophical emendations which suggested the state maintained capacities for autonomous normative action despite its newly-corporate characteristics.[49] Out of these ideas, grew the acknowledgement of differences between the state, still ascribed forms of legal personality, and governments, which operated as the agent of the state.[50] At the turn of the twentieth century, John Westlake suggested that the succession of states should be distinguished from succession by governments.[51] Rather than leading to a fundamental reformulation of succession as applying primarily to governments, this distinction led to the insulation of treaties from renunciation at the moment of inheritance even in instances of revolutions that

[46] For an example of this connection drawn through an intellectual history, see Michael Oakeshott, *On Human Conduct*, (Oxford: Clarendon Press, 1975), 196-202.
[47] Otto von Gierke, *Die Genossenschaftstheorie und die deutsche Rechtsprechung* (1887), 876-884 (translation provided by consulted German speaker on request).
[48] Georg Wilhelm Friedrich Hegel, *The Philosophy of Right (1821)*, Translated by T. Knox (1952), 331.
[49] Among other authors addressing the development of this idea in continental philosophy, see James T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought 1870–1920*, (Oxford: Oxford University Press, 1986), 96.
[50] This bifurcation appears to a significant degree Jean-Jacques Rousseau's *The Social Contract*, but is also present in the later political treatises of John Locke. See Jean-Jacques Rousseau, *The Social Contract*, Translated by M. Cranston, (London: Penguin, 1968), Book I, c vi, 61–2, Book III, c i, 101–102.

With regard to succession, D. P. O'Connell claimed that the original discussion of the implication of these ideas can be credited to Johann Caspar Bluntschli, in *Das moderne Völkerrecht der civiliserten Staten als Rechtsbuch dargestellt* (1867), who "dogmatically distinguished Succession of States and Succession of Governments." See O'Connell, 1972, 27–28.
[51] For example, in the first installment of *International Law*, Westlake argued that the state should be understood as an "ideal body, which on the one hand has a certain territory, and on the other hand is a society composed of individual men as its members, and having a corporate will distinct from the wills of its members…" going on to assert later when addressing the same distinction that "since the individual men associated in the State are moral beings, and the action of the State which they form by their association is their action, the State must also be a moral being, having a responsibility and a conscience which are of its members. In this character of a moral being, having a corporate will, responsibility and conscience, a State is capable of being a subject of law and having rights." John Westlake, *International Law*, 1904, 3.

toppled governments because international obligations were adjudged generally to be settled by and for the state.[52]

Although these intertwined philosophical claims did not lead to a fundamental reshaping of succession, they did allow for more radical arguments to be made in the future. Indeed, the reevaluation of universal succession they inspired through the nineteenth century largely reaffirmed existing underlying principles. Yet when succession arose amid significant governmental transformations, claims pertaining to the relationship between domestic political institutions and international law were implicated in doctrinal arguments repudiating universal treaty succession as an acceptable legal process in any context. Specifically, during upsurges in European nationalist sentiment, in episodes like Italian unification, some jurists were eager to argue that state succession more broadly, including matters regarding treaties, only affected "superstructures" of the state, and not the supposedly salient, "organic" nexus of social forces that served as a foundation for sovereignty. Through the preponderance of terms like "popular continuity"[53] and "organic substitution,"[54] new states emerging from this period of revolutionary change accepted a form of universal succession that maintained the appropriateness of inheritance despite radical territorial and governmental changes.[55]

Contrary to this tendency in juridical thought on treaty succession, there also emerged a novel set of propositions incorporating popular sovereignty into the conduct of states facing questions of succession after political transformation. In instances in which a state could be said to fall as a result of acts of communal self-consciousness, the establishment of a new political entity from the same bases created a rupture between it and the old state's

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[52] For this perspective, review, see S. Kiatibian, *Les conséquences juridiques des transformations territoriales des Etats sure les traités* (1892), 11–14.

[53] Paul Pradier-Fodéré, *Traité de droit international public européen & américain, suivant les progrès de la science et de la pratique contemporaines*, (Paris: G. Pedine-Lauriel, 1885), 134.

[54] John Westlake, "The Nature and Extent of the Title by Conquest," Vol. 17, *Law Quarterly Review*, 1901, 392; Huber, *Die Staatensuccession*, 1898, 18-19; O'Connell, 1972, 39-44; Westlake, 1904, 61.

[55] Huber attempted to describe this mode of succession by creating the concept of *Gesamtnachfolge*, what could be translated as "aggregate succession." See Huber, 1898, 24.

obligations, rights, and duties. New states, it was argued, had to engage in positive legal acts to assume a predecessor's treaties.[56] Scholars as diverse as Walther Schoenborn,[57] Gilbert Gidel,[58] Arrigo Cavaglieri,[59] and Arthur Keith,[60] invoked this understanding of necessary voluntarism.[61] Altogether, these formulations represented the beginnings of an articulated alternate doctrine set against succession as it had been overwhelmingly conceived in preceding centuries. Yet these claims remained largely confined to the conclusion that older understandings of succession could not be codified into a sustainable set of rules that cohered with how international law should relate both to municipal law and domestic institutions.[62]

By the interwar period, the proliferation of diverse new theories either bearing on or explaining the proper conduct of treaty succession led some commentators, like Herbert Wilkinson to come to the conclusion in 1934 that for states facing questions regarding inherited obligations, there was "no secure basis in general theory upon which to speculate concerning the future action of a nation in a given case."[63] In reality, the gathering prominence of ideas related to "received sovereignty" promoted attempts to regulate succession issues in general. This conceptual approach provided the groundwork to reinforce international legal constructs, because sovereign authority was described as lying with those legally competent to operate on behalf of the state, not merely the unrestrained power of a law-maker, or sovereign. This conception of sovereignty as equating to competence, and later a form of personality, suggested that international law regarding several areas of

[56] D.P. O'Connell argues that these notions should rightfully be credited to Franz V. Holtzendorff ("Handbuch des Völkerrechts, 4 Bde," 1885), later developed by Karl von Gareis (*Institutionen des Völkerrechts*, 1887). See D. P. O'Connell, "Recent Problems of State Succession in Relation to New States," 130 Hague Recueil, 95, 1970, 110-111.
[57] Walther Schoenborn, *Staatensukzessionen*, Vol. 2, (Germany: W. Kohlhammer, 1913).
[58] Gilbert Gidel, *Des effets de l'annexion sur les concessions*, (Paris: L. Larose, 1904).
[59] Arrigo Cavaglieri, "Regles générales du droit de la paix" *Hague Recueil*, Vol. 26, 311, 1929, 362–376.
[60] Arthur Keith, "The Theory of State Succession, With Special Reference to English and Colonial Law" (London: Waterlow and Sons, 1907).
[61] Georg Jellinek, *Allgemeine staatslehre*, Vol. 1., O. Häring, 1905. 367–75.
[62] Crawford, 1992, 16.
[63] Herbert Arnold Wilkinson, *The American doctrine of state succession*, (Baltimore: Johns Hopkins Press, 1934), 15.

succession—not just pertaining to treaties—could be articulated in such a way that decisions to renounce or accept previous agreements could be governed by forms of legal order.[64]

This brief background discussion of de jure treaty succession before the Second World War illustrates the largely customary nature of what has been considered "the law of succession." Until the attempt to codify treaty succession through the drafting of the 1978 Vienna Convention, debate about the correct legal interpretation of treaty succession took on the same discursive character. Given the customary nature of international law in the period under discussion in the next chapter, it is important to set out what qualifies for analysis of debate about the "law of succession." In the absence of codified law of treaty succession, a reader with a domestically-oriented understanding of "de jure's meaning" might wonder, given these circumstances, whether it is a fool's errand to attempt to gather together concepts and trends from the period between 1945 and the publishing of the Vienna Convention. Black's Law Dictionary provides a typical definition of de jure that might appear to support this perspective: "of right; legitimate; lawful; by right and just title."[65] However, this meaning is not in dispute in the discussion of de jure treaty succession in the third chapter and elsewhere in this dissertation. In the discussion of treaty succession from 1945 on, this definition is applied to law which is customary among states, not specifically delineated in universally-recognized or widely-ratified documents. The absence of definitive legal rules of succession should not be mistaken for a void of legal principles from which a claimant state could not argue for or against the right to inherit or renounce preexisting obligations. Nor

[64] Evidence of how the critiques explicit in theory of received sovereignty affected succession doctrine emerged in works like David Kennedy's 1997 work "International Law and the Nineteenth Century: History of an Illusion," in which he argues: "to fulfil their polemical mission, to render plausible a legal order among sovereigns, the philosophy which sets this question, which makes sovereigns absolute or requires a sovereign for legal order, must be tempered, if not rejected. As a result, to inherit positivism is also to inherit a tradition of response to the scepticism and deference to absolute State authority, which renders legal order among sovereigns *implausible* in the first place. [emphasis is author's own]" David Kennedy, "International Law and the Nineteenth Century: History of an Illusion," *Quarterly Law Review*, Vol. 17, 1997, 114.
[65] "De Jure," Bryan A. Garner and Henry Campbell Black, *Black's Law Dictionary*, (St. Paul, MN: Thomson/West, 2004), 2004.

should the absence of codified international law on treaty succession be taken to augur the futility of determinations about whether those arguments cohered with the dominant interpretations of the appropriateness of such claims. Lacking widely-recognized codified rules undoubtedly made it more difficult to prioritize and determine precise outcomes for competing claims, but the evaluation of trends in how such conflicts were resolved in aggregate may still be analyzed. Nevertheless, it is important to note that what follows is an examination of a legal discourse in a specific area, which attempts to identity dominant modes of thought. These are discerned from an evaluation of the analytical and theoretical tools that gained wider or lesser influence in the interpretation of treaty succession in the midst of the first round of legal confrontation that emerged in an early period of decolonization.

Chapter 3

Decolonization's First Succession Interface: Customary Continuity and Self-Determination (1945-1967)

"The transfer of territory from one national community to another gives rise to legal problems of a difficult and complex character…one State ceases to rule in a territory, while another takes its place. This is a fact which has legal consequences. A sudden and often serious influence is exerted upon the international relations of the territory concerned, and upon its economic, social, and legal structure. The body of law which has been built up for the solution of the problems arising from transfer of territory has for its object the minimizing of the effects of this change."[1]

~Daniel Patrick O'Connell

"Tunku and the other Ministers are firmly set against signing before independence. They claim the Agreement should come into force after Merdeka day [Independence]."[2]

~Permanent Secretary Richard Powell, Ministry of Defence of the United Kingdom

Introduction

This chapter will provide an account of the dominant de jure conception of treaty succession from 1945 to 1967, and will proceed to a contextualized case study from this period which surveys state practice in general and then addresses in greater depth the transition of Malaysia to independence. Through an evaluation of international legal debates during the confined decades under examination, the first section of this chapter will illustrate the development of a qualified version of universal succession in the aftermath of the Second World War. This de jure approach is indebted to Daniel Patrick O'Connell and was predicated on support offered by previous customary conceptions of treaty succession, which held that new states must take on nearly all of the obligations of their predecessors.

[1] D. P. O'Connell, *The Law of State Succession*, (Cambridge: University Press, 1956), 3.
[2] Notes from Permanent Secretary R. Powell, "Progress on Agreement Negotiations," September, 1956, DEFE 7/1332024, UK National Archives.

Despite the dominance of this de jure understanding, an examination of state practice from the period bears out the emergence of a code of conduct by states which resisted this legal tradition, acting outside the law in a loosely procedural fashion. Post-colonial states accepted and renounced treaties according to their will to define their relationship autonomously to the international community, not to comply with dominant interpretations of international law. This pattern of intermittently abandoning pre-independence obligations reflected the will of these states to demonstrate self-determination, but it did not represent anti-colonial sentiments insofar as post-colonial states did not seek to target what later international lawyers would describe as vestigial, systemic colonial legal relations. Analytical outcomes from the case study similarly provide a basis for questioning the characterization of post-colonial states' reaction to dominant approaches to treaty succession during this period that has been made by Matthew Craven. Rather than responding to resentful motives against their former colonial ruler, Malaysia's pre- and post-independence local governments acted to demonstrate the integrity of their self-determination by avoiding succession to treaties like the External Defence and Mutual Assistance Agreement until after independence had been achieved. In this way, the nascent government seized control in shaping its dealings with its former external ruler as well as with states with which it had previously established treaty relations. This chapter concludes when the contestation of universal succession in practice prompted the movement that began to call for the codification of rules regarding inherited obligations that emphasized consent.

PART I

THE RESURRECTION OF UNIVERSAL SUCCESSION

In many ways, the dominant de jure understanding of treaty succession that emerged after the Second World War constituted an intellectual anti-climax. The restatement of the proper conduct of the inheritance of international obligations represented a reversion to old principles of universal succession via new terminology that avoided disagreements over the nature of territoriality and legal continuity. In his summary of the era between World War II and the attempt at codification in late 1960s, Craven alludes to these developments by arguing that the law of state succession moved generally towards "the resuscitation of the old Grotian tradition: in place of an emphasis upon sovereignty or consent, the ideal of legal continuity in time of political change…taken as the point of departure."[3] When attempting to portray these developments, it would be simple enough to accept his meticulous historical sketch of this supposed rejuvenation of a previous paradigm through altered conceptual terms. Yet the account provided here is in dialogue with Craven's characterization, stemming from a brief account of the fragmented doctrinal circumstances that spurred the emergence of qualified universal succession. This expanded evaluation of the dominant de jure understanding of treaty succession between 1945 and 1967, allows the examination of apparent "Grotian" links borne by these ideas in the post-War period. It also illustrates the inadequacies of de jure interpretations that emerged after 1945 to deal with the problems to which they responded. As later analyses will illustrate, not only did competing notions of territoriality and the necessity of "legal continuity" provide the motivation for a reactive set of de jure principles between 1945 and 1967, but these controversies would enjoy influential recrudescence when anti-colonial lawyers turned their attention to the fate of inherited obligations in the late 1970s. The resurgence of these issues provided for the reevaluation of

[3] Craven, 2009, 92.

the law of succession which began with the work of the Waldock Commission in 1967, an event which marked the end of the era discussed in this chapter.

Two Interwoven Controversies: Territoriality and Continuity

After the Second World War, two rough categories of legal notions existed about the nature of territorial transfer in international affairs. Although they rarely provided direct prescriptions for treaty succession, they carried significant implications for interpretations of this area of international law. The first represented the culmination of progressive philosophical thinking about territory being linked to "political communities" or, alternatively, to the idea of "competence." The second category consigned territory to older emblems of property and titles, with the transfer of lands to one or another sovereign, thus taking on the legal character of commercial transaction. These competing notions of territoriality would impact how lawyers envisaged questions entailed by treaty succession because they ascribed different degrees of continuity or discontinuity in treaty relations when changes in sovereign control of territory takes place. For this reason, the notions described below were inextricably linked to related contemporaneous controversies about legal continuity and its relationship to succession.

One conception of territorial transfer belonging to the first, more innovative category of legal notions stressed that no less than the legal identity of states was at stake when territory changed hands. Modifications in control of lands inherently infracted existing, independent political communities.[4] These entities could consequently suffer radical changes in their relationships to the broader family of states if they gained or lost features of their

[4] In his *Private Sources and Analogies of International Law*, Hersch Lauterpacht elaborated the philosophical underpinnings of this approach: "the adherents of this view point out that imperium over a lifeless object of nature, such as territory, is impossible. The territory…is an element of the State, and it can no more be regarded as the object of a State's right, than the body of a man can be said to be his property. The territory is the space within which the jurisdiction of the State is exercised, it is the theatre of the State's rule. The State rules within the territory, not over it." Lauterpacht, 1927, 93.

geographical make-up, or if a political community established a newly-defined and separate territorial dominion.[5] As a result, international obligations, rights, and duties created before such changes took place were called into question, if not inherently jeopardized by territorial changes, and a wide variety of legal relations could be cast off in the wake of alterations to a state's identity. Theories of this type, which emphasize the attributes attached to territoriality, remain resonant in doctrines of statehood and recognition.[6]

A less extreme, though related doctrinal understanding of territorial transfer, appeals to ideas of political "competence." This approach provides a qualified delineation of the conditions described above which affect preexisting treaty relations. Rather than dwelling on potential changes to the identities of states, it suggests that changes in territory constitute the alteration of boundaries mainly in jurisdictional terms. It ascribes significance to whether populations and lands fall within one or another new frontier of state control once territory changes hands.[7] When borders expand or retract, the only immediate consequences are to the geographical reach of the sovereign competence of the states involved. Little in the way of

[5] The "attribute theory" of territoritoriality (in German "Eigenschaftteorien"), is found in works of scholars like Karl Victor Fricker, see *Vom Staatsgebeit, Gebiet und Gebietshoheit* (1867); this theoretical approach is also defended in Walther Schoenborn, "La nature juridique du territoire," *Hague Receuil*, 30, II, 1929, 116.
[6] See, for example James Crawford, *The Creation of States in International Law*, (Oxford: Clarendon Press, 1979).
[7] This conception is deeply linked to the development of international legal principles of "competence." For a classical exposition of these principles see Walter Henrich, *Theorie des Staatsgebiets*, (Wien, Leipzig : Hölder-Pichler-Tempsky A.-G., 1922); Paul Guggenheim, *Traité De Droit International Public, Avec Mention De La Pratique Internationale Et Suisse*, Vol. 1, (Genève: Georg, 1953), 336; Ernst Radnitzky, "Die rechtliche Natur des Staatsgebiets," Archiv des offentlichen Rechts, Vol. 20, 1906, 312-314 (Bound copy accessed at the Hague Academy of International Law Library). Somewhat provocatively, jurist Albert Geouffre de la Pradelle argued in the Permanent Court of International Justice's 1923 opinion on Nationality Decrees in Tunis and Morocco that "territory is neither an object nor a substance; it is a framework," going on to elaborate that territory is "the framework within which the public power is exercised…territory as such must not be considered, it must be regarded as the external, ostensible sign of the sphere within which the public power of the state is exercised." Albert Geouffre de la Pradelle, *Nationality Decrees in Tunis and Morocco Case* (PCIJ, Series C, 2, 1923, 106-109.

A later version of these arguments appears especially clearly in Hans Kelson, *General Theory of Law and State*, (20th. Century Legal Philosophy Series: Volume I), 1945, translated by Anders Wedberg 1999. He writes "the unity of the State territory, and therefore the territorial unity of the State, is a juristic and not a geographical unity, for the territory of a State is legally nothing but the territorial space of validity of the national legal order called a State." (Kelson, 1999, 208) Other authors excavating the assumptions behind this approach are Krystyna Marek, *Identity and Continuity of States in Public International Law*, (Genève: Librairie E. Droz, 1954), 20; as well as Malcolm N. Shaw, *Title to Territory in Africa: International Legal Issues*, (Oxford: Clarendon Press, 1986), 12-15.

international legal obligations are necessarily transferred among states when changes in territory take place. But states affected by territorial changes are not immediately entitled to withdraw from treaty relations simply because their borders have been altered. There are of course numerous immediate legal difficulties which emerge from this conception of territorial change, not least that it makes unclear whether territory constitutes a crucial criterion for a state's existence. Yet this approach also simultaneously emphasizes territories as spaces in which states engage in legal relations with groups of people under its jurisdiction. It furthermore provides little guidance on the fate of manifold internal public and private claims to ownership which a state must face should its borders change.[8] Perhaps unsurprisingly, this set of doctrinal approaches, which emphasize competence, remain associated with debates about jurisdiction in international affairs.[9]

Finally, set against this category of doctrinal approaches is an older legal conception of international territorial change which harkens back to metaphors of lands being transacted among title-holders, such as sovereigns. Contrary to the previously described notions, this understanding could be said to occupy a category unto itself because it conceives of territorial changes as inherently being bound up in the attainment or loss of collections of legal entitlements. Accordingly, when lands change hands in international affairs, the preexisting relationships attached to them are, with few exceptions, transferred as well, following rules of ownership associated now with commercial relations, including aspects of liabilities. Among the principles from which this notion is drawn are Roman legal concepts, such as the nemo dat rule, formally known as "nemo plus transferre quod non habet," in concert with the principle of "res transit cum suo onere."[10] Neither opening questions about the alteration of

[8] K Fricker, 1867 touches on this point in his evaluation of critiques of the attribute theory. Also see Paul Laband, *Das Staatsrecht des Deutschen Reiches*, Vol. 1., (JCB Mohr, 1901), 190-195.
[9] See, for example *The Lotus Case*, Permanent Court of International Justice, Series A, Number 10, 1927, 23.
[10] Anthony Carty, for example, elucidates that the most commonly subscribed notion of territorial change throughout the nineteenth century discussed related to these principles. Anthony Carty, *The Decay of*

legal relations of the transacting parties or third-party states, nor requiring any alterations to the legal effects of the territory which is changing hands, this essentially "patrimonial" legal notion suggests a static transfer of treaties and other international obligations.[11] To contemporary thinkers in international law and international relations, this approach remains deeply problematic.[12] More than its absolutist and feudal undertones,[13] it incorporates few commonly-accepted principles about what states are permitted to do with lands under their control, completely disregarding the political and social aspirations of those affected by territorial change, often relegating their consent to government to an afterthought.[14] Despite these objections, instead of being entirely abandoned, it remains semi-present in certain contemporary discourses about claims to territorial change.[15]

International Law?: A Reappraisal of the Limits of Legal Imagination in International Affairs, (Manchester: Manchester University Press, 1986), 173-194.

[11] William Edward Hall, *A Treatise on International Law*, 4th ed, (Oxford: Clarendon Press, 1895), 106; Gaetano Arangio-Ruiz, "L'Etat dans le sens du Droit des Gens et la Notion du Droit International," *Österreische Zeitschrifür öentliches Recht und Völkerrecht*, 26, 1976, 57.

[12] Robert Yewdall Jennings, *The acquisition of territory in international law*, (Manchester : Manchester University Press, 1963), 3; Arrigo Cavaglieri, *La dottrina della successione di stato a stato e il suo valore giuridico*, Archivio giuridico 'Filippo Serafini'. Vol 13, fasc. 2 intera collez. Vol 2, (Archivio Giuridico, 1910), 395. (downloaded from University of Michigan digitized works system); 385; Marek, 1954, 19.

[13] John Westlake, for example repudiated the burdensome analogies between property and territory, describing them as "being to confound in a common haze the right of the lord to rule in his manor and the right of our sovereign lord the king to rule in his kingdom." Westlake, 1904, 86.

[14] Friedrich Kratochwil argues that land "not only provides people with a 'place in the world' which forces people to address their common problems and engage in cooperative ventures, but it also becomes a symbol of continuity, and an assurance of transgenerational connectedness…" Friedrich Kratochwil, " The Limits of Contract," *European Journal of International Law*, 5, 1994, 465, 480. In a similar, but broader vein, Jennings states that changes in territoriality "means not just a transference of a portion of the earth's surface and its resources from one regime to another; it usually involves, perhaps more importantly, a decisive change in the nationality, allegiance and way of life of a population." Jennings, 1963, 3.

[15] Here again, it is Jennings who points out that when speaking of territorial title among states, an influential set of analogies has persisted which are based in Roman law notions of property. What is referred to above as the patrimonial concept of territoriality, that sovereignty can be understood in terms of the conference of "title" to territory, does provide some analytical flexibility in distinguishing exercise versus the possession of sovereign rights.

A few common instances in which this interpretation was important were in Germany after the Second War, and in the Permanent Court of International Justice's ruling on *Lighthouses in Samos and Crete.* In the former, the four liberating powers—the UK, U.S., France, and the USSR—undertook supreme authority over German territory, while these same states also claimed that Germany remained in existence as a sovereign state. Britain's State Immunity Act of 1978 thus allowed for Germany to qualify for sovereign immunity. *R. v Secretary of State for Foreign and Commonwealth Affairs, ex p Trawnik* [1985] TLR 18 Apr 1985, and [1986] TLR 21 Feb 1986. In the latter case, the Court held that, under Article 4 of the Treaty of London (1899), the Ottoman Empire had transferred "all rights of sovereignty and other rights which he possessed over that island" without giving up ownership of the island itself. PCIJ, Ser A/B, no 71, 92 at 103.

With regard to the establishment of de jure treaty succession, lawyers faced a second related set of intellectual quandaries centered on the idea of "legal continuity." The first aspect of continuity, deeply enmeshed with understandings of territoriality, was the baseline question of whether matters of succession—regarding treaties and other issues—were tied solely to instances in which territory changed hands, or whether the inheritance of obligations also arose amid reconstitutions of governments from within (including from secessions). Whether either territorial or non-territorial changes to sovereign authority represented moments of discontinuity that required or allowed a break with previous international obligations lay at the heart of this contestation. In many cases, this issue emerged amid contradictory definitions of succession provided by scholars attempting to resolve specific disputes. After the Second World War, some suggested that succession arises chiefly when territory has been "transferred" between states or, for that matter, between empires and newly-independent units.[16] While others contended that when one political entity that had assumed an obligation was "replaced," it too could re-evaluate the validity of preexisting obligations.[17] A significant aspect of the debate also revolved around the necessity of considering contested notions of what it meant to have sovereignty over territory,[18] or whether it was optimal to limit prerogatives to claim a moment of succession to instances in

[16] Ernst H. Feilchenfeld, *Public Debts and State Succession*, (New York: Macmillan Company, 1931), 12-14; Erik Castrén, "Aspects Recents de la Succession d'Etats," *Hague Recueil*, 78, 1951, 386-387.
[17] In his seminal treatise on international law, L. F. L. Oppenheim suggested that succession takes place when "one or more International Persons take the place of another International Person, in consequence of certain changes in the latter's condition." Lassa Francis Lawrence Oppenheim, *International Law: A Treatise*, I, (London: Longmans, Green, 1905), 119; Georges Kaeckenbeeck makes more or less the same point, when uses the word "substitution," asserting that succession occurs by a "substitution of one State for the other as one of the parties to the legal relation." Georges Kaeckenbeeck, "The Protection of Vested Rights in International Law," *British Year Book of International Law*, 17, 1936, 10-11. See also Manlio Udina, "La Succession des États Quant aux Obligations International autre que les dettes Publiques," *Hague Recueil*, 44, 1933, 665.
[18] Daniel P. Connell, *State Succession in Municipal Law and International Law*, (Cambridge: Cambridge U.P., 1967), 122; Wilkinson, 1934, 16; A. P. Lester sets out the circumstances of succession with a narrow focus, suggesting it takes place when there is a "change in sovereignty in a territory…" A. P. Lester, "State succession to treaties in the Commonwealth," *International and Comparative Law Quarterly*, 12.02,1963, 476. Jenks also touches on a broader definition, by arguing succession constitutes "a change of territory through concurrent acquisition and loss of sovereignty." C. Wilfred Jenks, *The Common Law of Mankind*, (London: Stevens, 1958), 72.

which "responsibilities" for lands had been affected.[19] The controversial implications for treaty succession of even simple scenarios in this area further confounded attempts by scholars and practitioners to find generally applicable resolutions.

In addition to debates about whether either or both territorial and non-territorial changes created grounds for succession to legal relations among states, a deeper paradox vexed international lawyers. It centered on potential contradictions between states simultaneously accepting precepts regarding the inheritance of obligations while still being considered "successors." The crucial issue which provided ground for disputes in this area were the contested circumstances in which a state could be said to cease to exist, being replaced or subsumed by another, and when a state endures through changes to its territory, its population, or aspects of its authority. For example, these ambiguities arise when self-liberated states with re-constituted governments profess their rights to succession to treaties, while simultaneously distinguishing themselves from previous political entities who had ruled them. Scholars after the Second World War often addressed distinctions in this area with little clarity about one or the other determination, often preferring to speak in general terms. Krystina Marek, for example, touched on the underlying tensions involved when she innovatively argued in 1954 that:

> The rights and duties of the new state will initially be derived exclusively from customary international law. The new state will not be internationally responsible for what has taken place on its territory prior to its birth. Its population and frontiers will be undefined and doubtful, pending a final delimitation by way of international agreements.[20]

Without laying out definitive criteria for when states could be considered "new," she directly contrasted their position regarding succession to that faced by "old" states:

[19] See Karl Zemanek, "State Succession After Decolonization," *Hague Recueil*, 116, 1965, 190. This same approach is embodied by the Vienna Conventions of 1983 (specifically Article 2.1.a), as well as that of 1978 (specifically Article 2.1.a).
[20] Marek, 1954, 2.

> On the other hand, an old state will naturally enough continue to bear its international rights and duties both customary and conventional. It will enjoy the same international status defined by both customary and conventional international law. Its territory and population will remain the same, except in the case of changes which, relating precisely to territory and population, leave the personality of the state unaffected. It will be subject to all legal duties and it will be entitled to claim all legal rights arising out of agreements to which it has been a party.[21]

Although Marek's suggestion remained largely unheeded at the time, it illuminated certain indeterminacies created by arguments about succession predicated on judging the degree to which a state's legal relations could remain intact after it underwent a political or territorial change. Contemporary authors addressing succession have often suggested that during the period after the Second World War and before the attempt at codification that began in the late 1960s, doctrinal discrepancies in this area remained obscure. As James Crawford argued, disputes were based on a "fundamental" yet largely then unrecognized difference between conceptualizations of state continuity versus state succession.[22] As Rein Mullerson wittily noted "a predecessor state simply cannot completely disappear, except in cases like that of the legendary Atlantis,"[23] asserting that "of the three elements of statehood—population, territory and authority—parts of the population and territory remain the same [in many cases]."[24] Yet during the period under examination in this chapter, the issue of how and when principles of succession could be applied to states that had undergone even extreme changes to the three attributes adverted by Mullerson lingered with little consensus.[25] The two

[21] Ibid.
[22] James R. Crawford, *The creation of states in international law*, (Oxford: Oxford University Press, 2006), 667.
[23] Mullerson, 1994, 139.
[24] Ibid.
[25] Examples of territorial change clearly altering the legal identity of a state come in all different shapes and sizes. For instance, it would be difficult to dispute that Britain had maintained the same legal identity after it lost British India. The United Kingdom had a fundamentally different relationship with the wider world before versus afterwards, it could no longer claim the same interests or identify the same threats to it interests once Indian independence had arrived. Yet it is worth noting that the legal continuity of Britain's external relations post-Indian Independence were never questioned. The predecessor in this case lost a significant amount of territory, without claiming a disruption leading to the renunciation of existing obligations.

In contrast to such cases, there are examples in which, after a territorial change has taken place, the state identified as continuing on in the position of an older state might at the same time be considered a successor. In instances like the cession of West Irian to Indonesia (1962) or that of the Saar to Germany (1957), it is arguable that the legal identity of these states was affected. Yet at the same moment, authors like O'Connell

exceptions to this doctrinal dissonance were in cases of liberation after occupations presumed to be "unlawful,"[26] as well as after alterations in internal systems of government which did not purport to establish a new state. [27] Unyielding antagonism between legal arguments applying to other circumstances persisted.

Side-Stepping Controversy under the Banner of "Continuity"

In large part, the international lawyers and scholars attempting to gather strands of coherence amid these controversies relied on claims about the necessity of continuity in legal relations. Foremost among them was Daniel O'Connell, who consistently put forward a set of critiques and a line of legal doctrine that insisted on the permanency of legal relations after changes in sovereignty took place. He specifically argued for a qualified version of universal succession in the case of decolonized states, in which these new members of the international community necessarily took on the vast majority of obligations signed during the course of their colonial dependence. He achieved this monumental task first by avoiding proposals for the resolution of major controversies raised by the incorporation of legal identity and personality into the conduct of treaty succession. With this foundational critique, he relentlessly supported legal continuity in relations among states.

found ground to argue that they served as potential inheritors, or successors to the international obligations of that the Netherlands and France had respectively taken on with regard to those lands (O'Connell, 1967, I, 40-42). Thus the newly established political entity, which had accrued through cession, became something of a successor in certain circumstances with respect to specific treaties.

[26] Brigitte Stern, *La Succession D'états*, (The Hague: M. Nijhoff, 2000), 89-91.
Geneviève Guyomar, "La Succession d'États et le respect de la volonté des populations," *Revue Générale de Droit International Public*, 1963, 93.

[27] Rivier, 1896, I, 62; Arnold McNair, "Aspects of State Sovereignty," *British Year Book International Law*, 26, 6, 1949, 8; Crawford, 2006, 678; Josef L. Kunz, "Identity of States under International Law," *American Journal of International Law*, 49, 1955, 97; Lassa Oppenheim, *Oppenheim's international law: Peace*, eds. Sir Arthur Watts, Robert Jennings, 9th ed., (London: Longman, 1992), 14; Martens, Fedor Fedorovich. *Traité de droit international*. (Chevalier-Marescq et cie., 1886), Vol. 1, 362; Westlake, 1904, I, 58; Johann C. Bluntschli, "Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt, Nördlingen." (1868), II, c 3, s 39, 76; Cornelius von Bynkershoek, "Quaestiones Juris Publici," II, 1930, 25; see generally Dionisio Anzilotti, *Cours de droit international*, Vol. 1, Recueil Sirey (société anonyme), 1929; Quincy Wright, "The Status of Germany and the Peace Proclamation," *American Journal of International Law*, 46, 1952, 299.

O'Connell's preeminence in setting out de jure interpretations of treaty succession from 1945 to 1967 derived from his doctorate on state succession, published in 1956,[28] which was followed by a series of articles. In these works, he specifically addressed the inheritance of international obligations over two decades.[29] Before the attempt at codification which began in the late 1960s, it was common for international lawyers invoking succession doctrine to describe O'Connell as "the most prominent of scholars working on the subject of State succession."[30] O'Connell was regularly consulted specifically on aspects of treaty succession by the International Law Association, joining its Committee on State Succession, and by governments. O'Connell's scholarly commitment to treaty succession and the wide-spread recognition of his in-depth knowledge culminated with a multi-volume monograph published in 1967, *State Succession in Municipal Law and International Law*, referenced in many of the reports on the subject produced by the International Law Commission.[31] Even as the majority of international lawyers began to abandon his arguments in the 1970s, the Hague Academy of International Law invited him to deliver a lecture series as an expert on state succession.[32] Over the course of his career, he derived and persisted in defending a set of coherent de jure principles of treaty succession which few of his peers successfully challenged until the organized attempt to codify international law in this area, which culminated in the 1978 Vienna Convention.

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[28] O'Connell, 1956; Daniel P. O'Connell, "Recent Problems of State Succession in Relation to New States," *Hague Recueil*, 130, 1970.

[29] Among the most influential of his significant corpus of works in this area were the following: Daniel P. O'Connell, 'State Succession in the British Commonwealth since the Second World War," *British Year Book of International Law*, 26, 1949, 454-462; Daniel P. O'Connell, "Economic Concessions in the Law of State Succession," 27 *British Year Book of International Law*, 1950, 93; Daniel P. O'Connell, "Secured and Unsecured Debts in the Law of State Succession," 27 *British Year Book of International Law*, 1951, 204; Daniel P. O'Connell, "Change of Sovereignty and the Doctrine of Act of State, 26 *Australian Law Journal*, 1952-1953) 201; Daniel P. O'Connell, "Independence and Succession to Treaties," 38 *British Year Book of International Law*, 1962, 84; Daniel P. O'Connell, "State Succession and Entry into a Composite Relationship," *British Year Book of International Law*, 39, 1963, 54; Daniel P. O'Connell, "State Succession and Problems of Treaty Interpretation," *American Journal of International Law*, 58, 1964, 41; Daniel P. O'Connell, "State Succession and the Theory of the State," *Grotian Society Papers*, 1972, 23.

[30] Craven, 2009, 82.

[31] O'Connell, 1967, I, and II.

[32] O'Connell, 1970.

Throughout his works on treaty succession, O'Connell stridently argued that legal continuity should be favored in the form of complete inheritance of treaties by states that had undergone changes in sovereignty. Providing scant exceptions for legal relations rendered irrelevant in moments of succession, he asserted his prescriptions not only accorded with existing principles of international law, but also that they were the most appropriate course of action for states to take, regardless of whether they had emerged through secession, unification, or internal reconstitution. He premised these arguments on the notion that amid transitions in sovereignty "the central principle...must be one of minimal disturbance of existing legal situations, consistent with the actual state of affairs resulting from a succession of States."[33] Therefore, in his view, preexisting international obligations and the position of legal titles before the arrival of independence for decolonized states should be acknowledged as remaining in force.[34] In his 1956 monograph, he specifically addressed these issues as they related to ongoing controversies in decolonized and decolonizing states,[35] later more fully articulating the foundations of his arguments by claiming his position could be sustained by appeals to doctrines of acquired rights.[36] Repeatedly and consistently, O'Connell analogized

[33] Ibid., 120.

[34] Ibid., 141. O'Connell specifically argues in this section of his piece that "if successor states are to be released from all obligations relating to the interests created by the antecedent legal system, this can only be by virtue of the total evaporation of all law and all titles in the territory affected by change of sovereignty. It is not only the predecessor and successor States or private individuals which would be affected if such a philosophy were to prevail, but the whole community of nations, which has a vested interest in political, social and economic stability."

[35] O'Connell, 1970, 95; More generally, see O'Connell, 1956.

[36] O'Connell, 1950, 15. O'Connell later clarified the subject of succession by way of suggesting that the inheritance of treaties was separate (and largely a matter of "treaty law and interpretation") from the succession of acquired rights such as debt, property, concession, and contracts. He nonetheless thought the two to be inextricably linked, explaining how the doctrine could apply to treaties in the following way: "Should the predecessor State have borrowed money . . . two things are created. There is, first, the juridical link between the parties, which exists until either the money is repaid or the State itself has disappeared. There is, secondly, the factual situation which consists in the actual detention by the State of money in which the lender has an equitable interest. When the debtor State is superseded, the legal duty to repay this money is not inherited *ipso facto* by its successor. *What is 'inherited' is the state of facts which the now extinguished legal relationship has brought about*. The equitable interest which the lender has in this factual situation is described variously as an 'acquired right', 'property right' and 'vested right'. The obligation of the successor State is to respect this interest. It is not an obligation derived from the predecessor, but one imposed *ab exteriore* by international law. It arises when the successor, through its own action in extending its sovereignty, becomes competent to destroy the title-holder's interest. The general principle in which this obligation is embodied, and which underlies the

the inheritance of treaties to common conceptions of acquired rights in municipal law, which hold that once vested, a right may not be violated by subsequent legislation.[37] Although often veiled in eloquent circumlocution, his doctrinal approach also appealed to the third understanding of territorial transfer described above, avoiding thorny disputes about the implications of competing doctrines for legal controversies intertwining territoriality and continuity. However, his response to the questions about potential contradictions between legal continuity and state succession were more explicit.

O'Connell's general doctrinal claim with regard to post-colonial states, that treaties contracted before independence should remain intact, rested on two critiques of international legal principles of state identity and personality. First, he harbored little regard for Hegelian characterizations of the state, which he saw as having fundamentally confused the interpretation of treaty succession, interfering with historical principles that defined the traditional course of state succession. He believed the influence of Hegelian constructs on jurists like Johann Caspar Bluntschli and subsequent scholars had led to unproductive emphases of the role of identity in legal approaches to succession.[38] He cast the incorporation of legal personality in such formulations as having deeply destabilized understandings of straightforward legal ideas in this area. O'Connell claimed that jurists could argue for permissive criteria that provided for states to renounce treaties due to even small or inconsequential changes in sovereignty. Amplifying the importance of mutable, intangible aspects of a state's personality could allow the perpetuation of harmful pretexts for alterations to a state's identity as it related to legal relations. O'Connell's dramatic portrayal of the consequences of these ideas led him to argue that the law of state succession had "reached a position of crisis, because evident moral and sociological pressures emphasise the need for

whole problem of State succession, is the principle that acquired rights must be respected." [emphasis added] O'Connell, 1956, 78.

[37] O'Connell, 1970, 134-146, 155-161, 162-165.

[38] Stated most clearly in O'Connell, 1979, 734. Here he references his earlier findings on the same question.

continuity and the avoidance of disruption, while theory remains enmeshed in the 19th-century conception of sovereign will."[39] In later works, he developed this argument to address formulations of sovereignty that emerged in the early twentieth century by questioning the nature of legal personality itself. He claimed that although post-Hegelian international lawyers had portrayed legal personality as "a reflection of some prototype sitting on a cloud somewhere,"[40] it was in fact "merely a shorthand expression indicating the faculties of legal action."[41] Accordingly, this characterization of personality amid succession as being a matter of transferring the "faculties of legal action" provided a simple conclusion for the fate of inherited treaties in the transition from colonial control to post-colonial government. Alterations in personality should not have, in O'Connell's view, impacted the transfer of old treaties to putatively "new" parties.

In addition to questioning the conceptual underpinnings of state identity and personality, O'Connell also argued that the process of decolonization did not cohere with post-Hegelian legal distinctions between state continuity and succession, as well as between changes in government versus changes in sovereignty. To sustain this outlook, he drew on common understandings of processes in municipal law leading up to independence for current and former colonies. O'Connell was inclined to see these progressions as methodical transfers of power, predicated on orderly steps toward constitutional devolution from the outside power to internal systems of government. He noted that these changes were often coupled with the handing over of capacities to conduct external relations to local

[39] O'Connell, 1967, I, 34.
[40] O'Connell suggested that the "concept of 'personality' with its Hegelian overtones, seems to have misled the theorists. Modern jurisprudence has assisted us in recognizing that the word 'personality' does not stand for something, is not descriptive of anything, and cannot be substituted for by a synonym; it is not, in fact, a reflection of some prototype sitting on a cloud somewhere, but merely a shorthand expression indicating the faculties of legal action." Daniel O'Connell, "Independence and Problems of State Succession." *The New Nations in International Law and Diplomacy*, 1965, 7-41.
[41] Ibid.

governments before independence was ultimately granted.[42] From this vantage, the steady handover of governmental powers to a post-colonial state could hardly be considered more disruptive to its external relations than a reconstitution of a government which did not result in the renunciation of treaties. Thus, rather than attempting to derive a conceptual schema that accounted for whether post-colonial states had undergone radical changes in sovereign control, he argued that in the context of decolonization:

> If there is any rubric…to which one could resort as a touchstone for the solution of all problems of political change over territory it might be this: that the consequences of such change should be measured according to the degree of political, economic and social disruption that occurs.[43]

As a result of his orderly vision of decolonization, the "disruption" was to be considered minimal, and thus the continuity of legal relations between colonial and post-colonial governments should necessarily be preserved. Underlying his argumentation was his deep-seated belief that the body of international law regarding the inheritance of obligations, which generally accepted a qualified form of universal succession, had to be respected over any prior questions of identity and personality raised by philosophical claims about the nature of the state. He avoided confrontation with many of the issues raised by earlier international lawyers and by his contemporaries, by insisting that the "real question is the extent to which a treaty loses its effectiveness in the changed situation."[44] By doing so, O'Connell evaded categorical dismissals of all issues arising from discourses about contradictions between continuity and succession. He argued that neither the supposed degree of changes in sovereignty nor the character of preceding obligations could themselves determine the

[42] O'Connell, 1967, I, 34. In his seminal text, O'Connell asserts "with the abstraction of the concept of sovereignty, however, a conceptual chasm was opened between change of sovereignty and change of government; in the one instance a problem of substitution in the possession of rights and obligations was raised; in the other, continuity of these rights and obligations was presumed in virtue of continuity in the personality of the possessor'. (ibid., 5-6).
[43] O'Connell, 1967, I, v–vi.
[44] O'Connell, 1967, II, 3.

appropriate conduct of succession. Indeed, cursorily addressed instances in which entirely unhelpful treaties could be renounced because they lacked any utility:

> [the] correct diplomatic stance in modern times is for successor States to serve notice of termination on other parties in respect of those treaties which are no longer useful, and to initiate negotiations for the termination of those which are on their face interminable and which are embarrassing.[45]

Nonetheless, he simultaneously favored the primacy of legal continuity in relations among states having recently gained independence. His consistent argument for the presumption of stability and the endurance of existing legal relations provided a dominant framework for the interpretation of treaty law amid succession.

Grotian only in Consequential Terms

The extent to which the reactive version of universal succession discussed above was situated in twentieth century legal thought is crucial. Claims by authors like Craven that the dominant legal understanding of treaty succession between 1945 and 1967 represented the reemergence of an "old Grotian tradition," can only be considered partially accurate. Hugo Grotius's diffuse claims about the inheritance of treaties shares certain similarities to the legal argumentation of scholars like O'Connell, but also differed in significant ways. Comparing the two can be misleading because it forges an association between them based on the outcomes they suggest are legally correct—that new states should accept most if not all legal obligations taken on by their predecessor political entities. However, an investigation into the declared motives of O'Connell and his followers illuminates the unique sources of inspiration behind early, post-War conceptions of treaty succession.

Grotius's ends in articulating a form of universal succession were quite different from those of O'Connell and others who called for legal continuity amid decolonization.

[45] O'Connell, 1967, II, 24.

Supporters of the latter qualified form of universal succession did not share the same purposes as Grotius. Understanding this difference requires recourse to a distinction drawn by Edward Keene, a scholar of Grotius's lasting impact on international relations:

> …Grotius did not really think about international relations in purposive terms at all. He was interested in the rights and duties that actors did hold, rather than those which ought to be vested in them in order to realize the best possible political or legal system. His attitude was that legal rights should be respected, but he did not try to define a particular distribution of rights that ought to be established in order to create a more tolerant and more civilized world.[46]

Contrasting this approach to that of later authors influencing conceptions of sovereignty, Keene notes:

> Most eighteenth-century international lawyers and political theorists parted company with Grotius in these respects. They increasingly believed that enquiries into the law of nations ought not only to say what the law was, but also to discern some moral purpose that either validated the existing order or provided an ideal that indicated how it should be reformed.[47]

Grotius's limited writings on the succession of legal obligations bear out the ends of his approach, as described by Keene. For instance, when speaking about the fate of international obligations in cases of unifications[48] or dismemberments of political entities,[49] Grotius's pursuit was to capture the rightful legal position of the parties involved, not to prescribe why or how they should organize their relationship to preexisting treaties. In contrast, advocates of qualified universal succession after the Second World War either consciously or through normative claims embedded in their arguments fell into the latter mode of scholarly inquiry

[46] Edward Keene, *Beyond the anarchical society: Grotius, colonialism and order in world politics*, (Cambridge: Cambridge University Press, 2002), 109.
[47] Ibid., 110.
[48] "Whenever two nations become united, their rights, as distinct states, will not be lost, but will be communicated to each other." Grotius, 1949, II, ix, 8.
[49] "...it may happen that a nation, originally forming but one state, may be divided, either by mutual consent, or by the fate of war; as the body of the Persian Empire was divided among the successors of Alexander. When this is the case, many sovereign powers arise in the place of one, each enjoying its independent rights, whatever belonged to the original state, in common, must either continue to be governed as a common concern, or be divided in equitable proportions." Grotius, 1949, II, ix, 9.

designated by Keene.[50] Writing on treaty succession in 1952, Clarence Wilfred Jenks underscored the necessity of legal continuity to achieve wider "participation" as well as full and lasting "cooperation" among the widening membership of the international community.[51] Similarly, presuming the permanence of treaties signed before independence was a means to "minimize disruptions in international legal relations" for Yilma Makonnen.[52]

However, it was O'Connell who embodied this departure from a Grotian outlook on treaty succession. He was unmatched in his belief that a modern version of universal succession would perpetuate certain cosmopolitan values while sustaining legal order among states. Speaking in terms that transcended the terminology of international law, he doubted that frameworks for succession that emphasized consent could fulfill certain metaphysical requirements of human societies in their association in international affairs:

> …the plurality of States finds its existential perfection in the order of the community of nations, in the subordination of individual States to the common good of mankind, in which political life finds its ultimate terminus. Unless all States are able to place minimal reliance upon durable principles of mutual intercourse, the common good, which alone gives normative value to human relationships, is apt to be defeated. There is, therefore, a sphere of rights and duties that exist, not because States have invented or even recognized them, but because they arise immediately from man's social nature and personal dignity…They find their concrete expression in the actual forms of inter-state relationships as they may from time to time be contrived, but because they are intrinsically antecedent to the state they constitute an objective limitation upon sovereignty.[53]

It was in these grandiose terms—recalling no less than the collective "good of mankind"—that O'Connell posited the stakes of adhering to succession grounded in legal continuity. In questions arising from the responsibility of new states to accept preexisting obligations, he placed succession to treaties before sovereignty. This perspective represented a deeply held

[50] Okon Udokang, *Succession of New States to International Treaties*. (Oxford: Oceana, 1972), 109.
[51] C. Wilfred Jenks, "State succession in respect of law-making treaties," *British Year Book of International* Law, 29, 1952, 105-108.
[52] Yilma Makonnen, *International Law and the New States of Africa: A Study of the International Legal Problems of State Succession in the Newly Independent States of Eastern Africa*, (London: Unipub, 1983), 137-140.
[53] O'Connell, 1970, 119.

normative dimension to his arguments, which together provided a legal framework which he felt not only cohered with preexisting prescriptions, but also served moral imperatives.

PART II

CONTEXT AND CASE STUDY 1: PRACTICE AND THE CODE OF THE SELF-DETERMINATION

At this point in the chapter, analysis turns to the practice of states in response to the dominant de jure understanding of the inheritance of international obligations. De facto treaty succession during the period under examination in this chapter, from 1945 to 1967, was defined by the fate of legal relations applying to lands governed by post-colonial states before they gained independence. The case study examined in this section is first placed within the general practice of treaty succession which emerged during the multiplication of new states that occurred during decolonization. These broader trends are then laid against the particularities of Malaysia's decision-making during the lead up to and after it gained independence.

Before presenting evidence regarding state practice from 1945 to 1967, it is crucial to note that this period circumscribes a particular stage and not the whole of European decolonization. For this reason, the following analysis should not be taken as a totalized account of post-colonial responses to contemporaneous de jure treaty succession.[54] Instead, it illustrates de facto treaty succession that occurred as the British, French, Portuguese, Dutch, and Belgian empires began a significant, permanent retraction in the decades under examination. Specifically, in the mid- to late-1940s, Jordan, Burma, Ceylon, Israel, India, the Philippines, and Pakistan became independent. Then followed another decade, the 1950s, rife with the birth of post-colonial states, including Guinea, Indonesia, Laos, Cambodia, Ghana, Libya, Sudan, Tunisia, Malaysia, Morocco, and Vietnam. 1960 saw the independence of Togo, Senegal, Somalia, Niger, Nigeria, West Congo, Mauritania, Mali, the Republic of the

[54] Depending on how one defines and applied the term "decolonization," it is possible to exhort to prior post-colonial responses to de jure treaty succession that are precede the decades covered in this chapter. Such cases might include that of the United States in 1776, Cuba and the South America Spanish colonies in the nineteenth Century, Texas in 1840, Panama in 1903, Greece in 1830, Finland in 1919, and Ireland in 1922.

Congo, the Malagasy Republic, Gabon, Dahomey, Cyprus, the Ivory Coast, Chad, the Central African Republic, and Cameroon. As the 1960s progressed, yet further post-colonial states gained independence, including Tanganyika, Burundi, Jamaica, Trinidad and Tobago, Uganda, Zambia, Gambia, Algeria, Rwanda, Zanzibar, Malta, Western Samoa, Kenya, the Maldives, Singapore, Barbados, Botswana, Guyana, and Lesotho, Equatorial Guinea, Nauru, Mauritius, and Swaziland. This arc of spreading independence and colonial acquiescence coincided with the expansion of the international community of states. This is perhaps best exemplified by the increase of the 50 founding states of the United Nations represented in San Francisco in 1945, then the 101 states voting in 1962 on the UN's Declaration on state sovereignty over natural resources.[55] This multiplication of new states, which gradually took up membership in the international community, engaged in a noteworthy, sustained body of practice regarding treaty succession which is examined below.

Case Study Context: Post-Colonial Claimants of Self-Determination

Examining the context surrounding the case study evaluated in this section of the chapter illustrates two notable trends. First, state practice from 1945 to 1967 generally contradicted the contemporaneous, dominant legal understandings of treaty succession offered by international lawyers. Second, newly-independent states in this period often operated according to notions of self-determination while addressing specific sets of claims when deciding which treaties they would succeed to and which they would renounce. Conventional sources chronicling practice reveal the first but shed little light on the second trend. Numerous reports from the United Nations Secretariat,[56] the International Law

[55] General Assembly Resolution 1803, U.N. General Assembly Official Records, 17th Session, Supp. No. 17, U.N. Document A/5217, 1962.
[56] For example, the "Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties," UN Document, ST/LEG/7, 1959.

Commission (ILC),[57] and the International Law Association[58] catalogue the details of de facto treaty succession in this period. These surveys document the wide-ranging, intermittent renunciation of preexisting legal relations by post-colonial states that disregarded prescriptions for qualified universal succession that governed de jure interpretations during the period. Yet these reports provide limited insight into the collective character and motives behind state practice. Rather, they often culminate with inconclusive, cumulative observations like the following, offered by the ILC: "close examination of State practice afforded no convincing evidence of any general doctrine by reference to which the various problems of succession in respect of treaties could find their appropriate solution."[59] Thus, these reports merely discern the non-application of existing de jure interpretations, rather than reflecting on potential patterns of interlinked practice.

Analysis of de facto treaty succession from international lawyers of this period similarly provides little insight into how and why post-colonial states made decisions regarding treaty succession. International jurists and advocates were understandably disinclined to acknowledge realities that seemed to repudiate the dominant doctrine of their day. When they did respond to the building record of post-colonial state practice, they clung to passive denials of what was occurring, rather than attempting to suggest it fulfilled one or another interpretation of the law. Mention of state practice in aggregate between 1945 and 1967, by scholars such as Erik Castrén, were often recorded in tentative tones: "the

[57] Succession of States to multilateral treaties: studies prepared by the Secretariat, UN Doc. A/CN.4/200 & ADD.1, 2, *International Law Commission Yearbook*, vol. II, 1968; Succession of States to Multilateral Treaties: Sixth Study Prepared by the Secretariat, UN Doc. A/CN.4/210, *International Law Commission Yearbook*, vol. II, 1969; Succession of States to Multilateral Treaties: Seventh Study Prepared by the Secretariat, UN Doc. A/CN.4/225, in: *International Law Commission Yearbook*, vol. II, 1970; Report of the International Law Commission, Twenty-Sixth Session; Report of the Commission to the General Assembly: Report of the International Law Commission on the Work of its Twenty-Fourth Session (Authored by the International Law Commission), 1972, Official Records of the General Assembly, Twenty-Seventh session, Supplement No.10, Document A/8710/REV.1, in *International Law Commission Yearbook*, vol. II., 1972.

[58] International Law Association, Buenos Aires Conference, 1968, "Interim Report of the Committee of the Succession of the New States to the Treaties and other Obligations of their Predecessors."

[59] "Summary of Findings," *International Law Commission Yearbook*, Vol. II, Pt I, 1974, (paragraph 51) 168.

elucidation of [a doctrine of treaty succession] is rendered difficult…in view of the great instability in the practice observed by different States..."[60] Sir Robert Jennings similarly gently gestured toward the direct contradiction that was unfolding between de jure and de facto treaty succession when, in 1967, he stated that it "is a subject which presents such a rich diversity of practice as to give some plausibility to a surprisingly varied range of theoretical analysis and doctrine."[61] Some stalwart proponents of qualified universal succession, however, rejected that unfavorable trends had emerged at all, dismissing the potential relevance of their implications. O'Connell, for instance, asserted retrospectively that "a record of what newly independent states have done, or of the attitudes which they have struck, often leads, not to concordance, but to incoherence, and the systematic treatment of the facts of so-called 'state practice' rarely rises above the anecdotal."[62] Only in the last two and a half decades have the majority of scholars candidly touching on trends in practice in this period noted the original pattern of overwhelming contradiction between de facto and dominant de jure interpretations of treaty succession.[63]

In providing a context for the case study evaluated in this chapter, the purpose is to elucidate a code of conduct in de facto treaty succession defined by self-determination which recurs broadly in the data collected. Of course, it would be unfeasible and outside the scope of this exercise to attempt a totalized account of all of the cases of succession in this period.

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[60] Erik Castrén, "Obligations of States Arising from the Dismemberment of Another State," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 13, 1951, 753.
[61] Robert Jennings, "General Course on Public International Law," *Hague Recueil*, 121, 112, 1967, 437.
[62] O'Connell, 1970, 116.
[63] Mullerson, 1994, 64-67; Brigitte Stern, *La succession d'états*, Vol. 262, (Leiden: Martinus Nijhoff Publishers, 2000), 27; Gerhard Hafner and Elisabeth Kornfeind, "The Recent Austrian Practice of State Succession: Does the Clean Slate Rule Still Exist," *Austrian Review of International & European Law*, 1, 1, 1996, 2; Stefan Oeter, in his article on German re-unification, discusses what refers to as the absence of a "common theoretical basis" in the period, as well as the contradictions between de jure and de facto succession. Stefan Oeter, "German Unification and State Succession," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,*1991, 355; Vladimir-Djuro Degan, "La succession d'Etats en matière de traités et les Etats nouveaux (issus de l'ex-Yougoslavie)," *Annuaire français de droit international*, 42.1, 1996, 207; Pierre Michel Eisemann and Martti Koskenniemi, "State Succession: Codification Tested Against the Facts." *Koskenniemi. Hague: Hague Academy of International Law*, 2000, 65.

Such an attempt would likely obscure dynamics associated with logics of appropriateness animating state behavior, simply because of the enormous scale of empirical detail bound up in the fate of even a small fraction of the body of treaties inherited by post-colonial states. Amid the conduct documented below, it is no doubt possible to find anomalies or equally weighty patterns of state behavior by examining other phenomena. Nonetheless, in drawing out the themes discussed below, an attempt has been made to discern a theoretically intelligible pattern of practice.[64]

Surveying treaty succession by new states in South Asia, Africa, and the Middle East illustrates the emergence of a code of conduct conceived outside dominant legal arguments regarding succession which was integrally linked to notions of self-determination. This behavior was not anti-colonial per se, but instead represented the pursuit of specific aims by post-colonial states that sought to define their relationship to the broader community of states. It is important to avoid confusing the motives for this de facto succession with the assumptions and agenda of anti-colonial doctrine which certain international lawyers began to advance over a decade later to respond to these developments.

The practice of South Asian states emerging from decolonization illustrates the relevance of notions of self-determination in shaping the renunciation of inherited international obligations after the Second World War. The general stability of several categories of legal relations following India's independence has occasionally been taken by scholars of succession as evidence of the permanence of treaties in general pertaining to South Asian states after they gained independence. This is a somewhat problematic interpretation that rests on the wide-spread acceptance by international lawyers at the time

64 I note that this approach is often how concepts are developed in social sciences such as international relations. Max Weber sets out the particular merits of this endeavor in *The Methodology of the Social Sciences*. See Max Weber, *The Methodology of the Social Sciences*, translated by Edward Shils, (Glencoe Ill.: Free Press, 1949). Authors such as Thomas Burger have further articulated the strengths and weaknesses of this methodology. See generally Thomas Burger, *Max Weber's Theory of Concept Formation: History, Laws and Ideal Types*, (Durham, NC: Duke University Press, 1976).

that India had maintained "the legal identity of British India" after independence.[65] New Delhi's renunciation of treaties regarding control of the Indian Ocean,[66] access to the Himalayas,[67] nationality and territory in French India,[68] among several other preexisting legal relations illustrate robustly that it followed neither the letter nor the spirit of qualified universal succession.[69] A sovereign India sought to alter its existing legal relations in such a way that illustrated through practice the new realities of its independence. De facto succession following the immediate secession and later fragmentation of Pakistan also demonstrated a form of practice in which, as a new state, it sought to define autonomously its relationship to the wider international community. The formal legal mechanisms establishing both Indian and Pakistani independence, which purported to establish Pakistan's secession directly after Indian independence, laid some legal groundwork for Pakistan to renounce obligations that did not cohere with its immediate foreign policy goals.[70] For example, rather than succeeding to treaty relations establishing membership in the United Nations, Pakistan elected to pursue a separate path, signing all attendant multilateral agreements through separate negotiations.[71] It repeated this pattern of practice in joining other international organizations, emphasizing its will to determine its own future, separate from the decisions made by former British colonial authorities.[72] In broader terms, Pakistan disputed claims by outside powers that the method of constitutional devolution that occurred when it gained

[65] Matthew Craven, "The problem of state succession and the identity of states under international law." *European Journal of International Law*, 9.1, 1998, 147.
[66] Zafar Imam, "The Indian Ocean and Decolonization." *Social Scientist*, 1980, 36-43.
[67] Aiyaz Husain, "Cold War in the High Himalayas: The USA, China, and South Asia in the 1950s," *Journal of Cold War Studies*, 2.3, 2000, 145-147.
[68] Jessica Louise Namakkal, *Transgressing the boundaries of the nation: decolonization, migration, and identity in France/India, 1910-1972*, Dissertation submitted at the University of Minnesota, 2013.
[69] See generally: T. S. N. Sastry, *State Succession in Indian Context*, (New Delhi: Dominant Publishers and Distributors, 2004).
[70] See the text of the Indian Independence Act (Articles 10 and 11, Geography VI, c. 30), adopted by Britain's Parliament in 1947; also see Daniel P. O'Connell, *State Succession in Municipal Law and International Law*, Vol. 1, (Cambridge, Cambridge University Press, 1967), 8-9.
[71] "Succession of States : Pakistan's Membership in the United Nations," *Canadian Yearbook of International Law*, volume 3, 1965.
[72] O'Connell, 1967, Vol. I, 185-187; Udokang, 1972, 143-148; K.P. Misra, "Succession of States: Pakistan's Membership in the United Nations," *Canadian Yearbook of International Law.*, Vol. 3, 1965, 281-289;

independence required it to succeed to treaties signed by British India.[73] Instead, after evaluating the relevance and implications of inherited obligations, it chose which ones to succeed to, and which to formally renounce.[74] The country's Supreme Court articulated arguments about the appropriateness of this position, which affirmed Pakistan's approach to inherited obligations.[75] Although its de facto succession lies temporally outside the focus of this chapter, it is worth noting that when Bangladesh ultimately seceded from Pakistan in 1971, it largely followed the conduct of treaty succession enacted by other post-colonial South Asian states.[76] While some scholars addressing the succession practices of South Asian states have suggested they were attempting to advance the doctrinal approach known as clean-slate or tabula rasa,[77] the occasional claims to succession by these states appears to indicate, in aggregate, a method of procedure that was less engaged with legal principles than

[73] "Order of Indian Independence," Gazette of India Extraordinary, 14 August 1947, (document viewed in the compedia of United Nations papers from the period, Doc. A/C 6/161, catalgue date 6 October 1947. In section of papers pertaning to General Assembly Official Records, Sixth Commission, 2nd Session, 308-310. It illustrates Pakistan's complicity and advocacy for the position of the UN that India should be considered as the "continuing state" resulting from the independence of British India.

[74] O'Connell, 1967, Vol. I, 128-130, 226-228; Zidane Meriboute, *La codification de la succession d'États aux traités: décolonisation, sécession, unification*, (Paris: P.U.F, 1984), 145-147; Marco G. Marcoff, *Accession à l'indépendance et succession d'États aux traités internationaux*, (Fribourg: Universitaires Fribourg Suisse, 1969), 335. The UN recognized this pattern of decision-making by Pakistan, and decided to provide justifications. In a legal memorandum drafted for the Secretary-General and circulated on 8 August, 1947, the Assistant Secretary-General for Legal Affairs argued "the territory which breaks off, Pakistan, will be a new State; it will not have the treaty rights and obligations of the old State, and it will not, of course, have membership in the United Nations." See "The Succession of States in relation to Membership in the United Nations," published Collection of Memorandum, the Secretariat, UN Doc. A - CN.4 - 149.

[75] See *Barlas Brothers v. Yangtze Ltd.*, decisions reviewed in published volume "Pakistan Legal Decisions," Vol. II (1961), Supreme Court Case 573. Pakistan's Supreme Court held that the national government of Pakistan did not need to follow the terms of Indian Independence Order, passed by Britain's Parliament before both countries gained sovereignty. The Court held "…when a new country is created it is an entirely separate international entity and is not bound by agreement entered into by the State out of whose territories it is created merely because its territories were previously comprised in that State."

Interestingly, the ambiguities raised by Pakistan's refusal to succession to treaties concluded by Britain on its behalf (when it was part of British India) were raised in 1999 in the deliberations of the International Court of Justice in the *Case concerning the Aerial Incident.* The case involved a dispute between Pakistan and India, which might have hinged on Pakistan's succession. Recognizing the Pakistan's departure in practice from the de jure prescriptions of the time, the ICJ avoided addressing this issue, save in the dissent of Ad Hoc Judge Pirzada.

[76] Lacking a devolution agreement of the kind created before Pakistan's independence, Bangladesh avoided claiming any status akin to being a successor state, instead declaring and acting on its intentions to accede to bilateral and multilateral treaties, separately joining international organizations. Meriboute, 1984, 153-154.

[77] Ibid., 144-147; Udokang, 1972, 178.

with demonstrating their new, autonomously-defined relationship to the international community.

African states practiced a similar form of treaty succession, premised on claims to self-determination that led them to deviate from de jure prescriptions for qualified universal succession. Of the significant axes of variation among former African colonies deciding whether or not to succeed to inherited treaties, two divides were significant. The first related to succession to international obligations regarding the delimitation and control of natural resources. States born into generally advantageous situations of existing treaty relations on these issues accepted them more often than not, whereas their less fortunate neighbors contested succession. The latter group sought to transform their treaty relations to be in line with their post-colonial aspirations.[78] Most notable among these disputes was the tendency of newly-independent African states to renounce obligations over access to water concluded by colonial authorities.[79] Although it was common for new states to accept river boundaries that were used to denote borders, preexisting legal relations about the use of water and navigation rights were consistently disputed.[80] Sudan's succession to and subsequent re-negotiation of the Anglo-Egyptian Nile Water Agreement of 1929 illustrates one case in which African states successfully dealt with the emergence of new goals by post-colonial governments.[81] But Tanzania's persistent renunciation of colonial-era international obligations regarding access to natural resources, not just water rights, is indicative of a wider pattern of newly-independent African states abandoning inherited obligations by citing their pursuit of self-determination.[82]

[78] P.K. Menon, *The Succession of State in Respect to Treaties, State Property, Archives, and Debts*, (Canada: The Edwin Mellen Press, 1991), 178.
[79] Makonnen, 1983, 304.
[80] G.M. Cole, *Water Boundaries*, (New York: John Wiley & Sons Incorporated, 1997), xi.
[81] A. Chelkeba, "Succession of Southern Sudan to the 1929 and 1959 Nile Water Agreements and its implications," Available upon request from the International Water Law Project, report produced in 2011.
[82] Makonnen, 1983, 304-307.

A second important divide arose between African states which had versus states which had not signed devolution agreements with departing colonial powers. Both categories of states engaged in similar behavior, yet they used differed arguments to justify their de facto succession. When Tunisia gained independence in 1956, the Diplomatic Protocol establishing its independence did not include a devolution agreement which mentioned succession to treaties.[83] Instead, as Madyous Fallah Al-Rashidi pointed out in his study of treaty succession by Arab states, Tunisia intentionally "exercised her independence in not accepting the devolution of five multilateral treaties of which the Secretary-General of the United Nations was a depositary."[84] This action was swiftly followed by a series of renunciations and separate accessions to treaties concluded by France on behalf of Tunisia before independence, such as membership in the General Agreement on Tariffs and Trade.[85] Some bilateral agreements, like the Franco-British Bilateral Treaty of 1889, were renounced soon after independence because their acceptance was adjudged by the nascent Tunisian government to be contradictory to the precepts of self-determination it had expressed with regard to multilateral agreements.[86] African states which had been given devolution agreements which specifically provided for their succession to treaties, faced a more complex legal situation. When Morocco gained full sovereignty through a Diplomatic Accord with France, this document contained a clause which sought to bind the new government to pre-independence treaties.[87] Morocco repudiated strong interpretations of this clause, using it on

[83] International Court of Justice, Annual Report on Proceedings, 1952, 176.
[84] Madyous Fallah Al-Rashidi, *The practice of Iraq and Kuwait in treaty succession: a selective approach based on the Islamic legal history*, Doctoral Dissertation in History submitted at the University of Edinburgh (Scanned and Downloaded with Consent of the University of Edinburgh Library), 1989, 381.
[85] Kamanda, Alfred M. *A study of the legal status of protectorates in public international law*. Doctoral Dissertation in Politics submitted at the Université de Genève, Institut universitaire de hautes études internationales, 1961, 111.
[86] Report of the *Gazette des Tribunaux Maroc*, March 20, 1957; "Revue crist-que de Droit International," 1958, 224.
[87] The 1956 Diplomatic Accord included a devolution clause in Article 11 which states that: "Morocco hereby assumes the obligations resulting from international treaties concluded by France in the name of Morocco as well as those which result from the international acts concerning Morocco, on which it has made no observations." Found in British and Foreign State Papers, 1905-06, Vol. XCII, 141. For a broader discussion of

the one hand to claim succession to certain multilateral treaties, like the 1929 Geneva Humanitarian Conventions,[88] while simultaneously renouncing many bilateral obligations undertaken by France on its behalf. One notable category included obligations regarding locations of military bases.[89] In several instances where Morocco sought to maintain bilateral treaties with other states, it renounced and replaced older legal relations.[90] The one exception to Morocco's policy against devolutionary succession to bilateral treaties pertained to France's previously-negotiated, colonial legal relations establishing the Moroccan-Algerian border.[91]

Finally, the practice of Middle Eastern states shared similarities with that of post-colonial entities in the two other regions discussed here. Gulf Arab states offer a particularly interesting insight into the development of de facto succession between 1945 and 1967. As Al-Rashidi notes, "The Arab Gulf states…advocated principles that have emerged from the practice of the other Arab states [on the continent of Africa and elsewhere]."[92] Of the several states in the Gulf region which gained independence in the period under examination, none were given devolution agreements which provided for their preexisting legal relations to remain intact. Whenever possible, they generally renounced and acceded to rather than

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the devolution terms, see Ryo Ikeda, *French policy towards Tunisia and Morocco: The international dimensions of decolonisation, 1950-1956*, Doctoral Dissertation submitted at the London School of Economics and Political Science, 2006.

[88] Anthony S. Reyner, "Morocco's international boundaries: a factual background," *The Journal of Modern African Studies*, Volume 1, Number 3, 1963, 315.

[89] Al-Rashidi notes that "there was no exception in the Moroccan application of the rule of the non-devolution of these treaties, even in the case of those establishing military bases (military servitudes)." Al-Rashidi, 1989, 384.

[90] Reyner, 1963, 314-320.

[91] In the decades following France's annexation of Algeria, which occurred in 1830, the government concluded the 1845 Boundary Treaty with the colony's neighbors. League of Nations Treaty Series, Volume CLXXXII, 1937-38, 38. In 1962, a crisis began when the two Arab states began a heated dispute over the border. The Secretary-General of the Arab League consulted the Chairman its Council, to attempt to find a negotiated solution. After visits by the Iraqi Representative of the League, leaders of Morocco and Algeria announced they would accept mediation facilitated by the Organisation of African Unity. The Organisation succeeded in resolving the disputes, but not on the basis of uti possidetis (relating to treaty succession). Instead, the Organisation's Council of Ministers cited a then recognized exemption regarding boundary disputes within state succession in the 1963 Addis Ababa Resolution.

[92] Al-Rashidi, 1989, 387-388.

simply succeeded to multilateral treaties, for example those of which were catalogued by the Office of the United Nations Secretary-General.[93] Middle Eastern states outside the Gulf engaged in slightly more complex conduct with regard to succession. Jordan provides a unique example of post-colonial practice through the negotiation of a devolutionary succession instrument. The Jordanian monarchy was determined to avoid the revival of Ottoman capitulations concluded when the Levant was under Istanbul's control. Typically, these involved restrictions of national government power and privileges for Western traders. As a result, both the Mandatory Resolution of the League of Nations and the devolutionary clauses in the 1946 treaty between Jordan and Britain which dissolved the previous Mandate Agreement avoided direct mention of preceding imperial obligations.[94] Although Jordan made no specific declaration regarding the continuity of pre-independence treaties, later in 1946, it signed a Treaty of Alliance with Britain which recognized the existence of the new state, but which also provided a less stringent clause addressing presumptions of permanence of certain preexisting obligations.[95] Rather than following even this less severe clause, "as an exercise of her independence,"[96] Jordan consistently chose which preexisting obligations to accept, which to renounce, and which to renegotiate.[97] In only one instance did it succeed to a multilateral treaty, and it took the rare step of publicly renouncing certain multilateral treaties tied to the League of Nations which were not amended or incorporated into UN Protocols, for

[93] J.C. Hurewitz, "The British Imperial Defence System," I. Con., May 1952, Number 481, 217; B. R. Pridham, "The Arab Gulf and the West," Centre for Arab Gulf Studies, University of Exeter, 1985, 3.
[94] Al-Rashidi argues that "neither the Resolution of the League of Nations nor the devolution clause embodied in the 1946 Treaty between Great Britain and Jordan which abrogated the mandate agreement contain any reference to the revival of the capitulations." Ibid., b398; also referenced in "Continental Shelf Boundary: Abu Dhabi-Qatar," Limits in the Seas, *The U.S. Geographer*, 29 May 1970, Number 18, 2.
[95] Article 8 of the Anglo-Jordanian Treaty of Alliance states that: "Any general international treaty, convention or agreement which has been made applicable to TransJordan by His Majesty the King or by his government [in the United Kingdom] as mandatory shall continue to be observed by His Highness the Amir until His Highness the Amir becomes a separate contracting party thereto or the instrument in question is legally terminated in respect of Trans-Jordan."
[96] Al-Rashidi, 1989, 402.
[97] Ibid.

example the 1931 Convention on Stamps Law. [98] For the most part, Lebanon and Syria invoked and followed procedures of accession rather than succession to undertake the multilateral treaties and humanitarian conventions signed by their mandatory predecessor.[99] However, the two states engaged in a hybrid accession process to accept League of Nations multilateral treaties amended by UN Protocols. Upon gaining full independence, Lebanon and Syria conveyed to the Secretary-General their willingness to accept succession to these particular multilateral treaties which mandatory powers had signed on their behalf, if they were given the opportunity to formally accede to these obligations by signing the UN's Amending Protocols.[100] With only one exception, Syria and Lebanon refused to accept previous treaty relations characterized as capitulations.[101]

[98] The government followed the doctrine of devolution with regard to multilateral treaties only once, to succeed to the 1929 Geneva Humanitarian Conventions. See Official Journal of the Government of Jordan, 31 May 1932, 345; United Nations Treaty Series, Volume 31, 1949, 495, 497.

[99] U.N. Doc.A/C I.4/200 and Addenda 1 and 2, 17, See Paragraphs 45-46, 49,168; United Nations Treaty Series, 1950, Vol 31, 495.

[100] This instance was the 1947 United Nations Amending Protocol on the 1921 Convention for the Suppression of Traffic in Women and Children (combined with the 1933 Convention for the Suppression of the Traffic in Women of Full Age). U.I.Doc.A/C I.4/150, 108.

[101] In September 1944, the United States declared that it was prepared to recognize the independence of Syria and Lebanon if and when the governments of the two states provided written assurances that the preexisting "rights of the United States and her nationals," as stated in treaties dating to 1924, would remain intact. Syria and Lebanon, eventually accepted these terms of succession with the caveat that these specific American rights would imminently be reinstated by a new agreement. See H.M. Davis, *Constitutions, Electoral Laws, Treaties of states in the Near and Middle East*, (Durham, Duke University Press: 1947), 162, 164.

Interestingly, a similar ultimatum delivered by the United Kingdom was declined by Syria and Lebanon three years later. Upon receiving letters from the Government of the United Kingdom in 1947, the Governments of Syria and Lebanon refused to accept the automatic revival of former British colonial capitulations in return for full recognition of their sovereignty. This declination extended to Britain's proposal for a set of treaties that would reinstate the rights enjoyed by its government and nationals, rather than perpetuate them through succession to preexisting treaties. Citing the previous unwillingness of France to fully recognize these capitulations, Syria and Lebanon persisted in this renunciation, leading the United Kingdom to eventually accept the fullness of local jurisdiction enjoyed by both states. G.B.T.S., 1947, No.37; and with the Government of Lebanon of 22 January 1947, No.45; J.C. Hurewitz, *Diplomacy in the Near and Middle Documentary Records*, Volume II, (D. Van Norstrand Co., New York, 1966) 23-26.

Malaysia as a Periodized Case-Study

Having surveyed de facto succession of post-colonial states from 1945-1967, the following case study seeks to elucidate practice from a vantage which the above analyses cannot provide. The following, closer examination of practice will focus on specific diplomatic relations surrounding treaty succession undertaken by a particular state undergoing decolonization. In addition to drawing out the particularities of de facto succession through the evaluation of primary documents, this analysis also seeks to test Craven's rudimentary explanation for dissonance between de jure interpretations of treaty succession and the practice of states between 1945 and 1967. Malaysia's transition to independence serves both purposes well. Negotiations surrounding the country's independence addressed of treaty succession in which multiple parties deliberated and rendered decisions about inheriting international obligations.[102] In addition to this episode of practice, the case study also pertains to former colonies in which, if Craven's explanation is correct, one would expect to find post-colonial succession practice arising from the historical factors he identifies as salient. Specifically, Malaysia's historical relations with Britain provide an ideal opportunity to test the accuracy of Craven's claim that post-colonial states acted according to motives that can be understood solely in the context of decolonization. Britain had a colonial presence in Malaya reaching back to the end of the eighteenth century, ultimately resulting in the establishment of a Crown Colony. Britain's colonial administration involved decades of extractive economic relations, as well as a bloody counterinsurgency war occurring just before independence. If Craven's argument correctly explains post-colonial treaty succession behavior, Malaysia's conduct should center on resentments born from its colonial experience, namely that it sought to renounce obligations as means of making an

[102] One could argue that it, in an account of Malaysia's treaty succession, it is necessary to evaluate its unification with and expulsion of Singapore. Although these developments were addressed in drafts presented at Confirmation of Status, it was excised in order to meet the word limit requires of the Department of Politics and International Relations.

impassioned public statement against systemic imperial domination. One would expect, if Craven's characterization holds, that Malaysia would conceive of preexisting treaties as part of a world-wide colonialist façade affecting formerly colonized peoples.

Before proceeding, it is also important to note that the conclusions in this case study have been shaped largely by the limitations of available material in the archival collections reviewed. Unfortunately, documents from the independent Malaysian government pertaining to succession in this period appear to be wholly unavailable. Aside from public pronouncements, made during the period under examination, the Malaysian government has adjudged diplomatic records regarding matters of treaty succession to have remained highly sensitive. Wherever possible, observations from secondary sources and the recollections of Malaysian leaders have been consulted. However, given that many consequential decisions regarding the inheritance of obligations were formulated during the colony's final years, the focus of empirical research remained located primarily in archival collections that pertain to British diplomatic relations leading up to and directly following independence. Whenever possible, sources and claims were cross-checked in existing, bound volumes of documents, as well as in related files in the newly-released Migrated Archive.[103] Some of the material consulted in this study appeared incomplete and redacted, often to the point that mention of the process of succession to specific treaties could not be definitely tracked through direct communications between the nascent government of Malaysia and other states. This could perhaps relate to the partial and rushed release of the documents, or it could be the consequence of historical developments like "Operation Legacy," an organized effort to destroy embarrassing colonial documents that Cahal Milmo first reported on in *The*

[103] The so-called "*Migrated Archives*" are a recently-released set of colonial administrative records (Series FCO 141). In accordance with a court order, they were released beginning in April 2012 in tranches organized by the National Archives.

Independent several months after the release of three tranches of the Migrated Archive.[104] Repeated reviews and parsing of diplomatic papers, records of proceedings, and protocol sheets circulated among the High Commissioner of Malaya as well as the Colonial Office suggest that numerous papers remain unavailable. Specific appendices to reports on decisions bearing on the fate of certain international legal relations are no longer attached to their covering summaries. Despite the partial absence of some documents, the materials evaluated for this study illustrate relevant patterns of decision-making regarding treaty.

Malaysia's General De Facto Treaty Succession

In the lead up to Malaysia's independence, gained from the United Kingdom in 1957,[105] the local authorities that ultimately took control of the country placed notions of self-determination at the center of their succession practices. The development of this pattern of de facto succession was deeply connected to the process of colonial constitutional design that occurred before independence. Malaysia did not address the inheritance of international obligations through a set of sweeping terms in a devolution agreement, as in other crown colonies. Instead, its leaders negotiated broad policy parameters regarding succession principally through the formulation of the new government's federal structure, as well as through provisions to maintain international legal continuity stated in the country's constitution at independence.

Although one might assume that the attributes of Malaysia's federalism would be disconnected to external matters of succession, the constitutional delineation of central and provincial authorities leading up to independence proved consequential to the inheritance of

[104] Cahal Milmo, "Revealed: How British Empire's dirty secrets went up in smoke in the colonies." *The Independent*, 29 November 2013, available online at: http://www.independent.co.uk/news/uk/home-news/revealed-how-british-empires-dirty-secrets-went-up-in-smoke-in-the-colonies-8971217.html
[105] See the *Federation of Malaya Independence Act*, 1957. Available online at: http://www.legislation.gov.uk/ukpga/Eliz2/5-6/60

treaties. The twelve years between the end of the Second World War and the arrival of Malaysian independence involved the swift evolution of its colonial forms of government. The failure in 1948 of the Malayan Union Agreement, a highly centralized constitutional arrangement,[106] led to the development of proposals for a federal system of government. From this, the Federation of Malaya Constitution ultimately emerged. This document later served as a blueprint for Malaysia's post-independence constitution. It not only created local powers for municipal and province-level systems of government, but it also recognized limited authorities exclusively in the domain of local traditional rulers.[107] Combined with the series of colonial constitutional alterations toward a federal system, the new federal structure created confusion about the extent to which the colony's legal relations with Britain and other states applied to the emerging central government in Kuala Lumpur, and thus to the colony as a whole. Against this notion, traditional rulers who enjoyed authorities applying to specific provinces attempted to assert rights to exercise separate treaty relations. This disagreement with would-be national ministers in Malaysia's emerging centralized institutions was grounded in historical experience. The British Empire had previously conceived of its relationship to the lands making up Malaya through treaties with specific traditional rulers and limited indirect rule of fiefs and other territories associated with holders of hereditary titles. Only after the Second World War did colonial authorities attempt to unify peninsular

[106] An important feature of the Malayan Union Agreement was its highly diminished position for traditional rulers in the colony, who had enjoyed limited recognition of their "sovereignty" and control over significant substantive matters before the Second World War. Instead of devolving local authority over administration and legislation to traditional rulers, they would be invited to sit on the "Council of Sultans," which would remain a solely deliberative and consultative body intermittently convened by the Governor. See Albert Lau, *The Malayan Union controversy 1942-1948*, (Singapore: Oxford University Press, 1991), 84-85.

[107] This issue was first brought to the fore in March 1946, when Dato Onn bin Ja'afar, leader of the rising United Malays National Organization, convoked the "Malayan Malay Congress" in Kuala Lumpur, to achieve broad denunciation of the Malayan Union Agreement by 41 groups. The UMNO would later join traditional rulers to boycott the inauguration ceremony of the Malayan Union Agreement held on 1 April 1946. So overwhelming was the sentiment of the ethnic Malay population that even the Malay communist leader Abdul Rashid bin Maiden directly contradicted his previous anti-communal stances to demand special rights for Malays and "the return of full powers to the Sultans" (Stubbs 2001, 53).

As a result, the Federation of Malaya Constitution allowed separate state governments established influential roles for the traditional rulers, who were given considerable control over administrative policy relating to agriculture, Malay Reservations, local judicial authorities, forests, and schools (Stubbs 2001, 53)

Malaya under far-reaching "constitutional" documents in long-term preparation for self-rule.[108]

Despite their persistence in ultimately proposing and reinforcing a federal structure of government, British colonial authorities created some legal precedent for the claims of traditional rulers when they issued an opinion in the case of the *Sultan of Johore v. Abubakar Tunku Aris Bendahar*. In these proceedings, which concluded in 1952, Britain's Secretary of State for the Colonies attested that "His Majesty's Government regard [Malay traditional rulers] as independent sovereigns in so far as your relations with His Majesty are concerned."[109] Although the legal relations in question did not involve treaties, the Privy Council reportedly certified this statement by the Secretary of State, and pledged to treat the appellant as "an independent sovereign entitled to the immunities in respect of litigation which attach to that status."[110] This ambiguity was only resolved by the Federation of Malaya's emerging central government through sustained claims that it would maintain a monopoly on the conduct of foreign policy. As a result, by 1959, within two years of independence, the central government had successfully achieved a moratorium on negotiations of previous treaty relations between western powers like Britain and traditional rulers.[111] Thus, this domestic dimension of treaty succession illustrated Malaysia's will to define its relationship with the international community. No longer would the nascent government in Kuala Lumpur allow the prerogative of inheritance of international obligations to reside at the local government level. Succession, then, served as one of the dimensions defining the country's new, unitary autonomy.

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[108] Barbara Watson Andaya, and Leonard Y. Andaya, *A History of Malaysia*. Second Edition. Hampshire: Palgrave, 2001), 264-265.
[109] Sultan of Johore v. Abubakar Tunku Aris Bendahar, *The American Journal of International Law*, Volume 47, Number 1, 1953, 153-155.
[110] Ibid.
[111] See Jerome R Bass, "Malaysia: Continuity or Change?" *Asian Survey*, 1970, Volume 10, Number 2, A Survey of Asia in 1969: Part II. 152-160; R. Allen, *Malaysia, Prospect and Retrospect: The Impact and Aftermath of Colonial Rule*, (London: Oxford University Press, 1968).

Although Malaysia's constitutional provisions pertaining to succession at independence appeared to favor the continuity of international legal relations, the newly-independent state did not follow de jure prescriptions for qualified universal succession. In constitutional terms, the colony established provisions to preserve existing legal relations after independence while intermittently avoiding the inheritance of specific obligations and renouncing many treaties in accordance with notions of self-determination. Crucially, Section 169 of the Federation of Malaya's Constitution states that international agreements created by Britain on behalf of the Federation "shall be deemed to be a treaty, agreement or convention between the Federation and that other country."[112] This constitutional provision was partially reaffirmed by an Exchange of Letters in January 1958, in which Britain and the Federation agreed that certain existing commercial arrangements concluded before independence remained intact. What proved truly remarkable about Section 169 was its implication that, under treaties with third states concluded by Britain on behalf of the colony, those third states could expect independent Malaysia to inherit the agreements.[113] Although there remain no examples of third states accepting this automatic subrogation, there is also little evidence that any third states clearly refused this arrangement.[114] Instead, Malaysia practiced succession by reaffirming the tenets of certain treaties through diplomatic procedures such as Exchanges of Notes, while ignoring the existence of certain obligations that should have remained intact.[115] This pattern of behavior was particularly clear in the succession of membership to international organizations. Section 169 of Malaysia's Constitution at independence further states that "any decision taken by an international organization and accepted before [Independence] Day by the Government of the United Kingdom on behalf of the Federation

[112] L. C. Green, "Malaya/Singapore/Malaysia: Comments on State Competence, Succession and Continuity," *Canadian Year Book of International Law* 4, 1966, 3, 21.
[113] Ibid.
[114] See International Law Association, *The Effect of Independence on Treaties*, London, 1965.
[115] Green, 1966, 22-25.

or any part thereof shall be deemed to be a decision of an international organization of which the Federation is a member."[116] This extreme provision in favor of legal continuity between colonial Malaya and the sovereign Federation which emerged at independence had sweeping implications which were directly contradicted during and after Britain's exit. This provision implies that independent Malaysia had agreed to succeed to any obligations accruing from decisions made before 31 August, 1957, by international organizations to which it was not a member, but to which Britain was a member during the course of the new country's colonial dependence. This claim to inheritance was not even partially observed. The most obvious example pertains to Britain's membership in the Council of Europe, and its accession to the European Convention of Human Rights. Section 169 would suggest that independent Malaysia had succeeded to this Convention, and yet within the same constitutional document itself there exist numerous ethnically-based reservations aimed at granting advantages to citizens belonging to the Malay majority.[117] These provisions are wholly inconsistent with obligations under Article 14 of the Convention.[118] There are of course other examples of how, in practice, the Federation of Malaya contradicted its declared legal position regarding succession.[119] These practices illustrate the predominance of notions based on self-determination in guiding the country's inheritance of treaties.

[116] Constitution of the Federation of Malaya, 1957.
[117] Constitution of the Federation of Malaya, 1957, Article 153, Section 2. Also see Article 8, Section 8.
[118] Specifically, Article 14 of the Convention states: "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."
[119] See A. W.B. Simpson, "Round Up the Usual Suspects: the Legacy of British Colonialism and the European Convention on Human Rights," *Loyola Law Review*, The Ninth Annual Brendan Brown Lecture Collection, Vol. 41, 1995, 629-711; Green also goes on to cite other examples, Green, 1966.

Avoiding Succession: the External Defence and Mutual Assistance Agreement

Of the currently available but scattered collections of papers pertaining to the Federation of Malaya's succession behavior, significant materials in the UK National Archives cover one particular treaty: the External Defence and Mutual Assistance Agreement. These sources allow an analysis of the country's initial decision-making regarding succession. The Agreement was a consequential international obligation, and one of the first of its kind taken on by the newly-independent country directly following its independence. Its signing was preceded by nearly a year of negotiation.[120] Before the Federation gained independence, Britain insisted that the colony accept the treaty so that it could simply succeed to it once independence arrived. The indigenous authorities resisted vigorously. Although they were consistently in favor of the Agreement, whose negotiated terms they accepted without reservation before independence, they demanded that the signing occur once they gained sovereignty. Malayan leaders thus successfully avoided succession despite significant pressure and their avowed self-interest to do so.

Before discussing the diplomatic exchanges that illustrate Malaysia's decision-making regarding succession, the substance and significance of the Agreement should be reviewed. It sought to govern military and strategic affairs between Britain and its rapidly decolonizing territory. The treaty emerged during intense negotiation between indigenous political leaders and the Colonial Office. Britain was winding down a lengthy counterinsurgency war in the peninsula. Indonesia, then Southeast Asia's pretender to regional hegemony, was beginning to signal the distrust and aggression that would culminate in the period of tension and military rivalry with Malaysia known as "Konfrontasi."[121] The chief terms of the treaty were spelled out in Articles 1 through 3. Britain agreed to provide protection of the central

[120] Karl Hack, *Defence and Decolonisation in South-East Asia: Britain, Malaya and Singapore, 1941-67*, (Richmond: Curzon, 2000), 226.
[121] Ibid., 226-227.

government from external threats. In return, local authorities granted Britain "…the right to maintain in the Federation such naval, land and air forces including a Commonwealth Strategic Reserve…necessary for the purpose of [defence] and for the fulfilment of Commonwealth and international obligations."[122] Article 6 of the Agreement specified what fell under the last phrase of this sweeping military commitment:

> a threat of armed attack against any of the territories or forces of the Federation of Malaya or any of the territories or protectorates of the United Kingdom in the Far East or any of the forces of the United Kingdom within those territories or protectorates or within the Federation of Malaya, or other threat to the preservation of peace in the Far East.[123]

In other words, the Agreement pertained to the weightiest issues of national and regional security that the new country would face. It was roundly acknowledged by British colonial authorities and local Malay leaders that a newly-independent Federation of Malaya would lack the military forces necessary to defend itself from existing external threats. Nearly a decade of fighting to put down an insurgency with overwhelming British resources illustrated to Malaysia's neighbors as well as outside powers that the new state would be born into a perilous position.[124]

From the outset, Britain pressed local authorities to endorse the colony's accession to the Agreement before independence and urged them to declare their intention to succeed to it once the Federation gained sovereignty. After the London Constitutional Conference of January to February 1956, which not only addressed the organization of the Federation's

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[122] "Anglo-Malay Mutual Defence Agreement," 1957, printed as appendix 3.1 in Jayaratnam Saravanamuttu, "Malaysia's foreign policy: the first fifty years," (Singapore: Institute of Southeast Asia Studies, 2012), 81. This quoted military commitment was spelled out further in Article 8: "in the event of an armed attack against **...** any of the territories or protectorates of the United Kingdom in the Far East or any of the forces of the United Kingdom within any of those territories or protectorates **...** the [two] Governments...undertake to co-operate with each other and will take such action as each considers necessary for the purpose of meeting the situation effectively." Ibid.

[123] Ibid.

[124] Mohamad Faisol Keling Md Shukri Shuib and Mohd Na'eim Ajis, "The Implications of Cold War on Malaysia state building process," *Asian Culture and History.* Volume 1, Number 2, 2009, 89-112.

government but which also established the general end goal of a defence agreement,[125] British colonial authorities attempted to gain local approval for accession to the treaty in two fora. One was the purely consultative External Defence Committee, made up of Malayan ministers and chaired by the High Commissioner in Malaya, Sir Donald MacGillivray. The other was the Anglo-Malayan Working Party on Defence, established at the insistence of MacGillivray and Robert Scott, then Commissioner-General of Singapore, who chaired the British delegation. Tunku Abdul Rahman, head of the dominant Alliance Party, and the leader destined to become the Federation's first Prime Minister, chaired the Malayan delegation.[126] In minutes of the External Defence Committee, there exists copious evidence that the issue of colonial accession followed by succession was raised time and again between March 1956 and June 1957.[127] After the Committee endorsed British-Malay defence "co-operation" after independence, the High Commissioner specifically explained that accession before independence and succession afterward would be the most expedient method of ratifying the Agreement being formulated "to accomplish this end."[128] Throughout 1956 and in early 1957, the Malayan ministers were repeatedly presented with concurring legal opinions.[129] A similar pattern of lobbying for accession before independence was undertaken in the Working Party. In deliberations and drafting meetings over the span of the year, ending

[125] "Constitutional Conference," 1956, Colonial Office. FCO 141/7474, Migrated Archive Collection. National Archives. Although this document states outcomes of the conference British aspirations for a long term defense treaty were stated in, among earlier collated memos: "Alliance demands and the extent to which they might be met," 1955, High Commissioner of Malaysia's response to "The London Talks" telegram. FCO 141/7474, the Migrated Archive Collection, UK National Archives; "Alliance Demands and the Extent to Which they Might Be Met [response telegram]," under telegram heading "The London Talks," section "A. Present political background and likely developments," 24 November 1955, High Commissioner's Office, labeled "from Kuala Lumpur" FCO 141/7474, Migrated Archive Collection, UK National Archives.
[126] Hack, 2000, 225-227.
[127] "[Appended note connected to] Telegram on Working Party Progress,"12 May 1956, from High Commissioner MacGillivray, directed to the Colonial Office, FCO 141/7499, Migrated Archive Collection, UK National Archives.
[128] "Message from the Office of the High Commissioner for the Federation of Malaya to the Colonial Office [unsigned carbon copy draft; final copy not found]," 14 March, 1957, CO (2)10308350, UK National Archives.
[129] "Letter to Foreign Office" (document circulated to three readers) from F.S. Tomlinson (Counsellor, Colonial Office), 31 July, 1957, CO (2)10308350, UK National Archives. Document of particular interest because it suggests Colonial Office anticipation of Konfrontasi with Indonesia, triggered by UN recognition of succession of pre-independence Malay Defence Agreement (contradicted by Poulgrain's *The Genesis of Konfrontasi* 1988).

in correspondence regarding final versions of the Agreement, the issue of how the treaty would come into force was broached numerous times. When the Working Party addressed accession before independence, the British delegation attempted to exploit what it believed to be its upper-hand, namely that their Malayan counterparts would inherit a country facing a security crisis if Britain walked away from the negotiation table.[130] This maneuvering stopped short of presenting an ultimatum that Malayan failure to accede before independence would result in a compromised security situation. yet correspondence from the British delegation to the Colonial Office stated that the case had been made to the local delegation that "delayed signing would bring hazards for presently negotiated terms."[131] Despite these circumstances, Britain's position regarding colonial accession followed by post-independence succession did not prevail.

Throughout the negotiation of the Agreement, local Malayan authorities resisted both accession before independence as well as a commitment to succession after their government gained sovereignty. Given their desire for the treaty to be established, this position on succession might appear paradoxical. If the future rulers of the Federation sought to establish legal relations obliging Britain to ensure their country's security, and if they accepted the terms of the relevant document, why would they delay signing it and demand that it officially come into force only after independence? Speaking about the negotiations of the Working Group in general, Karl Hack observed the predisposition of the Malayan delegation that "for UMNO Ministers, visibly untrammelled Malayan sovereignty was crucial. If Commonwealth troops could be presented as an army of occupation it might offend nationalist pride..."[132] Although the Working Group met only before independence, Malayan concern with

[130] "Message from H. Parker," Delegation to the Malayan Defence Agreement Working Party, to Richard Powell, Ministry of Defence, May, 1956, DEFE 7/1157024, UK National Archives
[131] "Consideration of Use of Burma Agreement [Appended page not available, archivist looking for complete duplicate or original]," 10 June, 1956, DEFE 7/11570, UK National Archives.
[132] Hack, 2000, 227.

appearances for the period after British exit overwhelmingly influenced the deliberations. Negotiation of the substance of the Agreement illustrated the importance for the soon-to-be independent leaders of outwardly dispalying the attributes of self-determination: they refused to accede to formal nuclear strategic arrangements and they demanded no mention of the Southeast Asia Treaty Organization in the Agreement (although Britain supported SEATO, Malaysia would not initially be a member at independence).[133] This tendency was reflected in the Malayan position on how the Agreement would come into force. As Harold Parker, then Permanent Secretary at the Ministry of Defence, and Richard Powell, Parker's Deputy and later successor would repeatedly note in their correspondence with Commissioner-General Scott, Tunku's position was immovable, resolutely backed by Alliance-affiliated Ministers installed elsewhere in colonial consultative bodies. Powell noted in late 1956, as then Permanent Secretary, "Tunku and the other Ministers are firmly set against signing before independence. They claim the Agreement should come into force after Merdeka day [sic] [Independence]."[134]

In the end, Britain capitulated to the demands of Malayan negotiators. The matter was resolved when John Profumo, Parliamentary Under-Secretary of State for the Colonies, wrote to Prime Minster Harold Macmillan on 12 August, 1957: "the Agreement will enter into force as soon as it is signed, which will be upon independence or as soon as possible thereafter, when it will be published both in the Federation of Malaya and in this country, and it will be presented to Parliament as a White Paper."[135] This document is notable because it establishes

[133] Ibid., 225-227.
[134] Notes from Permanent Secretary R. Powell, "Progress on Agreement Negotiations," September, 1956, DEFE 7/1332024, UK National Archives. Similar statements are made in telegram titled "From High Commissioner MacGillivray to the Office of the Secretary of State for the Colonies," 1 August, 1957, CO (2)577308350, UK National Archives, (does not appear in correct reverse chronological order per rest of the file; possibly dated by when it was received, which is not visibly cited). This latter document is of particular interest because it sets out British strategy to prolonged, politicized avoid post-independence ratification of the Defence Agreement.
[135] "P.M. (57) 39: [to the] Prime Minister, Message from Parliamentary Under-Secretary of State for the Colonies John Profumo to Prime Minister Harold Macmillan," [Page 2 of document, Item 4] 12 August, 1957, CO 10308350, UK National Archives, [archivist (S. Patterson) confirmed official heading citation to be incorrectly serialized (paper from Second Colonial Office); no intention expressed to relabel file].

both that the negotiations of the Agreement had concluded weeks before independence, and that, as Profumo further noted "it is intended, however, that before independence, the two Governments should formally confirm to each other that the Agreement as now drafted…is acceptable to them and should undertake to bring it forward for signature upon independence."[136] The Prime Minister assented to these terms on 21 August.[137] The uncertain signing date for the Agreement at the conclusion of its negotiation was intimated in the article pertaining to its duration and review. It read "following a common practice as between equal partners in the Commonwealth [it was agreed] that it was unnecessary to insert an article dealing with the duration and review of the Agreement, but that each party would always retain the right to suggest a review of the Agreement should this seem necessary for any reason."[138] In avoiding colonial accession and post-independence succession, the leaders of a post-colonial state made measured decisions about their relationship to the broader international community. Malaysia's strong and consistent aversion to succeeding to the Defence Agreement, which would prove crucial for its national security, illustrated in practice the will for self-determination to inform its inheritance of international obligations.

[136] Ibid.
[137] Ibid. On third page of the document, Macmillan wrote "I agree," initialing and dating this comment.
[138] Green, 1966, 24.

PART III

CONCLUSIONS

The evaluation of de jure and de facto treaty succession from 1945 to 1967 has provided evidence for three conclusions. First, while international lawyers elaborated a dominant set of interpretations favoring qualified universal succession, states violated the attendant legal prescriptions of these. Second, examining state practice through the chosen contextualized case study has illustrated the emergence of an extra-legal code of conduct regarding treaty succession, based on notions of self-determination, which guided states seeking to define their relationships to the international community autonomously. Finally, the evidence evaluated in this chapter challenges Matthew Craven's characterization of how and why post-colonial states contradicted the law of succession as it was predominantly understood during the period they gained independence.

Perhaps the most obvious conclusion to be drawn by the overarching comparison between interpretations of succession law and what states actually did between 1945 and 1967 is the unequivocal divergence between the two. The contextualization provided before the case study illustrates in aggregate the unwillingness of states emerging from decolonization to follow the legal interpretations of dominant thinkers like O'Connell. Widely represented throughout the data, this is clearly present in the case study as well. The numerous examples of states renouncing treaties which should have held under the prevailing doctrinal approach of international lawyers of the time elucidates that other considerations were guiding their behavior. Recalling to the normative vision of O'Connell, it becomes even clearer that state practice illustrates a remarkable discrepancy between what the interpretation of law required and what states actually did. Rather than accepting preceding obligations as a means of affirming cosmopolitan values that bind peoples and states across their borders, post-colonial states acted to illustrate their particular will to engage with the international

community on their own terms. That states often professed legal claims and undertakings to follow qualified universal succession and then did not do so is also a crucial recurring detail. Recognizing the realities of state practice in this period illustrates the distance between speech and action in the inheritance of treaties. States may have claimed to be engaged in a contemporary legal discourse, but their behavior bore out that this discourse had little influence on their decisions about which treaties to renounce and which to accept. Nonetheless, examples of renunciations do not provide the whole story. The pattern of behavior outlined above also includes many examples of states choosing to succeed to certain international obligations. For this reason, understanding what guided states requires an analysis that moves past the simple recognition that states repeatedly violated existing, dominant interpretations of the law in this area.

The evidence collected in aggregate and surrounding the case study analyzed in this chapter illustrates the emergence of a code of conduct informed by notions of self-determination. The survey of de facto succession during the period from 1945 to 1967 reveals the contours of a pattern of behavior that centered on states using practice to demonstrate their will to define their relationship to the international community autonomously. Interpreting what guided states in this period requires recognition of the broad variety of practices that were connected with processes by which former colonies illustrated their deliverance from their former position of external control. The notions behind their orchestration of the inheritance of obligations was more a set of guidelines for consistent procedure than a strict formula. Their decisions to succeed to certain treaties while renouncing others elucidates the emphasis they placed on their newly-achieved independence. The admixture of motives which led them to make decisions in this regard were premised on the notion that it was their prerogative to make those determinations. While organizing their succession behavior, states acted in a way which was intended to

demonstrate they were free from the requirements of obligations which were previously concluded and which they felt impinged on their capacity to define their legal relations with neighbors, former imperial powers, and other third parties with whom they had been contracted into treaties during the course of colonial dependence. The outlines of this code of conduct apply Malaysia. It engaged in succession to treaties in such a way that aided it in defining how it would interact with the community of states. The insistence by the central government of the Federation that treaty relations resided in the federal government, the interpretation of constitutional articles to allow the renunciation of certain international obligations, and the decision to avoid succession altogether when bringing into force a major treaty bearing on national security are typical of the documented, contextual trends among post-colonial states.

A typical counter-argument could be made in response to the code of conduct identified above. It would be mistaken to describe treaty succession by post-colonial states between 1945 and 1967 as being defined solely by their pursuit of self-interest or short-term legal convenience. There are two features of the de facto inheritance of international obligations during this period that suggest that the attainment of specific, immediate advantages or short-term gains were not the only or even the primary motivating factors for states. First, after many states gained independence, they repeatedly renounced treaties they explicitly intended to become parties to through accession, only occasionally re-negotiating the terms of these legal relations. Post-colonial states in South Asia, Africa, and the Middle East regularly declared their will to undertake preexisting international obligations, but they did not avail themselves of the legal shortcut of succession, as prescribed by the de jure prescriptions of their day. Instead, they often insisted on avoiding this legal mechanism in order to engage in lengthy and complex accession procedures. Malaysia's decision against a path to succession to the Defence Agreement provides further elaboration of this tendency. It

would have been far easier for the pre-independence Malayan authorities to accede to and then subsequently succeed to the agreement after they had gained sovereignty. Yet they resisted this path and chose the lengthier, more complex, and untested path of ratification after independence. If self-interest were directly or predominantly motivating state behavior, why would states like those cited in this chapter take these extra series of steps, especially in instances like Malaysia's where the treaties involved would serve a crucial role in sustaining their national security? Furthermore, why would these states temporarily imperil their membership in treaties relations if they had solid legal grounds to claim their permanence, especially if these states did not intend to change the nature of these inherited treaties? These details, in aggregate, complicate the instances of practice in which it appears that naked self-interest motivated the renunciation of or succession to treaties by post-colonial states. Second, the fact that states only rarely used succession as a bargaining tool in their relations after independence suggests that self-interest was not the primary motivating factor behind their behavior. When confronted with ultimatums regarding their acceptance of preceding treaties, post-colonial states would, more often than not, refuse to engage in succession in return for a specific concession, such as their recognition by a major power or neighboring state. Similarly, there were many cases in which states engaged in limited forms of succession which violated their immediate self-interests for the sake of establishing consistent treaty relations in accordance with their declared post-independence foreign policy. If self-interest had been the major impetus behind their succession behavior, post-colonial states would have more clearly and consistently used the inheritance of obligations as instrumental means to achieve identifiable immediate goals.

Finally, the evidence collected and analyzed in this chapter does not cohere with Craven's explanation for post-colonial state behavior. In advancing his portrayal of the so-called "decolonization of international law," the author makes two broad claims about why

post-colonial states did not act according to prevailing legal prescriptions for a qualified form of universal succession after the Second World War. On the one hand, he suggests that states emerging from decolonization acted according to sentiments understood only in the particular context of their experience as former colonies, in which bitter resentments had accrued which cannot be understood as relevant factors outside the period. These motives led them to renounce obligations to make a larger point about the role of colonial legal relations. Although it would be wrong to suggest that post-colonial states did not in part respond to their experience as former colonies, the arguments advanced here suggest that their behavior—in other words the actual decisions they made in aggregate—can be understood more accurately in terms of common notions of self-determination, relevant to the experience of states emerging before decolonization as well as those that would become independent decades later. This is bound up in Craven's second, subtler claim that the succession behavior of post-colonial states can be understood by examining anti-colonial doctrine that emerged later. In fact, the state behavior analyzed here cannot easily be accounted for as adherence to nascent anti-colonial doctrine regarding succession which sought to counter then dominant de jure prescriptions for qualified universal succession. Later intellectual opposition to O'Connell's traditional vision of treaty succession came from international lawyers and scholars who advocated non-succession as a means to destroy systemic, colonial and neo-colonial forms of international law. Although doctrinal arguments of this kind were articulated and applied in full in other areas of law in the decades under examination here, it was only in the early- to mid-1970s that they were developed in full regarding matters of succession.[139] Nonetheless, even if one were to grant that sufficient, coherent doctrine existed

[139] The earliest, clearly "anti-colonial" objection to the qualified universal succession advanced by O'Connell and others came from the Algerian jurist and diplomat Mohammed Bedjaoui. While serving as the International Law Commission's Rapporteur regarding the "Succession of States in Respect of Matters other than Treaties," he found means to address the topic seemingly excluded by the title of his position. He began by assailing the intellectual foundations of O'Connell's approach, namely by pointing out systemic, abusive characteristics of the doctrine of acquired rights. He closely associated this doctrine with colonial enterprises. Mohammed

to make the case that post-colonial states were following anti-colonial arguments, there appears to be little evidence, in aggregate, to support this claim. Neither rhetorically, nor in the fullness and range of their practice did post-colonial states aim to destroy "systems" of lingering colonial enterprise. Undoubtedly, they resented and contested specific treaties which constrained their means and hampered their aspirations after independence. But they tacitly accepted many such obligations, while aggressively enforcing and jealously policing partners in the adherence to certain obligations which they inherited. Their outlook was not a revolutionary one requiring the destruction of precepts of succession in full. For this reason, it is difficult to account for their behavior as following anti-colonial succession doctrine, or to sustain Craven's broader characterization of the practice of post-colonial states.

Bedjaoui, "Succession of States and Governments: Succession in Respect of Matters other than Treaties," UN Document A, CN4, 216, Rev. 1, *Yearbook of the International Law Commission*, 1969.

Yet even this early critique did not constitute a coherent doctrinal approach. It was only later when Bedjaoui developed a wider critique that directly addressed treaty succession did the framework of an anti-colonial doctrine emerge. Leading up to the formulation of the Vienna Conventions, he argued in the 1970s that the paramount objective for international lawyers concerned with succession was to fundamentally reform "traditional international law." Mohammed Bedjaoui, "Problèmes Récents de Succession d'Etats dans Les Etats Nouveaux," 130 *Hague Recueil*, 1970, 463. According to this approach, states in the process of decolonization should renounce treaties in order to combat existing systems of dependence, not just for themselves, but among all states. If they did not take this course of explicitly anti-colonial practice, they would find themselves in a perpetual category of "proletarian" or "probationary" statehood.

Chapter 4

The 1978 Vienna Convention and Custodianship's Rise: The Codification and Abandonment of Consent (1968-1995)

"Considering the profound transformation of the international community brought about by the decolonization process;"

~First Clause, Vienna Convention on Succession of States in respect of Treaties, 1978

"If tomorrow Russia goes into the Crimea no one will even raise an eyebrow."[1]

~Leonid Kravchuk, first President of Ukraine, remark upon the 1994 Budapest Memorandum on Security Assurances, following Ukrainian succession to the Nuclear Nonproliferation Treaty

Introduction

The next period of contemporary treaty succession analyzed in this thesis spans the period from 1968 to 1995. Dominant de jure understandings of the inheritance of international obligations are evaluated, followed by a contextualized case study from this period which surveys state practice in general and investigates in greater depth the treaty succession which occurred when Ukraine gained independence from the USSR. In this period, debates surrounding de jure interpretations of treaty succession resulted in the opening for signature of the Vienna Convention on Succession of States in respect of Treaties in 1978. This document attempted to establish binding rules for the rights and duties of new states to inherit or renounce treaties. The process of codification of treaty succession represented a fundamental, if imperfect, shift toward the conception of rights to renounce preexisting treaties borne by what the Convention referred to as "newly independent states." Issues regarding the salience of the record of post-colonial states to future cases were never fully resolved during the process of codification. Nonetheless, the deliberations surrounding

[1] "Kyiv Scorns NPT Exchange Deal," *Moscow Times*, December 8, 1994, 2.

these topics resulted in changes to predominate legal thought on treaty succession, toward the necessity of consent in treaty succession.

Although these changes in de jure principles envisioned a future in which new states would regularly choose to renounce obligations, the multiplication of independent subjects of international law in the 1990s charted a different course. These states acted outside the rules espoused in the 1978 Convention. Evidence collected and analyzed in Part II of this chapter illustrates that a code of conduct emerged among these states which set aside rights to renunciation for the purposes of maintaining regional and global order. Rather than complying with the guidelines of the codified law of the late 1970s, the 15 newly-independent states emerging from the Soviet Union, the newly-reunified Germany, and several others acted in aggregate to sustain the nexus of treaty relations which existed before they became sovereign. Heuristics of imperial domination which were ascribed to the USSR, and which could have been invoked in the context of the 1978 Convention's clauses regarding renunciation, were not linked by new states to their decisions related to treaty succession. The case study evaluated in this chapter confirms these trends, both in terms of Ukraine's general de facto treaty succession, as well as its crucial set of decisions regarding its inheritance of obligations pertaining to nuclear weapons. This body of evidence illustrates the emergence of a purposeful course of action adopted by states in the period which prioritized the order created by existing treaties documents, even when their acceptance appeared to be in tension with successors' immediate and long-term interests.

PART I

THE CODIFICATION OF CONSENT

In describing the development of the 1978 Vienna Convention, which represented the culmination of new doctrine departing from previous, dominant interpretations of customary law, a demarcation has been made. The analysis undertaken here focusses on the period beginning in 1967, with the International Law Commission's appointment of Sir Humphrey Waldock as Special Rapporteur for the Succession of States and Governments in Respect of Treaties.[2] His series of five reports on the subject of treaty succession set the parameters for the final drafting which took place in Vienna, as he sought to gather, address, and prioritize certain competing arguments that would influence the project of codification. Waldock's appointment coincided with the intensification of legal debates in the area of succession law resulting from the bulk of European decolonization taking place. In recognition of changing dynamics in the arena of debate in this area, the ILC included many new voices in the extension of decades-old debates, like Mohammed Bedjaoui, who became Special Rapporteur on questions of succession pertaining to rights and duties entailed by other legal instruments outside of treaty law.[3] Waldock's appointment represented the beginning of a period in which fresh arguments were brought fully to bear, and momentum gathered to put outstanding problems surrounding the law of succession to rest by creating a body of explicit rules that the great majority of states could formally accept.[4]

[2] "Documents of the Nineteenth Session Including the Report of the Commission to the General Assembly," 1967, UN Doc A/CN.4/SER.A/1967/Add.l, *Yearbook of the International Law Commission*, II, 368.
[3] Ibid.
[4] In his even-handed analysis of the formulation of the 1978 Vienna Convention, Matthew Craven states that "it is difficult to overestimate the influence of Waldock's approach to codification upon the articles of succession." Craven, 2009, 105.

Prologue to Codification

It is worth noting from the outset that the goal of codifying the law of treaty succession was not a new idea when work began in earnest in 1967. Codification as a means of developing succession within the domain of international law had merely languished in neglect for nearly two decades while customary law was simultaneously disregarded by states and accepted by many international lawyers as sufficient. When in 1948 the UN Secretariat tasked Hersch Lauterpacht with a "Survey of International Law in Relation to the Work of Codification of the International Law Commission," he included the "Succession of States and Governments" as one of twenty-five areas of law, specifically citing ambiguities with regard to the succession to treaties.[5] Lauterpacht suggested that codification would lead to "giving a precise formulation" to conflicting precepts of "respect for acquired private rights."[6] More profoundly, he argued that "…justice and…economic stability in the modern world probably require that in any system of general codification of international law…State succession should not be left out..." He concluded his recommendation for codification by stating that "the law of State succession prevents the events accompanying changes of sovereignty from becoming mere manifestations of power."[7] Evidently persuasive to his peers, these arguments led the ILC to include the topic among the fourteen it recommended for codification in 1949, at its inaugural session.[8] Only in 1961, however, did the ILC urge the UN General Assembly to prioritize codification of the law of succession, entailing formal requests for reports and funding for work to commence.[9]

[5] Hersch Lauterpacht, 1948, "Survey of International Law in Relation to the Work of Codification of the International Law Commission," U.N. Document "A/CN4/1," until February, 1949, when it was re-serialized as: A/CN4/1/Rev. Originally consulted in edited form in: Hersch Lauterpacht and Elihu Lauterpacht, *International Law, Being the Collected Papers of Hersch Lauterpacht*, (Cambridge: University Press, 1970).
[6] Ibid.
[7] Ibid., 28-29.
[8] See the *Yearbook of the International Law Commission*'s 1949 edition, specifically on page 281.
[9] U.N. General Assembly Resolution, 1686, U.N. General Assembly Official Records, 17th Session, Supp. No. 17, U.N. Document A/5217, 1961.

When the ILC's Secretariat finally received support to further the endeavor of codification, it established a Subcommittee to attempt to define how the topic might be addressed. After two years of soliciting and receiving working papers from members of the Subcommittee,[10] and drafting three lengthy studies itself on the accruing practices of post-colonial states,[11] the ILC's Secretariat accepted a report from the Subcommittee and arranged for the project of codification to be strongly validated by a vote at its annual session in 1963.[12] Unfortunately, due to the overwhelming attention paid to special missions emanating from the UN General Assembly in the period between 1964 to 1966, the ILC made little progress on the topic of treaty succession. After appointing Manfred Lachs as Special Rapporteur, he promptly resigned to become a Judge at the International Court of Justice.[13] By 1967, the ILC finally turned its attention to the matter of state succession to treaties once again, and installed Waldock at the helm as Special Rapporteur.

In the years before this consequential appointment, small steps were made without delving into substantive matters. When international lawyers affiliated with the ILC discussed how the issue might be addressed, an emphasis on state practice as providing the foundation

[10] These were submitted in the following chronological order: T. O. Elias, "Delimitation of the scope of 'Succession of States and Governments,'" U.N. Document (XIV)/SC.2/WP.l, 1962; "A supplement to item 5 of the note on succession of States and Governments," U.N. Document A/CN.4/SC.2/WP.6, 1962; Abdul H. Tabibi, "Memorandum on the topic of succession of States and Governments: An outline of method and approach to the subject," U.N. Document A/CN.4/SC.2/WP.2, 1963; Shabtai Rosenne, "The succession of States and Governments: The limits and methods of research," U.N. Document A/CN.4/SC.2/WP.3, 1963; Erik Castrén, "[No Title] Labeled: 'Working Paper,'" U.N. Document A/CN.4/SC.2/WP.4, 1963; Milan Bartoš "[No Title] Labeled: 'Working Paper,'"U.N. Document A/CN.4/SC.2/WP.5, 1963; Manfred Lachs, "[No Title] Labeled: 'Working Paper,'" U.N. Document A/CN.4/SC.2/WP.7, 1963. The Chairman of the Subcommittee (ex officio) and Special Rapporteur, Manfred Lachs, also submitted "Report by Mr. Chairman of the Sub-Committee on Succession of States and Governments (Approved by the Sub-Committee)," U.N. Document A/CN.4/160, 1963. This cumulative document summarized and provided an early appraisal of the Subcommittee's work.

[11] In chronological order, these were titled: "The Succession of States in Relation to Membership in the United Nations," U.N. Document A/CN4/149, 1962; U.N. Document A/CN4/150, 1962; "Digest of the Decisions of International Tribunals Relating to State Succession," U.N. Document A/CN4/151, 1962; "The Succession of States in Relation to General Multilateral Treaties of which the Secretary-General is the Depositary."

[12] Report of Manfred Lachs (in his temporary capacity as Chair of the Subcommittee on the Succession of States and Governments), U.N. Document A/CN4/160, *Yearbook of the International Law* Commission, II, 1963, 260.

[13] "Report of the International Law Commission on the work of its nineteenth session," 8, May-14, July 1967, Official Records of the General Assembly, Twenty-Second Session, Supplement Number 9, U.N. Document A/6709/Rev.1 and Corr. 1, *Yearbook of the International Law Commission*, II, 1967, 368.

for codification proved one of their very few points of consensus. This initial, preliminary conclusion emerged from the intermittent, often diffuse discussion that occurred in the early- and mid-1960s. While deliberating on what should define the project of codification, subcommittee members corresponded with one another and the Secretariat at length about what constituted a balanced approach that would not alienate the states-parties involved. Nearly all of the assembled jurists and academicians acknowledged that the principal question the ILC must answer in order to lay the groundwork for codification was the degree of deference to be shown to "historical" or "traditional" rules. Yet, surprisingly, given their remit, few ventured to support alternate conceptual frameworks or a rigorous intellectual compass in the form of an analogy to ongoing or previous codification which could supplant attention to past legal precedent in treaty succession. This hesitancy, and by extension the ILC's inactive pursuit of answers to these issues, stemmed from the general aura of unprecedentedness ascribed to the progress of colonial independence. Taslim Elias argued in his submission to the Subcommittee that traditional rules could be applied, but he insisted that a "deeper kind of legal analysis and adaptation is called for."[14] He was the first to suggest that escape from circular squabbling between proponents of universal—or what he referred to as "universalistic"—succession and the clean slate approach would come through a detailed analysis of what new states had actually been doing since they gained independence.[15] This turn toward practice, in light of the manifold, irresolvable, outmoded conceptual disputes among existing, rudimentary theories, quickly appeared in the working papers and testimony of other members of the Subcommittee.[16] Milan Bartoš, however, went the furthest, claiming

[14] T.O. Elias, "A supplement to item 5 of the note on succession of States and Governments," UN Document A/CN.4/SC.2/WP.6, *Yearbook of the International Law Commission*, 1963, 283.
[15] Ibid., 283-284. In the end of his appended discussion, Elias argued, without any self-conscious sense of contradiction, that any "presumption" in support of State succession that proceeds "with proper qualifications and exceptions" could potentially lead to "more rational [bases] for the continued integrity of international law and the facts of international life."
[16] Abdul H. Tabibi, "Memorandum on the topic of succession of States and Governments: An outline of method and approach to the subject," U.N. Document A/CN.4/SC.2/WP.2, 1963, 285.

that historical rules before the rise of decolonization rested largely on disputable and contingent advantages or disadvantages previous scholars had attached to legal continuity or discontinuity. Bartoš averred that this preoccupation was the result of academic as opposed to practical appraisal, and that it would result in failures to take into account the "material and legal status of the independent or emancipated State."[17] Of course, there is irony in these early proceedings of the ILC in this area, which formed conclusions based on the presumption that codification was appropriate. Before the ILC named Waldock as Special Rapporteur, many of his colleagues disagreed with this premise. The International Law Association (ILA), a non-governmental organization with consultative status with the UN, formed a Committee on succession with Daniel O'Connell as its Rapporteur. This body, named the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, addressed the fate of international obligations, forming fundamentally different arguments about the necessity of codification and the relevance of examining practice.[18]

Waldock arrived into these roiling tides of change, aware from the outset of the necessity that he propose several swift determinations about how to proceed. In the first two of his five reports submitted to the ILC between 1968 to 1972, he quickly sought to lay out certain specific parameters by which he would address the vast majority of issues raised not only by his predecessors in the ILC, but also within the ongoing legal debates in customary

[17] Cited in Erik Castrén, "[No Title] Labeled: 'General Memo on State Succession,'" U.N. Document A/CN.4/SC.2/WP.4, *Yearbook of the International Law Commission*, II, 1963, 289-291.

[18] Among the relevant texts produced by the International Law Association's Committee on Succession were the *The Effect of Independence on Treaties* (1965), which led to sustained investigation and report-making well into 1972. The ILA Committee produced four reports during this seven-year period and passed several significant resolutions on topics related to succession. See Committee on the Succession of New States to the Treaties and Certain other Obligations of their Predecessors, "Interim Report," International Law Association Report to Conference Number 52, 14–20 August, 1966, 574-621, as well as the Committee's follow up documents: "Interim Report and Draft Resolutions," International Law Association Report to Conference Number 52, 25–31 August, 1968, 596-644; "[No Title] Labeled: 'Report,'" International Law Association Report to Conference Number 54, 23–29 August, 1970, 101-141; and "State Succession and Governmental Contracts," International Law Association Report to Conference Number 52, 21–26 August, 1972, 654-732.

international law, as well as the issues raised by the onset and progression of decolonization.[19] His reports would prove highly influential in the creation of the draft articles for the 1978 Convention finalized by the ILC, which would ultimately be considered by the diplomatic representatives who assembled in Vienna to deliberate on the text of the Commission's proposal for codified law regarding succession to treaties.[20] Before analyzing the process of drafting which led to the act of codification, it is important to outline the method by which Waldock broadly defined the terms of succession in his first two reports. The two most important parameters he set out were a limited recognition of the uniqueness of

[19] In chronological order with annotation, these reports were: Sir Humphrey Waldock, "First Report of the Special Rapporteur on Succession of States and Governments in Respect of Treaties," presented at the 20th Session of the International Law Commission (ILC Report A/7209/Rev.1 (A/23/9), Chapter 3, Sections c & b), U.N. Document A/CN.4/202, *Yearbook of the International Law Commission*, II, 1968; in this first document, Waldock covered the first four draft articles of a general and preliminary character, with commentaries on the use of terms, as well as an statement about international agreements not within the scope of the present articles. Sir Humphrey Waldock, "Second Report of the Special Rapporteur on Succession of States and Governments in Respect of Treaties," presented at the 21st Session of the International Law Commission (ILC Report A/8010/Rev.1 (A/25/10) Chapter 3, Sections b.1 (1970)), U.N. Document A/CN.4/214, Addenda 1 and 2, *Yearbook of the International Law Commission*, II, 1969; this second installment covered an additional four draft articles, well as the area of territory passing from the State to another; devolution agreements, and the rise of unilateral declarations by successor States.

[20] The three concluding reports which Waldock produced illustrated the breadth and depth of his impact on the process of codification. These documents set out the remaining draft articles considered by the Conference which ultimately concluded the writing of the 1978 Vienna Convention. In chronological, annotated order, these installments of research and fact-finding are: Sir Humphrey Waldock, "Third Report of the Special Rapporteur on Succession of States and Governments in Respect of Treaties," presented at the 22nd Session of the International Law Commission (ILC Report A/8010/Rev.1 (A/23/9), Chapter 3, Section B), U.N. Document A/CN.4/224 and Addendum 1, *Yearbook of the International Law Commission*, II, 1970; yet further provisions were provided by Waldock in this report on the use of terms, while he also set out eight additional draft articles (5–12) dealing with the participation of "new States," as well as matters pertaining to multilateral treaties. Sir Humphrey Waldock, "Fourth Report of the Special Rapporteur on Succession of States and Governments in Respect of Treaties," presented at the 23rd Session of the International Law Commission (ILC Report A/8410/Rev.1 (A/26/10), Chapter 3, Section A), U.N. Document A/CN.4/249, *Yearbook of the International Law Commission*, II(1), 1971; this report provided draft articles (13–17) which addressed what the UN referred to as the "general rules governing the position of 'new States' in regard to bilateral treaties." Humphrey Waldock, "Fifth report of the Special Rapporteur on Succession of States and Governments in Respect of Treaties," presented at the 24th Session of the International Law Commission (ILC Report, A/8710/Rev.1 (A/27/10), Chapter 2, Section A(1)), U.N. Document A/CN.4/256 and Addenda 1, 2, 3, and 4, *Yearbook of the International Law Commission*, II, 1972; in this final report, Waldock provided draft articles (18–24) which he proposed would lay out rules applicable to particular categories of succession and to so-called "territorial," "localized," and "dispositive" treaties. In his report summarizing and evaluating the outcomes of this series of reports, Sir Francis Vallat pointed out the extraordinary accomplishment of Waldock in addressing the whole panoply of issues which were initially put to him as crucial to resolve from the outset. See Sir Francis Vallat, "Summary of the Comments of Governments: Proposals on the Revision of the Draft Articles," (26th Session of the ILC (1974)), presented at the 26th Session of the International Law Commission (ILC Report A/8010/Rev.1 A/9610/Rev.1 (A/29/10), Chapter 3, Section A), U.N. Document A/CN.4/278, Addenda 1, 2, 3, 4, 5 (see Corrections 1), and 6, *Yearbook of the International Law Commission*, II, 1974.

decolonization as well as his attempt to rely on previously established bodies of law regarding treaties. These early decisions about how to approach codification illustrated the Special Rapporteur's attempt to distill clear principles from extraordinarily complex and vociferous debates about status, identity, and the interpenetration of international and municipal law.

A Middle Way on Decolonization

Reviewing Waldock's conceptual compromises regarding the distinctiveness of decolonization in the course of the history of succession is crucial for two reasons. First, it was one of the initial issues he discussed when putting forward draft articles for the Convention that would arrive a decade later. Some credence must be paid to the notion expressed by jurists like James Crawford that, by the late 1960s, the sheer volume of practice and the difficulties it created had increased the appeal of articulating general rules to be formally accepted by states. Though the precise impact of decolonization's role in fomenting the effort to codify the succession of states to treaties may remain disputed, its chronological proximity to the ILC's work made it a significant trend in the minds of those addressing the crucial legal questions surrounding succession.[21] Second, throughout this period, perhaps the single most defining characteristic of Waldock as a jurist remained his interest in studying practice to establish rules in international law.[22] Contemporaries at the ILC, like Paul Reuter, observed this tendency in a positive light, describing Waldock's work on succession as being defined by appropriate "reliance on experience and the facts and the avoidance of premature

[21] While discussing both his and DP O'Connell's reservations about this historical narrative, James Crawford lays out the conception of needed "evolution," "progress," and other monikers of change called for in the law of succession during the ending phase of decolonization. James Crawford, "The Contribution of Professor DP O'Connell to the Discipline of International Law," *British Yearbook of International Law*, 51, 2, 1980, 29-32.
[22] This approach was perhaps rooted in his early training, which occurred in the British Admiralty, where he developed a very strong reputation throughout the 1950s, by being retained as counsel for the British government in several high-profile cases before the International Court of Justice, among them the Anglo-Norwegian Fisheries Corfu Channel, Anglo-Iranian Oil Company cases. He later served as legal advisor to United Nations Secretary-General Hammaskjold during his crucial missions to China in the mid- to late-1950s.

formulations and over-generalizations."[23] Later chroniclers of his career, like Ian Brownlie, lauded his "non-sectarian positivism,"[24] and lack of "deep interest in theory as such,"[25] stating that Waldock preferred to fashion his work for the ILC upon "the anvil of practice," coupled with "principle."[26] Given these analytical attributes of the Special Rapporteur, his reading of succession during decolonization is particularly important for understanding the shift in legal thinking that emerged through the exercise of codification he would incomparably shape.

As Waldock began research on his first two reports which heavily referenced the role of decolonization in shaping modern treaty succession, he was confronted by two polemical views on the significance of post-colonial state behavior in this area of international law. The more innovative approach, which suggested the facts of decolonization required a fundamental reformulation of law regarding succession, had gathered steam in the same period he was appointed Special Rapporteur. ILC member Milan Bartoš's arguments in this set out the central critique involved. Tellingly, he emphasized national resources:

> …if the old rule is maintained that treaties termed traités internationaux reels—i.e. treaties relating to the status of territory, to territorial servitudes and to privileges granted with regard to investments—continue in force, then the right of self-determination and the unrestricted sovereignty of the emancipated people is challenged once more as, consequently, is also the inalienable right of that people to the sources of its national wealth…[27]

His reference to material relations between newly-independent people and their former colonial rulers then served as the basis for a more abstract assessment of succession as it had

[23] Reuter added a second, interlinked observation about the Special Rapporteur's respect for the limitation set out for him: "he would confine his remarks to the concern for logic, for on the five questions submitted to the Commission, he agreed on the whole with the Special Rapporteur's point of view and with the general way in which he had defined his method and his subject." Paul Reuter, "Remarks on the 1067th Meeting: Regarding Succession of States and governments in respect of treaties," *Yearbook of the International Law Commission*, 1970, I, p 137.
[24] Ian Brownlie, "The Calling of the International Lawyer: Sir Humphrey Waldock and his Work," *British Yearbook of International Law,* 54, 7, 1984, 63.
[25] Ibid., 73.
[26] Ibid., 41-43.
[27] See Milan Bartoš and interlocutors' comments in Erik Castrén, 1963, "Summary records of the fifteenth session," UN Document, A/CN.4/SER.A, *Yearbook of the International Law Committion*, II, 1963, 290-293.

been practiced during the twentieth century. He focused on its incoherence with international legal principles elaborated after the Second World War:

> …if such treaties are recognized as remaining in force, the question arises whether the people concerned have really gained their freedom, or whether these treaties do not represent the vestiges of colonialism and the basis for what is now called "neo-colonialism"—one of the phenomena contrary to the principle of decolonization which…has become one of the guiding principles of the international practice established by the will of States within the framework of the United Nations.[28]

Bartoš thus cast decolonization in revolutionary, vaguely Marxist terms, whose legal dimensions were defined by struggles against vestigial domination. Nonetheless, he couched his obvious conclusion, that postcolonial states should have the right to renounce treaties signed during the course of colonial dependence, in an awareness of the potentially detrimental repercussions. He admitted, for example, that "the absolute repudiation of such treaty relations…would put the newly created State in difficulties, at least for a time, for it would have no treaty relations with other States." "With the consequence," he continued, "that even its frontiers, transit requirements, water supply, use of waterways, etc. could be called into question."[29] Bartoš then moderated the solution he advocated: "[within succession to treaties], as in many other branches of public international law, traditional rules must necessarily be intermingled with modern concepts; or rather it is necessary to bring these traditional rules into accord with the principles of the United Nations Charter and with the gradual evolution resulting from its development and application."[30] Although Bartoš's critiques were not explicitly included in the ILC's preliminary reports on succession in the late 1960s, his moderated conclusion was echoed in these documents and by the UN General Assembly's resolutions requesting the ILC pursue codification further.[31] This early

[28] Ibid.
[29] Ibid., 291.
[30] Ibid.
[31] Shabtai Rosenne's urging that the Commission "pay special attention to problems of succession arising as a result of the emancipation of many nations and the birth of so many new States after World War II" was echoed by many of his colleagues. See Shabtai Rosenne, "Working Paper," A/CN.4/SC.2/WP.3 in "Report by Mr.

formulation put forward an expansive role for the experience of decolonization in shaping the process of codification. Waldock's approach did not directly answer these arguments, which reemerged during the course of drafting articles for the 1978 Vienna Convention. Tensions surrounding the role of modern international legal principles and the extent to which they should enjoy primacy in the law of succession would recur over and over again as grounds for criticism of the findings, arguments, and debates which led to codification.

In addition to this emergent view, Waldock also had to contend with a second, competing perspective about decolonization's significance which merely updated the theoretical arguments advanced by O'Connell in the decades prior to the ILC's work. Beginning in 1961, O'Connell, in his capacity as Special Rapporteur for the ILA's Committee, had continued to elaborate his outlook regarding the nature of decolonization in the course of the history of treaty succession.[32] To his arguments about orderly processes of decolonization favoring continuity in treaty relations in the twentieth century, the ILA Committee added two elements. First, they posited a historical distinction between what had occurred in contemporary European dominions and what had transpired in nineteenth century episodes of secession. Articulated fully in its 1965 pamphlet, *The Effect of Independence on Treaties,* this perspective reduced into two categories the modern complexity of treaty

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Manfred Lachs, Chairman of the Sub-committee on Succession of States and Governments [Approved by the Sub-Committee]," A/CN.4/160 and Correction 1, "Succession of States and Governments," *Yearbook of the International Law Commission*, II, 1963. Cited from "Extract from the Yearbook of the International Law Commission," available online at: http://legal.un.org/ilc/documentation/english/a_cn4_160.pdf

Rosenne's strident formulation in the same document that "the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter," was heeded by the series of General Assembly Resolutions which called on the International Law Commission to focus its findings on conclusions which might be drawn from the practice of decolonization. Specifically, General Assembly Resolution 1902, passed 18 November, 1963, put forward that the ILC "continue its work on the succession of States and Governments, taking into account the views expressed at the eighteenth session of the General Assembly, the report of the Sub-Committee on the Succession of States and Governments and the comments which may be submitted by Governments, with appropriate reference to the views of States which have achieved their independence since the Second World War."

[32] See Committee on the Succession of New States to the Treaties and Certain other Obligations of their Predecessors, "Interim Report," International Law Association Report to Conference Number 52, 14–20 August, 1966. This document outlined the origins of the Committee's work.

relations created by separations resulting in new states.[33] Set against the "orderly, and sometimes progressive, transfer of constitutional power to dependent territories" which had supposedly occurred as imperial European powers exited their colonies, they observed an older, antithetical model, "that of secession when no regular grant of power is involved."[34] The course of decolonization and the resultant implications for treaty succession, the Committee argued, had to be separated from the chaotic fragmentation which had ensued, for example, when United States declared independence from Britain in 1776, when Brazil became independent from Portugal in 1825, when Greece overthrew Ottoman rule in 1830, when Colombia dissolved European rule in 1831, when the independent nation of Texas cleaved itself from Mexico in 1840, when Norway declared independence in 1905 from Sweden, and when Iceland severed itself from Denmark in 1918. Inherent in this bifurcation lay an implicit attempt to confine the evaluation of practice by states to a period where a supposedly wide-spread set of similar constitutional processes favored continuity—rather than change—in treaty relations once independence had arrived. Explicitly citing only two exceptions to this idealized process of twentieth century decolonization—Guinea and Israel—the ILA committee took a position that O'Connell had not previously emphasized: that "independence of colonial territories at the present time is…contextually novel."[35] This awkward, quite sweeping claim was necessary in order for the ILA Committee to endorse the primacy of customary international law on succession. This existing doctrine did not engage

[33] The ILA Committee's prologue to its arguments claimed with regard to historical episodes of state practice that it would be "premature" in any case "to formulate definitive principles to govern the solution of this problem." In setting out these categories it argued "while refraining, therefore, from commitment at this stage to a statement of rules of law, the Committee offers a statement of the problems raised and an analysis of the possible attitudes towards them." Charles Rousseau, *The Effect of Independence on Treaties: A Handbook*, Published under the Auspices of the International Law Association, (London: Stevens & Sons), 1965, xiii-xiv. The arguments then advanced have much in common with the simultaneous development of O'Connell's own work. See D.P. O'Connell, "State Succession and the Effect upon Treaties of Entry into a Composite Relationship," *British Yearbook of International Law*, 39, 1963, 54-83; and D.P. O'Connell, "State Succession and Problems of Treaty Interpretation," *American Journal of International Law*, 58, 1964, 41-57.
[34] Rousseau, 1965, 1.
[35] Rousseau, 1965, 2.

with practice in any systematic fashion, and it might look ever more irrelevant if past pertinent instances of its non-application became apparent. O'Connell and the ILA Committee sought to divorce discussion of decolonization in the twentieth century from earlier periods in which nascent states had made substantially mixed decisions about the fate of treaties signed before their independence. Rather than accepting earlier episodes as incoherent with customary law on treaty succession as O'Connell had previously articulated it, the ILA Committee insisted that earlier periods should be considered wholly separate from ongoing legal difficulties resulting from decolonization.

This newly-framed argument went hand-in-hand with the second element added to O'Connell's portrayal of contemporary decolonization as failing to repudiate precepts of continuity. The ILA Committee suggested that any position on decolonization's relationship with the history of treaty succession should be coupled with support for the "harmonization" of post-colonial domestic law with international law. This set of claims were deeply connected to O'Connell's longstanding interest in addressing "sociological as well as juridical factors."[36] The Committee argued that decolonization should not be considered so radical a transition in sovereignty as to merit sweeping rights to renunciation because doing so would irrevocably harm emerging legal order within post-colonial states. National, domestic, and municipal laws, the ILA Committee observed, had in many cases been legislated and implemented so as to accord with the operation of international agreements conceived by departed or departing European colonial powers. This argument was in part empirical in that this phenomenon was purported to illustrate a presumption on the part of post-colonial states of the permanence of pre-existing treaties. Yet it was also normative in the sense that the "localized" aspects of international agreements conceived among

[36] These factors are discussed in both volumes of O'Connell's *State Succession in Municipal Law and International Law*, which was influenced by the ILA's proceedings. See Daniel P. Connell, *State Succession in Municipal Law and International Law*, (Cambridge: Cambridge U.P., 1967), I, 31-32; and see Daniel P. Connell, *State Succession in Municipal Law and International Law*, (Cambridge: Cambridge U.P., 1967), II, 89.

Europeans were considered to serve an enlightened purpose for the societies now managing their own internal affairs.[37] This expanded theoretical understanding of decolonization's relative significance to the course of treaty succession sustained O'Connell's previous interpretative stance. If domestic and international law of post-colonial states were deeply, consensually enmeshed, these new states should favor continuity in treaty relations.

Waldock accepted neither of these approaches—the emergent, progressive reading of decolonization advanced by the ILC Subcommittee or the trenchant, reactionary position of the ILA Committee—in full. Specifically, he rejected two opinions that were, ironically, shared by both sides in their characterizations of decolonization's significance for the future of succession law. First, Waldock argued that episodes of state practice of treaty succession which took place before the end of the Second World War were equally salient to the project of codification as those that had occurred afterward. As outlined above, for divergent reasons, the anti-colonialists on the ILC's early Subcommittee as well as O'Connell's acolytes at the ILA wedded their arguments to the overwhelming relevance they ascribed to decolonization. Their purposes differed, of course: the first camp sought to rationalize the evolution of existing succession law, whereas the second aimed to substantiate its adequacy. Although Waldock willingly accepted that the weight of his investigation had to focus on the plight of new states,[38] he strongly disagreed with the notion that only states which became "new" in

[37] O'Connell himself made this point very clearly when he argued: "As local autonomy grew, so the relevant legal orders became ever more detached from metropolitan influence, until … treaties were not extended without local decision, and survived locally even when terminated with respect to the metropolis. This process of 'localization' of treaties has its mysterious aspects, but it presents no insuperable puzzle to jurisprudence." He went on to argue "the grundnorm was shifted imperceptibly from the metropolis to the territories by attrition of constitutional links, and resulted in a concretization of treaties in the local legal orders, so that these gained a new and modified validity from a new centre of legal gravity." See D.P. O'Connell, "Independence and Succession to Treaties," *British Yearbook of International Law*, 37, 1962, 88-99. In same text, he would further provide the groundwork for the ILA Committee's conclusion, which echoed the premise that "The problem of succession raised by this phenomenon is novel, inasmuch as the process is not one of sudden fragmentation of a political entity, but evolution through various intermediate stages of internal autonomy to full maturity, the process extending over varying periods of time, but tending to be constant in character. The treaties affected are not, generally speaking, treaties of the parent State contracted without specific relation to the maturing territories, but treaties expressly applied territorially and, on the whole, autonomously administered." (84-86)

[38] Bertrand G. Ramcharan, *The International Law Commission- Its Approach to the Codification and Progressive Development of International Law*, (The Hague: Nijhoff, 1977), 101.

the preceding twenty years should be exclusively or even primarily of interest to his and the ILC's scholarly inquiries. He abjured that "any purpose would be served by distinguishing at all sharply between the value of earlier and later precedents."[39] He further rebuffed his interlocutors by arguing that in the course of codification of treaty succession, "the basic problem…remains what it has always been: to discuss with sufficient clearness how far the practice is an expression of policy and how far… an expression of legal right or obligation."[40] In this same vein, Waldock rejected the conclusion of both sides that decolonization was a "novel" legal event or period in the course of treaty succession. Interestingly, here again, the two camps that claimed to have described the legal uniqueness of decolonization, did so to achieve different purposes. But Waldock sidestepped these arguments by pointing out the hastening conclusion of colonial exit by European imperial powers. He argued that: "decolonization is approaching completion, and the adoption of rules governing it will not satisfy future needs," adding with aplomb that "attention should therefore be devoted mainly to the cases of succession most likely to occur in the future, e.g. dissolution, merger, economic integration, and not only to the important but transitory problems of decolonization."[41] Here the diplomatic skills of the Special Rapporteur shone through, as he found expedient means of dismissing both the ILC Subcommittee's and the ILA Committee's convoluted legal arguments which unduly focused on one or another set of facts about decolonization. Waldock accepted elements of both, that decolonization had, in many cases, been orderly, while acknowledging that it also drew into conflict precepts of international law

[39] Ibid., 102-103.
[40] "Summary records of the Twentieth Session: 27 May - 2 August 1968," *Yearbook of the International Law Commission,* U.N. Document A/CN.4/202, II, 90. See also Waldock's *Report of the Sixth Committee*, 1972, U.N. Document A/8892, 15-17.
[41] Ibid.

emerging from the UN Charter and the behavior and expectations of former colonial powers maintaining that treaties previously signed would and should be sustained.[42]

Striking out on his own terms, Waldock fashioned an independent interpretation of decolonization's significance for the historical course of succession law. His approach was often obscured by his unwillingness to explicitly go beyond existing legal principles. Waldock's approach is decipherable only in oblique representations of decolonization. He suggested on occasion that European colonial exits in the twentieth century illustrated recurrences of an older theme of self-determination known to states and sovereigns well before the conclusion of the Second World War. Waldock was careful not to define this characterization too sharply. After all, his purpose was to discuss how the law of succession might be brought into a more harmonious relationship with what states had done while making a statement about what they should do in the future when confronted with questions surrounding the inheritance of international obligations. Nonetheless, he referenced a vague concept of self-determination in his Second Report to the ILC, when he denounced general presuppositions of legal continuity in treaty relations in post-colonial circumstances. He argued that to "admit as a matter of policy the general desirability of a certain continuity in treaty relations upon the occurrence of a succession" was quite separate from "[expressing] that policy in terms of a legal presumption."[43] Waldock averred that "on this point, quite

[42] Herbert W. Briggs commented on the logic behind Waldock's reasoning, which Waldock interpreted, stating "He would, however, be prepared to accept the inclusion of a reference to self-determination in the section concerning 'Origin of succession.' All States had come into being through the exercise of the right of self-determination, with or without struggle, with or without the consent of the mother country."-Herbert W. Briggs, Comments in "Documents of the fifteenth session including the report of the Commission to the General Assembly," *Yearbook of the International Law Commission,* U.N. Document A/2934, II, 1963, 276.

Waldock would reply, however, that outside of processes of explicit, legally-defined devolution among former colonies, the behavior of these new entities "contains comparatively little evidence suggesting, so far as concerns the present topic, a need to treat decolonization as a specific category of succession. Equally it contains little evidence to suggest that decolonization, as such, calls for recognition as a specific element in the legal rules applicable to the succession of new States. The points mentioned…will be valid also in the case of a new State arising from a dismemberment outside the process of decolonization." Sir Humphrey Waldock, "Second Report of the Special Rapporteur on Succession of States and Governments in Respect of Treaties," ILC Report A/8010/Rev.1 (A/25/10), U.N. Document A/CN.4/214, *Yearbook of the International Law Commission*, II, 1969, 49.

[43] Ibid., 50.

independently of the question whether such a presumption is compatible with the modern State practice, the [ILC] may have to consider the possible relevance in this regard of the principle of self-determination."[44] He did not linger on this idea, but invoked it only when doing so was essential to resolve apparent conflicts between what he termed "self-determination" and necessary deductions of continuity, derived from surveys of practice and the law. One obvious case of this risk-averse analysis arose when Waldock drafted articles of the 1978 Convention pertaining to treaties establishing boundaries of new states. While accepting the appropriateness of a general presumption of continuity,[45] he restated his commitment to a conception of self-determination which transcended decolonization, going on to say that this limited capitulation "in no way excludes the independent operation of the principle of self-determination in any case where the conditions for its application exist."[46]

What emerged from Waldock's stance on self-determination—that it was an idea present within but exceeding the historical confines of decolonization—was an aversion to ideological commitments, be they modern or self-consciously defined by doctrine from the past. State practice during decolonization could not be said to be solely or even predominantly defined by confrontation with Bartoš's "neo-colonialism." Similarly, the spirit of the UN Charter had to be brought fittingly to bear, not as the harbinger of radical change in arguments about progressive alteration of succession law.[47]

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[44] Ibid. Of the few scholars arguing about the impetus for this conclusion, Georg Schwarzenberger presents the most compelling argument about Waldock's background in empiricism leading to this approach. See Georg Schwarzenberger, "The Inductive Approach to International Law," *Harvard Law Review*, 60, 1946, 539-548.
[45] Sir Humphrey Waldock, "Second Report of the Special Rapporteur on Succession of States and Governments in Respect of Treaties," presented at the 21st Session of the International Law Commission (ILC Report A/8010/Rev.1 (A/25/10), U.N. Document A/CN.4/214, Addenda 1 and 2, *Yearbook of the International Law Commission*, II, 1969, 92.
[46] Sir Humphrey Waldock, "Second Report of the Special Rapporteur on Succession of States and Governments in Respect of Treaties," presented at the 21st Session of the International Law Commission (ILC Report A/8010/Rev.1 (A/25/10), U.N. Document A/CN.4/214, Addenda 1 and 2, *Yearbook of the International Law Commission*, II, 1969, 93.
[47] Ibid., 166-173.

The Paradoxes of Pactum

Waldock's approach to codifying the law of succession was also overwhelmingly defined by his will to avoid protracted theoretical debate about the nature of the bundle of legal actions that constitute the inheritance of obligations by states. He thought an appropriate strategy to achieve this end would be to base the drafting process on conclusions which could be drawn from the recently codified Law of Treaties. This largely unprecedented approach diverged from previous thinking, and illustrated the salience of Waldock's past experience to his work as Special Rapporteur for treaty succession. The previous Subcommittee formed by the ILC unequivocally endorsed the opposite of Waldock's inclination, stating treaty succession "should be dealt with in the context of succession of States, rather than in that of the law of treaties."[48] Like Waldock's departure from the recommendation, the Subcommittee's judgment was a product of the context of its work. The jurists and lawyers making up this group conducted their fact-finding and research while the 1969 Vienna Convention on the Law of Treaties was being formulated. That treaty's articles did not consider questions of succession in significant depth, commensurate to the attendant legal challenges which were emerging at the time.[49] For several Subcommittee members, this strongly implied succession was a separate topic, requiring fundamentally different legal appraisals.[50] Waldock, on the other hand, and been integrally involved in the drafting which preceded and the planning that bolstered the Vienna Conference on the Law of Treaties. After

[48] Report of Manfred Lachs, in his capacity as Chairman of the Sub-Committee on Succession of States and Governments, "Report by Mr. Chairman of the Sub-Committee on Succession of States and Governments (Approved by the Sub-Committee)," U.N. Document A/CN.4/160, II, Annex II, 1963, 260-261.
[49] While Sir Gerald Gray Fitzmaurice, Special Rapporteur on the Law of Treaties did address the general topic of succession in his First, Second, Fourth, and Fifth Reports, one need look no further than the text of Article 73 of the 1969 Vienna Convention on the Law of Treaties, which states: "the provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States." For more information, see Sir Gerald Gray Fitzmaurice, "First Report, on the Law of Treaties," U.N. Document A/CN.4/101, *Yearbook of the International Law Commission*, II, 1956.
[50] See, for example, see Shabtai Rosenne, "The succession of States and Governments: The limits and methods of research," U.N. Document A/CN.4/SC.2/WP.3, 1963, 287; Erik Castrén, "[No Title] Labeled: 'Working Paper,'" U.N. Document A/CN.4/SC.2/WP.4, 1963.

its conclusion, he was a fierce advocate for ratification of the resultant 1969 Convention. He viewed these developments in international law as the feat which would establish the ILC's position as a major force in international affairs.

In defense of his position, Waldock furnished the ILC with two logical explanations for proposing reliance on and reference to the Law of Treaties. His preliminary disagreement with the legal uniqueness ascribed to the inheritance of treaties took form in a call to sideline concepts which separated succession from the normal conduct of treaty law. "The solution of the problems of so-called 'succession' in respect of treaties" could not be fully or adequately addressed through "any general law of 'succession,'"[51] he argued. But instead, codification had to be developed according to precepts of previously-established law regarding treaties, which had received historical benediction through codification and wide-spread ratification.[52] Waldock argued that the multiplicity of practice as it had occurred across centuries would obscure the observation or distillation of widely-applicable principles of de jure succession. He included special references to the supposed concentrated period of diversity in practice which had transpired amid "modern" instances, by which he meant the early and intermediate stages of decolonization.[53] His logic became slightly circular and served to obfuscate the progress made by his First and Second Reports, given his simultaneously-issued conclusions about the age-old relevance of self-determination in succession procedure during decolonization.[54]

Indeed, when providing his second explanation for sketching out a convention "designed as a sequel to the draft articles on the law of treaties rather than…a single

[51] Sir Humphrey Waldock, "First Report of the Special Rapporteur on Succession of States and Governments in Respect of Treaties," presented at the 20th Session of the International Law Commission (ILC Report A/7209/Rev.1 (A/23/9), Chapter 3, Sections c & b), U.N. Document A/CN.4/202, *Yearbook of the International Law Commission*, II, 1968, 89.
[52] Ibid.
[53] Ibid., 89-91.
[54] Ibid., 91-93.

comprehensive codification…of the law applicable to succession of States and Governments,"[55] he would suggest that diversity in practice had led to irreconcilable variance in theories of succession. For this reason, previous theoretical constructs "of succession" were suspect and should largely be discarded. Here again, however, his premises slightly shifted. While citing the purported unyielding diversity of practice, he then decried attempts to sluice the historical record to fit theories of either the clean-slate or universal succession. Yet theoretical application was not the issue he raised in the first instance. When justifying reliance on the Law of Treaties, Waldock consistently glossed over the possibility that principles "of succession" had emerged from practice alone, when he would later return to readings of practice as a sounding board for the appropriateness of articles laying down in legal terms what states should do in the future .[56] Combined with his factual observations about the array of theories of succession that had emerged, he strongly disputed that "any specific legal institution" of succession had gained recognition within international law in centuries of state behavior.[57] Once again linking the varieties of state behavior from the past and present to seemingly boundless legal theory on the topic, he argued that were "any one specific theory…to be adopted by the Commission, it would almost certainly be found to be a straitjacket into which the actual practice of States, organizations, and depositaries could not be forced without inadmissible distortions either of the practice or the theory."[58] Waldock

[55] Ibid., 89-90. Waldock references the development of the draft articles of the 1969 Convention on the Law of Treaties, specifically stating that against significant opposition, what was first draft "Article 69," was eventually, with revisions, included in the Vienna Convention on the Law of Treaties as Article 73, which stated that the Law of Treaties would not allow any "prejudging" of succession matters.
[56] Waldock's vacillatory positions on using and judging the merits of practice as a guide was reflected throughout the deliberations on codification hosted by the International Law Commission. Among the many contributions in testimony to the ILC, which illustrate these tensions, see Jorge Castañeda, "Contribution and Testimony in Summary Records of the Twentieth Session," 27 May-2 August 1968, The International Law Commission, *Yearbook of the International Law Commission*, I, 1968, 136-137; Alfred Ramangasoavina, "Contribution and Testimony in Summary Records of the Twentieth Session," 27 May-2 August 1968, The International Law Commission, *Yearbook of the International Law Commission*, I, 1968, 142-143.
[57] Sir Humphrey Waldock, "First Report of the Special Rapporteur on Succession of States and Governments in Respect of Treaties," presented at the 20th Session of the International Law Commission (ILC Report A/7209/Rev.1 (A/23/9), Chapter 3, Sections c & b), U.N. Document A/CN.4/202, *Yearbook of the International Law Commission*, II, 1968, 89-90.
[58] Ibid., 134-135.

thus established two sets of analytical tensions when initially providing the outlines of principles which states might follow in future instances of succession. On the one hand, practice was to be followed as it could be understood with regard to the law of treaties, while on the other, it could not itself provide evidence of trends in succession. In addition, he maintained that theory was to remain suspect if it attempted to address "succession" as a separate category of legal action, while recourse to the theoretical divisions and distinctions within the law of treaties was to receive special attention as a guide to dealing with the difficulties of succession. Although in hindsight these conclusions may seem arbitrary, they were in fact understandable attempts by Waldock to establish points of reference. He needed an overarching rubric in which to distinguish rules from their exceptions within the monumental task before him.[59]

Beyond these initial analytical complications which the Special Rapporteur unwittingly fashioned like ropes across Gulliver's chest, reliance on the law of treaties entailed two specific internal paradoxes. The first was a matter of emphasis of continuity, which surfaced in early objections to Waldock's first report. Picand Albónico, for instance, argued that:

> If the problem were approached from the point of view of the law of treaties, the general principle would be that, subject to certain exceptions that confirmed the rule, a party that consented to be bound by a treaty did so both on its own behalf and on behalf of its successors…If the problem were approached from the standpoint of succession, however, the emphasis would be on the change which took place when the sovereignty of the predecessor State was replaced by that of the successor State. Since the successor State was a separate legal entity, the rule would be exactly the opposite to that which would apply under the law of treaties…"[60]

[59] Nikolai Ushakov raised important issues regarding the nature of the treaties being considered for succession instruments, the readily-discernable intentions of original contracting parties, the charactaristics of the events that might trigger succession. See Second Vice-Chairman, Nikolai Ushakov, "Contribution and Testimony in Summary Records of the Twentieth Session," 27 May-2 August 1968, The International Law Commission, *Yearbook of the International Law Commission*, I, 1968, 138-140.

[60] Fernando Albónico, "Contribution and Testimony in Summary Records of the Twentieth Session," 27 May-2 August 1968, The International Law Commission, *Yearbook of the International Law Commission*, 1968, I, 135.

This critique, however, proved unpersuasive for Waldock and Albónico's wider audience in the ILC because the reverse position which had been articulated previously accomplished little in the way of clarifying the extent to which legal continuity might have been implied. The foundational work of international lawyers to separate the realities of succession from ideas about its consequences had been formulated to imply legal continuity despite change. But the intricate details of defining which continuity was sacrosanct and which should be rightly consigned to the past nonetheless persisted. While Waldock provided no immediate evidence that his approach would succeed where that which Albónico endorsed had faltered, the embedded contradictions were such that a fresh legal stance was acknowledged as an acceptable risk during the beginnings of codification.[61]

The far more abiding paradox entailed by Waldock's theoretical preferences related to the centrality of unambiguous and deliberate consent by specific parties which is at the heart of treaty law. Waldock succeeded in establishing that the law of treaties could salve contradictions in the allowance of rights and duties to successor states if the initially-contracted parties consented. However, he could not fashion arguments about how treaty law might lead to the transfer of those rights and duties to a successor without the restatement or—he admitted—the re-enactment of treaties' terms.[62] This of course related to the ancient institution of "pactum," which had crystalized in international law as signifying an explicit agreement between or among states, manifested in a treaty. That pactum could be extended to circumstances in which one party could enter into this institutional arrangement without meaning to and without willing it into force required considerable stretching of the principles

[61] Mustafa Kamil Yaseen's wry, prescient comment signaled the incredulous openness to the new approach held by many ILC members: "if it were decided to refer only to the law of treaties, all problems would be solved if it were possible to give a categorical answer to the question whether the successor State was a third State with respect to the treaty or whether it was a party to the treaty; but that was impossible." See Mustafa Kamil Yaseen, "Contribution and Testimony in Summary Records of the Twentieth Session," 27 May-2 August 1968, The International Law Commission, *Yearbook of the International Law Commission*, I, 1968, 142-143.
[62] Jorge Castañeda, "Contribution and Testimony in Summary Records of the Twentieth Session," 27 May-2 August 1968, The International Law Commission, *Yearbook of the International Law Commission*, I, 1968, 136-137.

involved. Such an exercise would seemingly contradict the concept of pacta tertiis, which was captured in Article 34 of the already established Vienna Convention on the Law of Treaties.[63] Third parties could not, according to this principle, be brought into an agreement or be forced to undertake rights or duties by a treaty contracted between other states. Because treaties apply to signatories and states-parties,[64] it became very unclear how a successor state, as a third party, could be tied legally to it simply because the former contracting party exercised some form of sovereignty or jurisdiction over the land that the successor now controlled.[65]

Waldock's was silent on these contradictions, which placed him in an invidious position. As a Special Rapporteur with the main goal of distilling straightforward, practical principles for succession, he could hardly be blamed for avoiding the vexing conclusions that might be drawn by stringent fidelity to the all of the core suppositions of treaty law as it had been codified by the 1969 Convention. His options for resolving these issues were exceptionally poor in light of his aims. Waldock could have been drawn back into the theories of succession which he had in the first place sought so fervently to avoid, namely by

[63] William Beckett, "Decision of the Permanent Court of International Justification Points of Law and Procedure of General Application," *British Yearbook of International Law,* 1, 1930, 1.

[64] In twentieth century case law, this can be clearly observed to be affirmed under the Permanent Court of International Justice's ruling on the *German Interests in Polish Upper Silesia Case*. The finding averred that a treaty "only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States." See pages 28–30 of the decision. For a general discussion of this feature of international law, see Baron Arnold Duncan McNair, *The Law of Treaties,* (London: Clarendon Press, 1961), 308-322; as well as
Robert Jennings and Arthur Watts, "Oppenheim's International Law: Volume 1, Peace," 1995, in which the authors argue that the UN Charter and its predecessor the League of Nations Covenant necessarily "be regarded as having set a limit, determined by the general interest of the international community, to the rule that a treaty cannot impose obligations upon States which are not party to it." (1263)

[65] In the course of his research and report-writing, Waldock admitted that the "assignment" of obligations, rights, or duties to third parties through a treaty was also not recognizable in international law. In his second report, he stated "an assignment is by its very nature a transaction which purports to impose an obligation on a third party…an obligation on the third party to accept a different form of performance of its contract than that to which it is entitled; and in international law the rule seems clear that an agreement by a party to a treaty to assign either its obligations or its rights under the treaty cannot bind any other party to the treaty without the latter's consent." See Sir Humphrey Waldock, "Second Report of the Special Rapporteur on Succession of States and Governments in Respect of Treaties," presented at the 21st Session of the International Law Commission (ILC Report A/8010/Rev.1 (A/25/10), U.N. Document A/CN.4/214, Addenda 1 and 2, *Yearbook of the International Law Commission*, II, 1969, 56.

refuting arguments that the changes to sovereignty involved in succession were sufficient to warrant classification of successors as third parties. Or, he could have granted third party status to successors, and then claimed that their position vis-à-vis pre-existing treaties constituted a specific, restricted immunity to the requirements of pacta tertiis. Although this second option would allow the assumption or renunciation of obligations by the new third parties, it would necessitate significant elaboration and perhaps the adoption of principles not already in place in the law of treaties as it had been previously codified.[66] Waldock's consequent reticence on the obvious contradictions created by the mediation of sovereignty and succession through the law of treaties persisted throughout the drafting process.[67]

Newly Independent States, Separations, and Dependency

The Third, Fourth, and Fifth reports of the Special Rapporteur dealt with an enormous array of issues, an accomplishment matched by an equally vast breadth and depth of detail on each. Among the many topics Waldock addressed were semi-sovereignty, devolution agreements, bilateral agreements, dispositive treaties, unilateral declarations, protectorates, trusteeships, boundary agreements, and mandates, as well as the dismemberment, dissolution, federation, and union of states. Waldock's progress was simultaneously supplemented by the ILC Secretariat's creation of multiple independent studies which sought answers to many of the quandaries raised between 1972 and 1975.[68] The purpose of this first half of this second

[66] See Sir Gerald Gray Fitzmaurice, "Fifth Report, on the Law of Treaties," U.N. Document A/CN.4/130, *Yearbook of the International Law Commission*, II, 1960, 94; Baron Arnold Duncan McNair, *The Law of Treaties*, (London: Clarendon Press, 1961), 602-604.

[67] Mohammed Bedjaoui pointed out the constant recurrence of these issues throughout the process of Waldock's report-writing and article-drafting efforts. See Mohammed Bedjaoui "Meeting Regarding Progress on the Succession of States in respect of treaties," U.N. Documents A/CN.4/202, A/CN.4/214 and Addenda l and 2, A/CN.4/224 and Addenda l, A/CN.4/249, A/CN.4/256, *Yearbook of the International Law Commission*, I, 1972, 79-81.

[68] Secretariat of the International Law Commission, "The Succession of States to multilateral treaties - Studies prepared by the Secretariat," U.N. Document A/CN.4/200, Corrections 1 and Addenda 1 and 2 *Yearbook of the International Law Commission*, 1968, II; Secretariat of the International Law Commission, "Materials on Succession of States," *United Nations Legislative Series*, U.N. Document ST/LEG/SER.B/14; a supplement to

empirical chapter cannot be to catalogue all debates which arose and their outcomes. Instead, the underlying shift in de jure interpretations of succession—toward the necessity of consent—illustrates what this extended, investigative collaboration represented. For this reason, attention is primarily paid here to a fundamental distinction and subsequent modifications to that distinction. The 1978 Vienna Convention would establish the right of consent for what were termed "newly independent" states, while putting forward principles of continuity for states which fell into other categories. This was the most important conclusion resulting from the work of Waldock, the ILC's broader membership, and the representatives of states who ultimately accepted the draft articles for ratification at the Conference leading to the 1978 Vienna Convention.

As noted above, Waldock recognized the necessity of discerning when cases of succession entailed matters of what he narrowly defined as self-determination. In attempting to distinguish groups of cases in which states came into existence, the Special Rapporteur created a series of interlinking, complex typologies. He then tried to determine what the consequences of succession would be for each, with reference to the already existing law of treaties set out by the 1969 Vienna Convention. For example, Waldock explored how a union of political entities resulting in a state would impact treaties,[69] contrasting these outcomes with those resulting from an internal secessionist movement which produced a state. Irreconcilable problems emerged as the ILC's members began to review Waldock's proposals in these areas. They rigorously analyzed his conclusions with reference to the winding processes of state formation which often occurred within and among former colonies directly after independence. When Waldock put forward a general rule of continuity of treaty

this volume was published in 1972 as a document of the twenty-fourth session of the Commission, U.N. Document A/CN.4/263.

[69] Sir Humphrey Waldock, "Third Report of the Special Rapporteur on Succession of States and Governments in Respect of Treaties," presented at the 22nd Session of the International Law Commission (ILC Report A/8010/Rev.1 (A/23/9), Chapter 3, Section B), U.N. Document A/CN.4/224 and Addendum 1, *Yearbook of the International Law Commission*, II, 1970, 222.

relations in cases of unification, he simultaneously attempted to maintain that states which had emerged through separations from a "rump" state were to be given certain rights to renounce treaties which the larger whole had signed.[70] Yet there were many obvious instances in which decolonization had brought about temporary unions among territories that then fragmented, such as East and West Pakistan and the Central African Federation.[71] Further objections were raised when Waldock attempted to distinguish between "dismemberment" of such a union, and the separation of part of a unitary state from a larger whole. If dismemberment of a confederation of states implied continuity in treaty relations among them, why was the expectation not extended to the position of new states emerging from secession?[72] And if some "newly independent" states were given rights to renounce former treaty relations, why exactly could such rights be prohibited in moments of secession resulting from organized rebellion, their existence within a federation notwithstanding?[73] These questions plagued the proceedings guided by the Special Rapporteur. In many cases, the critiques raised were motivated by the contemporary position and decisions of specific, nascent states. International lawyers from the post-colonial world expressed virulent objections, and Waldock realized late in the process that by opening the entire historical record of state practice for discussion, he had armed his detractors with an enormous

[70] Ibid., 321-333.
[71] Nikolai Ushakov, "Commentary on Proceedings," Summary records of the twenty-fourth session 2 May-7 July 1972, *Yearbook of the International Law Commission*, I, 1972,-175; See Waldock's response in the same section: Sir Humphrey Waldock, "Commentary on Proceedings," Summary records of the twenty-fourth session 2 May-7 July 1972, *Yearbook of the International Law Commission*, I, 1972, 174-176.
[72] Ibid., 231. See Paul Reuter's response and contribution in the same section: Paul Reuter, "Commentary on Proceedings," Summary records of the twenty-fourth session 2 May-7 July 1972, *Yearbook of the International Law Commission*, I, 1972, 232.
[73] Nagendra Singh, "Commentary on Proceedings," Summary records of the twenty-fourth session 2 May-7 July 1972, *Yearbook of the International Law Commission*, I, 1972, 175; See Waldock's response in the same section: Sir Humphrey Waldock, I, 1972, 173-175; Arnold Jan Pieter Tammes, "Commentary on Proceedings," Summary records of the twenty-fourth session 2 May-7 July 1972, *Yearbook of the International Law Commission*, I, 1972,-175; See Waldock's response in the same section: Sir Humphrey Waldock, "Commentary on Proceedings," Summary records of the twenty-fourth session 2 May-7 July 1972, *Yearbook of the International Law Commission*, I, 1972, 172-174.

repertoire of contradictory evidence, which they succeeded in marshaling selectively to illustrate the appropriateness of their chosen positions.

What emerged was a slow, sliding recourse to that distinction which Waldock had initially attempted to disavow, between post-colonial states and all others subject to treaty succession before the contemporary contraction of European empires. This new course emerged inexplicitly at first, perceptible in the Special Rapporteur's work starting in 1972.[74] Decolonization as encompassing a distinguishable set of succession protocols initially took form in Waldock's acceptance of parallels between cases of secession and dismemberment. He argued that identical rules of succession favoring consent for new entities should apply if the rump state accepted continuity in its treaty relations after the separate entities were established. This conclusion was reached by creating a definition for "newly independent states," a moniker that had been referred to throughout the process of drafting articles. Crucially, the ILC endorsed the idea that this term applied to "dependent territories."[75] Debate about this definition did not result in any clear outcome about whether the term "newly independent states" should apply to non-colonial secessions or unifications.[76]

After nearly two years of silence on the topic, discussion about self-determination within the definition of "newly independent states" surged once again, when governments began to issue formal responses to the full list of draft articles which Waldock had submitted.

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[74] See Paul Reuter, "Commentary on Proceedings," Summary records of the twenty-fourth session 2 May-7 July 1972, *Yearbook of the International Law Commission*, I, 1972, 135; Nikolai Ushakov, "Commentary on Proceedings," Summary records of the twenty-fourth session 2 May-7 July 1972, *Yearbook of the International Law Commission*, I, 1972,-183.

[75] Francis Vallat documented the importance of the decision, when he pointed out the acceptance of the Swedish government's proposal that "the General Assembly's wishes might better be met by seeking a separate solution to treaty problems related to succession connected with decolonization, i.e. by an ad hoc settlement of an ad hoc situation." He also noted that discussion of this lay underneath the United Kingdom's gesture to define "newly independent States" as those whose territory was "part of the territory of the predecessor State" before the process of succession was undertaken. See Francis Vallat, "First Report of the (new) Special Rapporteur for the Succession of States in Respect to Treaties," U.N. Document A/CN4/278 and Addenda 1, 2, 3, 4, 5, 6, *Yearbook of the International Law Commission*, II, 1974, 5 (Swedish comments and response), and 30 (UK Comments and response).

[76] Ibid., 68-72.

By 1974, Francis Vallat had been named the new Special Rapporteur for the Succession of States in Respect to Treaties, and he made his own mark on the process by simplifying Waldock's manifold distinctions into two succinct draft articles. The first stated that in the case of "separation of part of a state," the new entity would enjoy the same broad latitude to renounce former treaty relations accorded to so-called "newly independent states." The second stated that in cases of the "dissolution of a state," a general rule of continuity in treaty relations would be applied to the new entities.[77] Yet this streamlined rubric met repeated opposition from diplomatic representatives. The Government of Sweden sensibly questioned whether "the principle of self[-]determination should require a clean slate for newly independent States and for States emerging by separation…[while prohibiting such rights] for States created by uniting of States or dissolution of a State."[78] Other countries, like the United States, claimed that the updated division between "separation" and "dissolution" was superficial, repeatedly characterizing the differences between the two scenarios as "nominal" and "quite nebulous," and that they shared more traits than exhibited variation.[79]

Vallat tenaciously argued for sustenance of his position on the issue of "dependency," coupling it with an appeal to the will of peoples and their governments. In his correspondence, he insisted that distinctions of this kind were necessary, to set out degrees of consent to be accorded to new entities in different cases. He averred that when a state falls

[77] Ibid.
[78] See the comments of the Swedish government above, as well as "Comments of the USSR" cited in Francis Vallat, "First Report of the (new) Special Rapporteur for the Succession of States in Respect to Treaties," U.N. Document A/CN4/278 and Addenda 1, 2, 3, 4, 5, 6, *Yearbook of the International Law Commission*, II, 1974, 8. Given the position of the USSR on preexisting treaty relations after the October Revolution, Moscow was incredulous about the exclusion of rights to a clean slate after so-called instances of "social revolution."
[79] "Written Comments Submitted by the United States of America," cited in Francis Vallat, "First Report of the (new) Special Rapporteur for the Succession of States in Respect to Treaties," U.N. Document A/CN4/278 and Addenda 1, 2, 3, 4, 5, 6, *Yearbook of the International Law Commission*, II, 1974, 69; Similarly, the Government of Belgium, with particular concern for the future of treaty relations for its former colonies, suggested that the updated division described by Vallat was "artificial," see "Oral Comments of Belgian Government" cited in Francis Vallat, "First Report of the (new) Special Rapporteur for the Succession of States in Respect to Treaties," U.N. Document A/CN4/278 and Addenda 1, 2, 3, 4, 5, 6, *Yearbook of the International Law Commission*, II, 1974, 65.

into dissolution, treaties signed by the predecessor whole "may be presumed to have been made with the consent of the people of all parts of the State."[80] Whereas, he attested that:

> this is a very different situation from that of a dependent territory which, although it may be consulted about the extension of the treaty, does not normally play any part in the actual government of the State concerned, and cannot therefore be regarded as responsible for the conclusion of the treaty as such."[81]

Emphasizing the widely accepted discernment of a right to renounce inherited obligations if they were contracted during the course of colonial dependence became Vallat's principal defense for the division he authored in the amended draft articles. But he failed to put to rest the apprehension diplomats had expressed about differentiating between separations of states under formerly territorially contiguous governments and separations of overseas colonies. The latter grouping of cases had historically been afforded special attention in the interpretation of the Charter of the UN, leading to the perceived salience of issues of self-determination. Instead of challenging this division head on, Vallat invoked francophone conceptions of the "will of the population,"[82] when Waldock had previously warned that these "factors were not really susceptible of codification, despite their relevance..."[83]

These arguments about dependency led to a final confrontation at the conference which considered the draft articles between 1976 and 1978. After the exchanges between Vallat and diplomatic observers reached a standstill, Edvard Hambro, a member of the International Law Commission, became the chair of a new drafting committee tasked with answering objections raised by governments that had reviewed the articles.[84] The main issue addressed by this specially-recognized body pertained to setting out which non-colonial new

[80] Vallat, 1974, 71.
[81] Ibid.
[82] Richard D. Kearney, "Commentary on Proceedings," Summary records of the twenty-fourth session 2 May-7 July 1972, *Yearbook of the International Law Commission*, I, 1972, 234.
[83] Sir Humphrey Waldock, "Commentary on Proceedings," Summary records of the twenty-fourth session 2 May-7 July 1972, *Yearbook of the International Law Commission*, I, 1972, 234.
[84] Edvard Hambro, "Progressively Drafted Article 27 and Article 28," In Response to Request of the ILC, *Yearbook of the International Law Commission*, I, 257-259.

states would have rights to renounce treaties under the convention. After considerable debate, they added a third paragraph to the draft articles pertaining to "newly independent states" and their rights:

> If a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State, the successor State shall be regarded for the purposes of the present articles in all respects as a newly independent State.[85]

Here the ILC attempted to allow for future analogies between the position of new states and the plight and protestations of former colonies. In future cases that resembled post-colonial states, the convention would allow them to be treated as if they had been forced into treaty obligations and thus had a right to be freed from them. Ironically, after so much division and strife over this question, the third paragraph cited above was deleted at the Conference which considered the draft articles. After Switzerland and France issued fresh objections and further amendments to the distinction between secession from territorially contiguous entities versus instances of post-colonial independence, numerous other governments fell victim to suggestion, and began arguing that the categories created by the ILC or proposed changes to those categories could embolden political groups making territorial claims. Diplomatic representatives also claimed that any changes at this late stage would diminish the emphasis on decolonization, changing its character in the Convention.[86]

After the deletion of the third paragraph was deemed the appropriate solution by the conference delegates assembled at their first meeting in Vienna, the 1978 Convention crystalized with two sets of articles which vaguely distinguished between the consent for inherited obligations provided to post-colonial states on the one hand, and the prohibition of such freedoms for certain categories of new states on the other. Article 16 stated "a newly

[85] Ibid., 258. See Draft Art 27, Section 3.
[86] Craven, 2009, 198-199.

independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates."[87] Whereas Article 34, Section 1 provided that:

> When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist: (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;[88]

This same distinction was echoed in the main articles addressing the fate of membership in multilateral treaty relations. Article 17, Section 1 provides that "a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates."[89] Whereas Article 9, Section 1 establishes that

> Obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States Parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.[90]

By Section 2 of this latter Article, the mechanism of consent by all other parties of multilateral treaties is required for the successors resulting from separations is required in order for to the successor to engage in treaty succession.

Through these articles, the 1978 Vienna Convention represented a fundamental change, but an interminably vague one, toward the legal principle that new states maintained the right of renunciation. It coupled this right with a responsibility to express or withhold consent, rather than presume continuity if new states considered themselves in a similar

[87] Vienna Convention on Succession of States in respect of Treaties, Vienna, Austria, 23 August 1978, Entered into force on 6 November 1996, United Nations, Treaty Series, Volume 1946.
[88] Ibid.
[89] Vienna Convention on Succession of States in respect of Treaties, Vienna, Austria, 23 August 1978, Entered into force on 6 November 1996, United Nations, Treaty Series, Volume 1946.
[90] Ibid.

position to post-colonial states. Yet the lingering question of whether future nascent states could be considered in the same position as post-colonial states, and how such determinations might be made were left unresolved. Nonetheless the underlying and crucially important codified emphasis on the consent of new states to the inheritance of treaty relations represented a monumental shift in de jure interpretations of treaty succession. In this sense, the 1978 Vienna Convention envisioned a world in which new states would sometimes find themselves in comparable circumstances to those of post-colonial. Were those eventualities to come into fruition, they would be afforded broad latitude to renounce international obligations signed on their behalf by outside powers, an endeavor they were expected to undertake.

PART II

CONTEXT AND CASE STUDY 2: PRACTICE AND CUSTODIANSHIP'S RISE

In outlining and interpreting practice in the defined interval covered by this chapter, spanning from 1968 to 1995, the behavior of states is discussed first in aggregate and then in a case study, which delves more deeply into the specific decision-making processes of a single state: Ukraine. The bifurcation between, on the one hand, the evolution of de jure principles of treaty succession documented in Part I of this chapter and, on the other hand, the actual conduct of states during this period is complicated by two factors. First, during the decade from 1968 to 1978, when the Vienna Convention on Succession of States in respect of Treaties was being developed and fully drafted, the progress of decolonization continued and largely concluded.[91] As briefly indicated in the previous chapter, the practice of the states who achieved independence during the tapering off of colonial decline largely followed on the practice of their forbears who had been in a similar position before Waldock began his consequential work in 1968. In many cases, their later achievement of self-government was deeply connected to earlier acts of independence. That these states followed the purposeful precedent set by earlier post-colonial claimants of independence was directly addressed in the brief discussion of Bangladesh in the preceding chapter. It is also described as a theme of succession during decolonization by authors like Madyous Fallah Al-Rashidi. The phenomenon of stopgap and stilted colonial acquiesce drawing in regional issues of treaty succession connected decisions from the period of 1945 to 1968 with the ongoing processes of decolonization that largely came to an end between 1968 and 1978, while the crucial Vienna Convention relating to the fate of inherited treaties was being drafted. In other

[91] In chronological order: in 1968, Mauritius, Swaziland, Equatorial Guinea, and Nauru gained independence; in 1969, Saint Vincent and the Grenadines; in 1970, Tonga and Fiji; in 1973, Guinea-Bissau, and the Bahamas; in 1971, Bahrain, Qatar, and the United Arab Emirates; in 1972, Bangladesh; in 1974, Grenada; in 1975, Mozambique, Cabo Verde, Comoros, São Tomé and Príncipe, Angola, Suriname, Papua New Guinea; in 1976, Seychelles, Solomon Islands; in 1977, Djibouti; and in 1978, Dominica.

instances, in the mid-1970s, shortly after independence was gained it was subsequently suppressed, as in the case of Timor Leste (which only later became permanently independent).[92] The decade when the 1978 Vienna Convention was being drafted also saw the conclusion of many of the formal arrangements of Trusteeship orchestrated by the United Nations, as in the case of Nauru. Succession in these episodes occurred without a sense of urgency to implement simultaneously the change occurring in de jure thought in relevant areas pertaining to treaties. While the ILC was engaging in debate on codification, the intermediate conclusions of its lawyers rarely influenced the decisions of states. Whereas Part I of this chapter illustrated how it was commonplace for the reverse to take place, that the preceding and ongoing decisions of states shaped the debates about how treaty succession should take place in the future.

The second complication inherent in examining state practice in aggregate during the 41 years focused upon in this chapter relates to the dearth of cases of succession between the opening of the 1978 Vienna Convention for signature and the beginning of the dissolution of the Soviet Union in 1989. Aside from Zimbabwe's achievement of independence the year of the second and final Conference on the 1978 Vienna Convention, the only significant acts of state succession which occurred after that year and before the USSR's dissolution took place in the hotly contested case of Namibia. The nascent country was at the time engaged in a bloody struggle for separation from South Africa in which the transfer of governmental authorities remained unclear until a final resolution was officially reached in 1990.[93] The

[92] Another case which drew in dynamics of decolonization and treaty relations related to the travails of the independent Republic of Vietnam (which existed from 1955-1975). It was eventually defeated by North Vietnam after the US and other countries pulled out of the war there. Like other regional actors in Southeast Asia, communist North Vietnam renounced many treaties upon its founding, and repeated this behavior when it conquered South Vietnam.

[93] For information about the historical development of this outlying case, see: Yilma Makonnen, "Namibia: Its International Status and the Issues of State Succession" Lesotho Law Journal: A Journal of Law and Development, Vol. 3, 1987, 183; Paul C. Szasz, "Succession to treaties under the Namibian Constitution," *South African Yearbook of International Law*, Vol. 15, 1989, 65-66 (summary of issues); Julio Faundez, *Independent Namibia: succession to treaty rights and obligations incorporating Namibian treaty calendar*, Namibia studies series, (Lusaka, Zambia: United Nations Institute for Namibia), 1989.

resultant lack of opportunity to argue for the implementation of the newly-codified rules of succession became a particularly trenchant anticlimax. The international lawyers who drafted the 1978 Vienna Convention, as well as the highly-technical 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, observed a kind of purgatorial dormancy set in for both.[94]

Detractors of the Vienna Conventions pertaining to succession were especially mordant about these realities. His life's work in favor of customary, universal succession having been utterly left behind by codification, Daniel Patrick O'Connell noted in 1979, with equal parts epicaricacy and elegy, that "among the diplomatic priorities of most governments, State succession is of a very low order…[they believed the Vienna Conferences] altogether unimportant and not worth expenditure of public funds."[95] Unsettling as his conclusions were, they proved accurate at the time, and were demonstrated by the lethargy exhibited by states now able to sign, ratify, and deposit the documents confirming party-status to the 1978 Vienna Convention with the UN Secretariat. After an initial spate of signatures in 1978[96] and in 1979,[97] the necessary, individual state-processes of accession eked along at a pace which threatened to make the document wholly irrelevant. The treaty barely met the threshold to enter into force prescribed by its own text when the Republic of Macedonia became a party in 1996.

In this section of the chapter, the lack of cases of succession occurring between 1978 and 1989 serve a larger purpose than explaining the impassivity of potential states parties to

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[94] Eli Nathan, "The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts," in special series on "International Law in a Time of Perplexity, Essays in Honour of Shabtai Rosenne," *Netherlands Yearbook of International Law*, 1989, 488-489; Rudolf Streinz, "Succession of States in Assets and Liabilities: a New Regime? The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts," *German Yearbook of International Law*, 1983, 198; Brigitte Stern, *La Succession D'états*, (The Hague: M. Nijhoff, 2000), 140-145; Paul Williams and Jennifer Harris, "State Succession to Debts and Assets: The Modern Law and Policy," *Harvard International Law Journal*, 42, 2001, 355.
[95] See O'Connell, 1979, 725 and 725-727.
[96] In chronological order: Côte d'Ivoire, Democratic Republic of Congo, the Holy See, Angola, Brazil, Peru, Senegal, Sudan, Uruguay, Chile, Madagascar, and Niger.
[97] In chronological order: Pakistan, Paraguay, and Poland.

the 1978 Vienna Convention. The 11-year absence of succession from interstate affairs also provides a significant separation between the tapering off of decolonization, to which the yet unfinished 1978 Vienna Convention was not applied, and the next consequential multiplication of states which occurred after 1989. For these reasons, the monumental events of the decade after 1989 are the focus of Part II of this chapter. These include both major events which shook the foundations of world order—the fall of the USSR, the reunification of Germany, and the dissolution of the former Socialist Federal Republic of Yugoslavia—as well as other cases that populate the same period. Less-celebrated acts of treaty succession, prompted by the independence of Eritrea,[98] the unification of the twin Yemeni Republics,[99] as well as the largely harmonious partition of Czechoslovakia provide important illuminating details of how states behaved in aggregate when confronted with questions stemming from their inheritance of international obligations.

Case Study Context: The Paramountcy of Preserving Order

The period under examination provides recurring evidence of two phenomena in state practice. First, states inheriting obligations after the dissolution of the Soviet Union acted outside the spirit, and often the principles of the 1978 Vienna Convention, sidelining issues of their consent to specific treaties for the sake of taking on previous treaties en masse. Second, these same new countries went further than merely to repudiate existing legal standards, behaving with contextually novel purposes to wield succession as a means to maintain regional and global order.

As in the last chapter, it is necessary to look outside the writings of the those to whom one might immediately turn to for informative observations in this area, namely in the

[98] Raymond Goy, "L'Indépendence de l'Erythrée," *Annuaire Français de Droit International*, 33, 1993. 337-339.
[99] Raymond Goy, "La Réunification du Yémen," *Annuaire Français de Droit International*, 30, 1990, 249.

commentaries of international lawyers as well as scholars and jurists. After the decade of toil spent among them in disputatious debates and drafting which resulted in the 1978 Vienna Convention, one might presume they would be eager to examine the extent to which new states emerging in the 1990s were following the new rules, and if not, why not.[100] Unfortunately for those interested in the practice of treaty succession in the 1990s, the actual conduct of states in the arena of treaty succession turned out not to be a major point on which the focus of these commentators settled. Instead, a whole series of documents and commentaries appeared which rehashed old debates, tried to extend principles articulated in the 1978 or 1983 Conventions, or endeavored to elaborate areas these documents left untouched. The International Law Association (ILA), for example, once again preempting the ILC, addressed the topic of "the extent to which the United Nations Conventions on State Succession of 1978 and 1983 have contributed to the development of international law."[101] One institution was swiftly created to address such questions more concretely in a specific context, the so-called Badinter Commission.[102] It promised to apply the "principles of international law embodied in the Vienna Conventions of…1978 and…1983"[103] as the "foundation"[104] to resolving disputes in the former Yugoslavia arising over relevant issues. Ultimately the body simply cast aside as unimportant any conclusions that might be drawn from the conventions regarding its recommendations.[105] Following this finding, appearing

[100] One of the very few examples of a more comprehensive attempt to address this area arrived from two imminent scholars just one year after the end of the period under examination, when most cases had concluded: Martti Koskenniemi and Pierre Michel Eisemann, *State Succession: Codification Tested Against the Facts*, (The Hague: M. Nijhoff, 2000).
[101] International Law Association, Committee on Aspects of the Law of State Succession, "Rapport Final Sur La Succession en Matiere de Traites," New Delhi Conference, International Law Association Report, 70, 1992.
[102] The Commission's formal name was the "Arbitration Commission on Yugoslavia."
[103] Chairman Robert Badinter, Conference on Yugoslavia, Arbitration Commission, *International Law Review*, Opinion Number 9, 203, 1992, 1521-1524. Accessed online at Cambridge Law Reports Database, available at: https://ebooks.cambridge.org/clr/case.jsf?bid=CBO9781316152195&id=CBO9781316152195A015#LGY-fn-197
[104] Ibid.
[105] At the conclusion of its proceedings, the Arbitration Commission on Yugoslavia, still under the leadership of Badinter, asserted that "there are few well established principles of international law that apply to State succession," ignoring the universalistic aspirations of the 1978 Convention by describing the applicability of its principles as "largely to be determined case by case, depending on the circumstances proper to each form of

publicly in full only in 2001, L'Institut de Droit International in Paris put forward a set of "guiding principles" for states to consult on questions of debt and property, which avoided the transfer of political and commercial treaties.[106] The Council of Europe made a forward-looking foray into matters of treaty succession when the internal Committee of Legal Advisers on Public International Law began to explore the relationship between the inheritance of international obligations and the recognition of new states in Europe.[107] When the ILC belatedly added matters of succession to its agenda for the first time in over a decade, it decided to pursue issues of the transfer or nullification of nationality which were omitted from the earlier proceedings leading up to codification.[108] In response, the Venice Commission of the Council of Europe, which is concerned largely with constitutional questions, released a declaration concurring with findings involving issues of nationality addressed by the ILC.[109] The International Court of Justice evaded dispositive conclusions about the applicability of the 1978 Vienna Conventions, before and after they entered into force. The ICJ addressed unique instances on their particular merits, as in the Gabcikovo-Nagymaros Case,[110] and a large body of interstate disputes in the former Yugoslavia.[111] Only

succession." Opinion Number 13, 32, 1992, 1591-1592. Accessed online at Cambridge Law Reports Database, available at: https://ebooks.cambridge.org/clr/case.jsf?bid=CBO9781316152195&id=CBO9781316152195A015#LGY-fn-197

[106] L'Institut de Droit International, "State Succession in Matters of Property and Debts," Vancouver Session, 32, 2001.

[107] The resultant report was authored by Martti Koskenniemi, Jan Klabbers, Andreas Zimmermann, Oliver Ribbelink, *State Practice Regarding State Succession and Issues of Recognition*, "on behalf of: Max Planck Institute for Comparative Public Law and International Law, Germany; T.M.C. Asser Institute, The Netherlands; Erik Castrén Institute of International Law and Human Rights, Finland," (The Hague: M. Nijhoff, 1999).

[108] International Law Commission, "Draft Articles on the Nationality of Natural Persons in Relation to the Succession of States," General Assembly Official Records, 54, Supplement Number 10, U.N. Document A/54/10, 1999.

[109] The Venice Commission, The Council of Europe, "Declaration on the Consequences of State Succession for the Nationality of Natural Persons, European Commission for Democracy through Law," Venice, Italy, 28th Meeting, 1996.

[110] Gabcikovo-Nagymaros Project Case, Claimants: Slovakia and Hungary, International Court of Justice, Judgement 7. A series of disputes arose pertaining to the instituting a dam project, which would increase the navigability of the Danube, enhance clean electricity capacity, and decrease the likelihood of flooding. It was established by the September 16, 1977 Budapest Treaty.

[111] See, for example: Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, International Court of Justice, Judgment Report, 1996; and Application of

in rare instances did sections like Articles 11 and 12 of the 1978 Convention, which articulate principles of continuity in the boundary and territory demarcations established by treaties, gain wide recognition as pertinent points of consensus that were and should be recognized by new states.[112] This seemingly wide-spread, willful neglect toward appraising state practice as it was occurring in aggregate might be partially understood by the fact that neither the 1978 nor the 1983 Conventions had yet come officially into force before 1996 and 2003 respectively, given their deadlines and requirements for signature. However, the unwillingness of international lawyers to find themes drawn from what new states were doing en masse and to begin to discuss these developments with regard to the documents finalized in Vienna suggests a deeper cause. One might recall a congruency between the analytical gaps in commentary on practice in 1990s and amid the onset of decolonization. Just as in the earlier episode, it seems plausible that international legal experts remained relatively silent rather than vigorously engaged with the coincidence of wide-spread, obvious divergences between state practice and previous, dominant interpretations of law in the area of treaty succession. The dissolution of the Soviet Union, it seems, led to an uncomfortable, rapidly surfacing distance between what states were actually doing, and what the international legal community had codified in order to provide clear prescriptions with regard to treaty succession.[113]

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the Convention on the Prevention and Punishment of the Crime of Genocide, Claimants: Croatia v Serbia and Montenegro, International Court of Justice, Judgment Report, 1999.

[112] See, for example, the International Court of Justice's carefully cited support of the section on these issues in the previously cited Gabcikovo-Nagymaros Project Case (paragraphs 123 and 124). Rather than delving into the accordance of Article 34 (and its subparts) of the 1978 Convention with "the state of customary international law," the Court affirmed that "the particular nature and character of the 1977 Treaty," the so-called Budapest Treaty which established the project in question, itself cohered with the territorial and boundary requirements of the 1978 Vienna Convention.

[113] Records of the American Society of International Law's oral proceedings in 1992 provide stark evidence of this disconnect and the unwillingness of its esteemed membership to describe it. When issue of state succession was raised, perhaps inauspiciously on 1 April of that year, a panel presentation was assembled. The discussion was set to address attendant issues of succession in the 1990s, with no explicit emphasis on aspects of self-determination, even though that topic and its connections to decolonization were at the center of the codification which occurred in Vienna in the 1970s. Gerald Hamilton and soon-to-be-named U.S. Ambassador to the United Nations, Madeleine Albright, reverted to a discussion of the 1978 Convention and discussed specific implications for acts of self-determination which related to secessions. The other panelists, among the James

Finally, before presenting a survey of succession behavior, it is important to note once again the purposes for providing context for the case study in this chapter, which is the aim of the following analysis of collective state behavior during the period under analysis. The objective is to elucidate an emergent code of conduct in treaty succession, referred to as custodianship, which recurs broadly in the data collected as a guiding notion in the de facto treaty succession of states between 1968 and 1995. Recalling the same constraints which shaped the previous provision of context in the last chapter, a totalized account of all aspects of all cases of succession is not undertaken here. An effort in that regard would more likely confuse the threads that link state behavior between and among important cases, if only because of the vast swathes of empirical data that would be drawn into the analysis by doing so. A critic of the necessarily selective account of context provided below might certainly be able to find divergent examples or counterexamples of the treaty succession described here. But the aim, of course, is not to address each of those potential counter claims. It is instead, ultimately, to provide a conceptually-readable theoretical understanding of this period.

Reviewing treaty succession by states affected by the dissolution of the USSR, the dismemberment of the former Yugoslavia, as well as other contemporaneous changes in international affairs illustrates the emergence of a code of conduct referred to here as custodianship, which was conceived outside preceding dominant legal arguments regarding succession. First and foremost, the coming apart of the 69-year-old, highly-centralized, union of subnational Soviet republics led to new governments willfully attempting to maintain regional and global order. In large part, the 15 new states directly made independent

Crawford, uniformly discussed contemporary issues of succession without reference or dialogue to the points being made by their colleagues. The tension and obvious disarray of the discussion was so palpable that it was light-heartedly noted by the moderated. But the twin divergences in perception between what was important to discuss, and whether self-determination and the 1978 Vienna Convention were important to the issues at hand in the 1990s was never brought entirely to the surface. See American Society International Law, Annual Meeting Proceedings, Volume 86, April 1, 1992, 1-8. Available online at: https://www.asil.org/resources/annual-meeting-proceedings

by the USSR's dissolution, [114] and the several other acts of succession indirectly spawned by unifications and divisions of states under Soviet influence during the cold war, demonstrated a will to forgo abstracted debates about imperial domination and their relationship to rights to consent, with states avoiding available procedures of renunciation created by the effort of codification. Those states directly gaining sovereignty are discussed first. In examining the succession behavior of this group in aggregate, their widely accepted division into four categories, originally posited by Michael Bothe and Christian Schmidt, lends some clarity.[115] An important starting point is to note, as these authors did, that only the new Russian Federation claimed to be the continuation of the USSR at the time. It is possible to see this merely as an attempt to seize the rights and powers afforded by previous treaty relations, symbolized by Russia's insistence that it supplant the USSR in its seat in the United Nations and, crucially, on the Security Council. Yet the new state with its capital in Moscow largely acted to sustain existing networks of legal relations to promote stability during the transition. This was evident in the leadership role of the Russian Federation first through the Belavezh Accords and later in the Alma-Ata Protocols. The latter documents remain famous for delineating the Commonwealth of Independent States, but one of their less-celebrated accomplishments consisted of decisively defining what became a sweeping principle of continuity in succession complied with by former Soviet republics. With the exception of Georgia and the Baltic states, they undertook "in accordance with their constitutional procedures the discharge of the international obligations deriving from treaties and agreements concluded by the former Union of Soviet Socialist Republics."[116] For the Russian

[114] These were: Russia, Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Tajikistan, Turkmenistan, Ukraine, Uzbekistan.
[115] Michael Bothe and Christian Schmidt, "Sur quelques questions de succession posees par la dissolution de l'URSS et celle de la Yugoslavie," *General Review of Public International Law*, 96, 1992, 811-842.
[116] American Society of International Law, International Legal Materials, 31, 1992, 149. Available online at: https://www.asil.org/resources/international-legal-materials.

Federation, this plank of the Protocols applied almost uniformly to bilateral relations.[117] Examining the fate of treaties pertaining to human rights and arms control illustrates how this Russian tendency extended to multilateral treaties as well. Russia succeeded to all former commitments to disarmament and non-proliferation, most notably the Treaty on the Non-Proliferation of Nuclear Weapons of 1968 (NPT)[118] and the Anti-ballistic Missile Agreement of 1972 (ABM Treaty).[119] Succession to the Strategic Arms Reduction Treaty of 1991 (START) signed between the US and the USSR, required creative legal thinking given that it was still awaiting ratification, but this applied more to the other republics than the Russian Federation, for which it was assumed by the parties involved there was an implied acceptance

[117] Documentation of the fate of bilateral treat between the USSR and the United States, and three European countries provides considerable evidence in support of this characterization. The US concurred with the Russian Federation's will to sustain bilateral treaties where possible. Craven, for example, notes that "the US, in response to the declarations of independence of each of the former USSR Republics, sought to make it a condition for the establishment of diplomatic relations that they commit themselves to fulfil pre-existent treaty obligations. In a subsequent exchange of notes with each of the Republics, the governments…agreed to 'continue' those bilateral treaties that had not expired or were not obsolete. In each case, these treaties were spelt out in the Annex to the exchange of notes." The UK undertook a similar approach, see Anthony Aust, *Modern Treaty Law and Practice*, (Cambridge: Cambridge University Press, 2000), 312-314l; *British Yearbook of International Law*, 1992, 652-655; *British Yearbook of International Law*, 1997, 535-537. The German and Finnish authors who contributed to Koskenniemi et al.'s anthology on treaty succession note that their respective countries engaged in similar undertakings. See Kosekenniemi, 2000, 100. It is important to note, however, that the countries undertaking partnerships to succession with the USSR generally carefully reviewed the relevant treaties to ensure that the effects of these documents were still relevant to their bilateral relations with the new Russian Federation. In Finland's case, this resulted in only 5 of 48 treaties originally signed with the USSR remaining in effect because the remainder were considered wholly obsolete.

[118] George Bunn and John B. Rhinelander, "The Arms Control Obligations of the Former Soviet Union," *Virginia Journal of International Law*, 33, 1993, 323; Lucinda Love, "International Agreement Obligations After the Soviet Union's Break-up: Current United States Practice and Its Consistency with International Law," *Vanderbilt Journal of Transnational Law*, 13, 1993, 372-374; Rein Müllerson, "The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia," 42 International Comparative Law Quarterly, 42, 1993, 488-491. A Committee from the International Law Association addressing this issue, however, noted the complications for succession created by the fact that the NPT created a regime of differential obligations for non-nuclear parties than it did for nuclear ones. Could the new non-nuclear successors be considered to have succeeded to terms of treaty which they had previously been signed onto under different circumstances? After some debate, the means of the process of treaty succession involved some negotiations and a declaration of adherence, which the ILA members making up the committee agreed to be "equivalent" to other acts of succession. See International Law Association, Committee on Aspects of the Law of State Succession, "Rapport Final Sur La Succession en Matiere de Traites," 2002, 56-59.

[119] Fabrizio Pagani, "Identité et succession d'Etats aux instruments conventionnels relatifs au désarmement et à la maîtrise des armements," in Martti Koskenniemi and Pierre Michel Eisemann, *State Succession: Codification Tested Against the Facts*, (The Hague: M. Nijhoff, 2000), 437; International Law Association, Committee on Aspects of the Law of State Succession, "Rapport Final Sur La Succession en Matiere de Traites," New Delhi Conference, International Law Association Report, 70, 1992, 617; George Bunn and John B. Rhinelander, "The Arms Control Obligations of the Former Soviet Union," *Virginia Journal of International Law*, 33, 1993, 323, 335.

of the attendant obligations.[120] The new government in Moscow similarly treated multilateral obligations pertaining to human rights in the blanket manner it had those on arms control and disarmament. As Menno T. Kamminga noted, "the Russian Federation on 27 February 1992 informed the UN Secretary-General that it would honour the commitments deriving from treaties concluded by the USSR. This obviously includes human rights treaties."[121] In other instances, this sweeping inheritance of preexisting treaty documents was prescribed by bodies made up of neighboring states that were original parties to such treaties, like the European Council. This organization set out automatic succession to relevant documents as a mandatory step in the normalization of relations among its members and the newly-independent states.[122] But the initiative of the Russian Federation in this area was decisive. Even amid the domestic political and economic instability which ensued directly after it became independent, it chose succession in broad-strokes followed by steadfast efforts towards compliance to preexisting international obligations.

The three other categories of states immediately made independent by the USSR's dissolution more or less followed the rump state's example, either directly or indirectly. They succeeded to the vast majority of treaties previously signed on their behalf by the Kremlin. In the area of arms control and disarmament treaties, Belarus, which maintained it had been sovereign once the USSR dissolved, Estonia, Latvia, and Lithuania, all of which demanded their independence be deemed "restored" from their 1940 occupations, as well as Armenia, Azerbaijan, Georgia, Uzbekistan, Moldova, Tajikistan, Kazakhstan, Kyrgyzstan, and

[120] See the Treaty on the Reduction and Limitation of Strategic Offensive Arms, 31 July 1991. Principles of succession were further elaborated by what became known as START II, the Treaty on the Further Reduction and Limitation of Strategic Offensive Arms, 3 Jan 1993.
[121] Menno T. Kamminga, "State Succession in Respect of Human Rights Treaties." *European Journal of International Law*, 7, 1996, 479.
[122] European Council, Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 16 Dec 1991, 1992, 1486. Specifically citing this document, Ukraine and the Republic of Belarus acted in 1992 under the auspices of Article 5 of the Agreement on Joint Measures with Respect to Nuclear Weapons to succeed as non-nuclear states to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons.

Turkmenistan, which made no such claims, came to succeed through more complicated means than Russia. For the international community at large as well as these states in particular, the fate of the NPT, ABM Treaty, and START I became of topic of urgent concern. Three of their number—Ukraine, Belarus, and Kazakhstan—retained weapons that could potentially allow them to become members of the exigently exclusive club of nuclear powers. This potentially dangerous scenario of automatic proliferation was transformed, remarkably, into an episode of nearly automatic succession by the 1992 Lisbon Protocol. This legal instrument had far-reaching implications for the inheritance of arms-related treaties for successor states to the USSR. It provided that, in the "shortest possible time," the three heirs of Soviet nuclear assets take on the NPT as "non-nuclear weapon States."[123] The Lisbon Protocol also provided all of the newly-independent Republics with legal courses to succeed to START I without independent ratification.[124] The Treaty on Conventional Forces in Europe of 1990, which is dealt with in greater depth in the case study, found an almost identical path to continuity through the dissolution of the USSR.[125] The 1972 Anti-ballistic Missile Agreement (ABM) between the US and USSR was sustained among the non-Russian republics by similar means. After passage of a unanimous resolution among the Commonwealth of Independent States at the Bishkek Summit in 1992 that stated they would follow the terms of the treaty,[126] the members acted of their own volition to request a Memorandum of Understanding with the United States which was eventually signed in

[123] See Lee Wolosky, Jonathan Malis, and David Schwimmer, "Start, Start II, and Ownership of Nuclear Weapons: The Case for a 'Primary' Successor State," *Harvard International Law Journal*, 34, 1993, 581. These authors note that the Non-Proliferation Treaty arranged schemes of differential obligations as regards nuclear and non-nuclear powers (defined respectively in its Article IX, Section 3 as a state "which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967," and one which has not).
[124] Ibid.
[125] American Society of International Law, International Legal Materials, 30, 1991, 1-4. Available online at: https://www.asil.org/resources/international-legal-materials. Of the states inheriting territory lying west of the Urals (Armenia, Kazakhstan, Azerbaijan, Moldova, Russia, Belarus, Georgia, and Ukraine), new weapons allocations were negotiated and agreed to within the framework of the CFE at the Tashkent Agreement of 15 May, 1992. New and old States Parties to the CFE accepted the legitimacy of these allocations at their next meeting in Oslo, which took place on 5 June, 1992.
[126] Bunn and Rhinelander, 340-342.

1997.[127] That the United States ultimately renounced the Memorandum in 2001 illustrates the willfulness on the part of the newly independent states, who then claimed they should be considered to have previously succeeded to the treaty. The United States did not contest and subsequently has not contested this claim.[128]

The fate of human rights treaties among the newly-independent former satellite republics was determined by a more varied set of paths, with the outcome of general, persistent succession being the nearly the universal outcome. Belarus restated its position that, having been sovereign by the time of the USSR's dissolution, it had already invoked its rights emanating from Article 80 of the USSR's 1977 Constitution voluntarily to become a party to the UN Charter and the body of human rights treaties involved.[129] Four Central Asian states—Kyrgyzstan, Tajikistan, Turkmenistan, and Kazakhstan—succeeded in short order to the human rights documents signed by the USSR through the International Labour Organization, as well as to the Geneva Conventions and Protocols.[130] Preferring to claim accession rather than succession to human rights treaties, Azerbaijan proved an outlier, prompting chastisement at the time from the UN Human Rights Committee, which strongly favored succession.[131] As a result, Moldova, Georgia, and Uzbekistan were persuaded to accept their deposit of accession instruments under the legal label of succession.[132] Despite

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[127] The United States, Departments of State and Defense, "Memorandum of Understanding Relating to the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of 26 May, 1972," Signed 26 September, 1997.
[128] Ibid., Annex Note in Library of Congress Collection.
[129] Kamminga,1996, 479.
[130] International Labour Organization, *ILO Official Bulletin*, Series A, 1993 168; The International Committee of the Red Cross, *Annual Report*, 1994, 266-268.
[131] Human Rights Committee, Annual Report to the U.N. General Assembly, U.N. Document A/49/40, Volume 1, 1994, 93. Specifically, see paragraph 294.
[132] Tomas Schweisfurth, "Das Recht der Staatensukzession: Die Staatenpraxis der Nachgolge in Völkerrechtliche Verträge, Saatsvermögen, Saatsschulden und Archive in den Teilungsfällen Sowjetunion, Tschechoslowakei und Jugoslawien" Berichte der Deutschen Gesellschaft für Völkerrecht, 1994 (later published in Fastenrath et al., *Das Recht der Staatensukzession*, 1995; Brigitte Stern, "Rapport préliminarie sur la succession d'états en matière des traités," International Law Association, Helsinki Conference, 1996, 20-22.

It is worth noting that there are several multilateral treaties which at the time these authors suggested the successor states had not made their intentions known. At the time of drafting this thesis, the fate of these treaties remained unclear. Among these were the Anti-Doping Convention of 1989. Only Ukraine later signed

entirely reconstituting their governments and partially negotiating their territories, the Baltic states maintained the convenient narrative that in fact their statehood had never been lost but was revoked illicitly through occupation by the USSR starting in 1940.[133] They thus engaged in an abbreviated accession process to several major human rights treaties, noting as much to the UN Secretary-General in 1992, while succeeding directly to others.[134] Among these newly-independent former satellite republics, a forthright and unwavering will to sustain existing legal relations, regardless of their rights to renounce them, was evident throughout their proactive succession behavior during the 1990s.

Two notable episodes of succession resulting indirectly from the USSR's dissolution similarly illustrate strands of purposeful continuity in state behavior which determined the fate of preexisting legal relations. German unification and the division of Czechoslovakia resulted in a series of actions by the resultant governments which highly favored succession to treaties. After the eventual abandonment of Chancellor Helmut Kohl's 1989 ten-point plan for a federal union between East and West Germany,[135] the 1990 Unification Treaty led to the

onto this treaty through an accession process, a course of action seemingly unconnected to its previous succession behavior.

[133] Authors like Menno T. Kamminga critiqued the decision of the Baltic states, while respecting their right to reject the legitimacy of Soviet occupation through a unique approach to succession. Kamminga argued "the Baltic approach is ultimately unsatisfactory because it fails to recognize that human rights treaties enjoy a special character which is different from other treaties. In particular, the assumption of the Baltic States that they are not bound by treaties in which rights had been granted to people within their territories seems questionable." Others suggested that this behavior was not an attempt to manufacture ambiguity about the states' accountability for violations which took place before their accession in the 1990s. See Martti Koskenniemi and Marja Lehto, "Succession d'États de l'ex-URSS, avec examen particulier des relations avec la Finlande," *Annuaire français de droit international*, 1992, 38.1, 179-219.

[134] In chronological order: "Communications from Estonia," October 8, 1991; "Communication from Latvia," February 26, 1993; and "Communications from Lithuania," June 22, 1995, in *Multilateral Treaties Deposited with the Secretary-General of the United Nations,* Accessed through the online archive. See also the Regional Status Report, December 31, 1995.

[135] Keith Heilbronner, "Legal Aspects of the Unification of the Two German States," *European Journal of International Law*, 2, 1991, 18-20; Frans von der Dunk and Peter H. Kooijmans, "The Unification of Germany and International Law," *Michigan Journal of International Law*, 12, 1991; Jochen Frowein, "The Reunification of Germany," *American Journal of International Law*, 86, 1992, 152-157; Christian Schricke, "L'Unification allemande," *Annuaire français de droit international*, 1990, 47-52; Dieter Papenfuss, "The Fate of the International Treaties of the German Democratic Republic within the Framework of German Unification," *American Journal of International Law*, 92, 469, 1998, 470;
Stefan Oeter, "German Unification and State Succession," *Zeitschrift fur auslandisches offentliches Recht und Volkerrecht*, 51, 1991, 349-353.

"absorption"—legal, political, economic, and territorial—of the German Democratic Republic (GDR) by the Federal Republic of Germany (FRG).[136] Articles 11 and 12 of the document addressed treaties the FRG had previously signed, clearly stating the will of the new government and of the German people, including those in the new provinces, to maintain all of these previous legal relations.[137] Continuation,[138] provisional extension,[139] or outright termination[140] of treaties signed by the GDR were determined through consultations with over 130 countries by the newly-expanded government of the FRG, which sought wherever possible to salvage productive, previously-established legal relations which had been brought into existence.[141] As a result of this sweeping succession after unification,[142] the FRG

The proliferation of writings specifically on Germany had to do more with the legal circumstances of the unification than with its consequential nature more generally for international affairs, or indeed the country's highly sophisticated public international law professoriate. Because the FRG and GDR orchestrated a treaty "Establishing a Monetary, Economic and Social Union," know as the "State Treaty" of July, 1990, means, ends and methods of unification shifted, and a new analysis of the legal ramifications were required.

[136] Article 1 of the Treaty of Unification stated that "…upon the accession of the German Democratic Republic to the Federal Republic of Germany…the Länder of Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt, and Thuringia shall become Länder of the Federal Republic of Germany." Article 7 then deepened and extended this union in financial terms. Article 8 did the same for Germany's federal law. See also Frowein, 1990, 333.

[137] This legal interpretation of succession through the Treaty of Unification became particularly important to the character of relations between the FRG and the Three Allied powers. Their quadrilateral relations were initially spelled out in the Convention on the Relations between the Three Powers and the Federal Republic of Germany, signed on 26 May 1952 (subsequently amended in 1954). The relations among these troops drew in questions of treaty law providing for the stationing of foreign troops in the FRG, and therefore had significant implications for regional security.

[138] For example, the Regulation of Property Questions with Austria, Finland, Denmark, and Sweden. For analysis, see Papenfuss, 1998, 234-237.

[139] One pertinent instance of this intermediate step during unification was the Treaty of Cooperation in the Field of Social Security, signed 24 May 1960, between the USSR and GDR. The FRG sought to avoid difficulties in the area of domestic social security by upholding certain provisions, using the treaty as the non-legislative basis for doing so.

[140] For example, consider the fate of The Agreement Concerning the Demarcation of the Established and Existing Polish-German State Frontier, signed 6 July 1950. The relevant entry in the United Nations Treaty Series suggests this treaty was deemed obsolete because the FRG and Poland considered the new border permanent. See Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, 319, 93. K-G Lee argues that 2, 214 international obligations undertaken by the GDR were considered officially terminated by 1998. K-G Lee, *The Law of State Succession in the Post-Decolonisation Period with Special Reference to Germany and the former Soviet Union*, Unpublished PhD Dissertation, University of Cambridge, 1998, 95.

[141] See Oeter, 1991, 360; Deiter Papenfuss, "Die Behandlung der völkerrechtlichen Verträge der DDR im Zuge der Herstellung der Einheit Deutschlands,**"** *Ein Beitrag zur Frage der Staatennachfolge*, 1997, 68.

[142] Germany's Federal Minister for Foreign Affairs stated to the Secretary-General in October, 1990, that "through the accession [unification] of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, the two German States have united to form one sovereign State, which as a single Member of the United Nations remains bound by the provisions of the Charter in accordance with the

presented a compelling, and ultimately successful bid to remain a member of NATO. This resulted in the extension of the North Atlantic Treaty's Article V protection to 105,980 square kilometers of European territory. German membership in the European Community remained identically continuous.[143] The 1992 splitting of Czechoslovakia into the Czech Republic and Slovakia, which occurred by peaceful democratic resolution within the former state's parliament, illustrated a similar custodial disposition to preexisting legal relations on the part of both successor states.[144] Independently, the new Czech and Slovak political entities undertook, through constitutional provisions[145] and consequent, rapid diplomatic procedure, succession to over 2,000 bilateral and 800 multilateral treaties that had been signed by the previously unified country.[146] In his work on the inheritance of human rights

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solemn declaration of 12 June 1973. As from the date of unification, the Federal Republic of Germany will act in the United Nations under the designation 'Germany.'"

Wider analysis of Germany's succession behavior is provided in Konrad Bühler, "State Succession, Identity, Continuity and Membership in the UN," *Rapport pour le Centre d'études et de recherches de la Haye*, 1999, 187; Yolanda Gamarra, "Current Questions of State Succession Relating to Multilateral Treaties," (in Eisemann and Koskenniemi, 2000, 402-403; Patrick Dumberry and Daniel Turp, "State Succession with Respect to Multilateral Treaties in the Context of Secession: From the Principle of Tabula Rasa to the Emergence of a Presumption of Continuity of Treaties." (2013).

[143] The European Community's Memorandum of the Commission of the European Community on the subject and the Declaration of Dublin put forward on 28 April, 1990, the process by which this sustenance of membership would take place. For example, with regard to the General Agreement on Tariffs and Trade, the Commission declared "the German Democratic Republic has been united with the Federal Republic of Germany on the basis of an accession to the latter. Thus the territory of the Federal Republic of Germany, a member State of the European Communities, has been extended and, as a consequence, the territory to which the treaties establishing respectively the European Community for Coal and Steel, the European Economic Community and the European Atomic Energy Community apply, has also been extended to include the territory of the former German Democratic Republic and of Berlin.

For further analysis of the Community's integration of the larger German Republic, see C. W. A. Timmermans, "German unification and Community law," *Common Market Law Review*, 1990, 27.3, 437-449; Pierre Jacqué, "German Unification and the European Community," *European Journal of International Law*, 1991, 2, 1.

[144] Jirí Malenovsky, "Problèmes juridiques liés à la partition de la Tchécoslovaquie, y compris tracé de la frontière," *Annuaire français de droit international*, 1993, 39.1, 305-307.

[145] Body of Czech Constitutional Law, Articles 4 and 5, December, 1992; Constitution of the Republic of Slovakia, Article 153, November 1992.

[146] Both republics submitted letters to the Secretary-General to the effect of the one issued by the Czech Republic notifying the UN Secretary-General that, 'In conformity with the valid principles of international law and to the extent defined by it, the Czech Republic, as a successor State to the Czech and Slovak Federal Republic, considers itself bound as of 1 January 1993, ie the date of the dissolution of the Czech and Slovak Federal Republic, by multilateral international treaties to which the Czech and Slovak Federal Republic was a party on that date…' (appears as received in the depository on 16 February, 1993). Slovakia's letter was dated as received on 19 May 1993. Records from the Director General of IAEA (Slovakia's letter received January and the Czech Republic's in February, 1993), the Director General of UNESCO (both letters dated in March 1993), and the Director General of the ILO (both letters dated in Mar 1993) suggest this approach to existing treaties was undertaken in other institutional contexts as well. The 2002 report from the ILA suggests that both

obligations immediately after the fall of the Soviet Union, Kammenga notes with regard to the Czechslovak case that "…the episode constitutes clear evidence of the strong desire on all sides to ensure seamless continuity of obligations in the field of human rights."[147] Succession to the European Convention on Human Rights by both new states in 1993 required both swift confirmation by the Council of Europe's Committee of Ministers that the two new states were admitted as members of the Council, as well as nearly simultaneous acceptance of their claims of succession.[148] The Committee required formal recognition by the Czech and Slovak Republics that they would accept the right of individual petitions for redress of previous violations of the Convention, under its twenty-fifth article, which occurred before the two new countries came into existence. Given the enormous number of abuses committed by the Czechoslovak Socialist Republic, this undertaking held enormous implications for the acknowledgement of historical wrongs and access to just compensation.

The succession behavior exhibited by the states of the former Yugoslavia similarly demonstrates support for former treaty relations for the sake of regional order. An important aspect of this episode had global implications because it entailed qualified acceptance of the inheritance of international obligations by partnering countries in the period. In his brief review of de facto succession in the breakup of the Socialist Federal Republic of Yugoslavia (SFRY), Matthew Craven notes, for example, that "in a general sense, all the successor States endorsed the principle of treaty continuity."[149] This broad trend emerged in the widely-enacted succession to human rights treaties which occurred in the first round of secessions from the old state which had bound the whole of Yugoslavia under the rule of Belgrade.

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states aggressively engaged in a campaign of Exchanges of Notes with independent states (see the discussion on page 574-578).

[147] Jean-François Flauss, "Convention européenne des droits de l'homme et succession d'Etats aux traités: une curiosité, la décision du Comité des Ministres du Conseil de l'Europe en date du 30 Juin 1993 concernant la République tchèque et la Slovaquie," Revue universelle des droits de l'homme, 6, 1994, 1.

[148] Ibid.; Minutes Concerning Admittance of Czech Republic and Slovakia, Council of Europe Document H/INF.94.1 and Addendum 1, 1993.

[149] Craven, 2009, 239.

Slovenia, which declared independence in June, 1991, Macedonia in September, 1991, Croatia in October, 1991, and Bosnia-Herzegovina in March, 1992, all rapidly contacted the good offices of the UN Secretary-General to notify him that they considered themselves successors to the treaties the SFRY had signed when it joined the UN.[150] In a similar fashion to that styled by the Czech and Slovak republics, Slovenia specifically cited its intention to allow retroactive pleas and petitions against the state made by victims of human rights violations perpetrated by the former regime with control over the territory.[151] Small deviations occurred, such as when Slovenia and Bosnia-Herzegovina chose accession over succession to the 1948 Genocide Convention, in part to commemorate through domestic political processes the terrible price paid in blood by the region's new states that sought freedom from Serbian domination.[152] On technical grounds, Slovenia renounced the 1980 Convention on Civil Aspects of International Child Abduction, arguing that the treaty was never applied by the former federated system's local legislature which allowed some autonomy in the governance of Slovenia.[153]

By far the most intriguing variation to emerge in the disintegration of the SFRY regarded claims of continuation of that state. When the Federal Republic of Yugoslav (FRY), later called Serbia-Montenegro claimed to be the continuation of the SFRY, the international community, led by neighbors of the would-be rump state, refused to accept that determination. This complicated the FRY's later attempts at succession to several human rights treaties, and created a global dialogue about succession. The other former constituents of the communist Yugoslav Federation demanded that the FRY be declared a wholly new

[150] Human Rights Committee, Comments on Slovenian Correspondence UN Document CCPR/C.79 and Addendum 4, 1993; Also noted in: Application No. 23131.93, *Brezny and Brezny* v. *Slovakia*, European Commission of Human Rights, Information Note Number 132, 11.
[151] Ibid.
[152] Declaration Received by the Republic of Croatia, UN Document E/CN.4/121, 1995, 2.
[153] International Law Association Report, 2002, 596-597. It is important to note that Slovenia chose not to succeed to but rather to accede to the 1984 Torture Convention, but cited its succession and intended full compliance with the 1966 International Covenant on Civil and Political Rights.

state, as its fellow new political entities had declared themselves, requiring separate, contestable acts of treaty succession.[154] A series of proclamations from the Badinter Commission,[155] the United States, as well as the U.N. Security Council,[156] endorsed this position. The UN General Assembly later came to the same determination and barred the FRY from taking the seat of the SFRY within its ranks.[157] In response, the FRY, which subtly began to accept its designation as a separate entity defined by its rule of Serbia and Montenegro, asserted that its opponents were contradicting the principles behind the according of such rights to the Russian Federation, which was accepted at the time as the continuation of the USSR.[158] Yet the need to deprive Belgrade, still controlled by President Slobodan Milošević, of international legal advantages appeared paramount to the members of international institutions and the leaders of populations victimized during the Balkan conflicts.[159] Gainful treaty succession could not be allowed, they argued, through the kind of brutal, often gruesome repression Belgrade had undertaken during the violent dismemberment of Yugoslavia. Slovenia, Croatia, and Bosnia-Herzegovina took the lead among these aggrieved parties by demanding that the FRY accede to human rights treaties like the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, and the Convention on the Elimination of all Forms of Discrimination against Women. They triumphed over the

[154] Citing its constitutional preamble, which was proclaimed in 1992, the FYR claimed the "unbroken continuity of Yugoslavia" understood by its people represented the continuation of the SFRY.
[155] Chairman Robert Badinter, Conference on Yugoslavia, Arbitration Commission, *International Law Review* ("International Law Materials"), Opinion Number 10, 203, 1992, 1526. Accessed online at Cambridge Law Reports Database, available at: https://ebooks.cambridge.org/clr/case.jsf?bid=CBO9781316152195&id=CBO9781316152195A015#LGY-fn-197
[156] Edwin D. Williamson and John E. Osborn, "A US Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia," *Virginia Journal of International Law*, 33, 1993, 263-273.
[157] UN General Assembly, Resolution Number 47/1, Passed 22 September 1992.
[158] Yehuda Z. Blum, "UN Membership of the 'New' Yugoslavia: Continuity or Break?," *The American Journal of International Law*, 1992, 86.4, 830-833.
[159] Edwin D. Williamson and John E. Osborn suggest the American government at the time refused to "to bless Serbia-Montenegro as the legitimate heir to the SFRY." See Williamson and Osborn, 1993, 270-271.

objections of the UN Legal Counsel in their attempt to humiliate the maligned aggressor by excluding the FRY from meetings of the UN Human Rights Council on the grounds that it was not a party to these and other documents.[160] In the end, a compromise was found through the FRY's formal succession—rather than its bid for implied omnibus continuation—of these treaties, as a means of public recognition of its independent acceptance of them.[161] In this way, the collaborative nature of defining custodianship to preexisting international obligations took on a wider form of joint action. Although states accepted that the FRY would need to sustain treaties pertaining to human rights as a matter of course, it could not use succession as a means of achieving power or status despite its criminal behavior, nor could it implicitly obscure past atrocities by claiming its continuation rather than outright succession to multilateral human rights documents.

An earlier example in this period from outside of Europe illustrated a less consistent, but still predominant acceptance of continuity of preexisting treaties over any claims to renunciation grounded in the 1978 Vienna Convention. When the People's Democratic Republic of Yemen united with the Yemen Arab Republic in 1990, the two states ended a separation that had resulted from the crumbling of two separate empires during two separate periods. The state to the north, the Yemen Arab Republic had become sovereign and independent after the collapse of the Ottoman Empire in 1918, first constituting itself as a kingdom and then later as a republic after a coup d'état. The state to the south, the People's Democratic Republic of Yemen, had been formed after an insurgency had forced Britain to relinquish control of the colony it had created in the territory. After decades of strained relations, as well as intermittent proclamations in favor of the idea of unification, the states acted to become one international political unit in 1990. The first article of the Agreement

[160] Letter co-signed by Bosnia-Herzegovina and Croatia, Addressed to all Permanent Representatives to the United Nations, U.N. General Assembly Document Number A/47/485, 29 September 1992.
[161] Summary Record of the 102nd Meeting, Held at Headquarters, New York, Human Rights Committee, 4th session, U.N. Document CCPR/SP/SR.18, 31 July 1978.

establishing their peaceful and consensual union in April of that year, stipulated that "the international personality of [the People's Democratic Republic of Yemen and the Yemen Arab Republic] shall be integrated in a single international person called the 'Republic of Yemen.'"[162] The Foreign Ministers of both states wrote a joint letter to the UN Secretary-General consummating this undertaking by explicitly stating:

> The Republic of Yemen will have single membership in the United Nations and be bound by the provisions of the Charter. All Treaties and agreements concluded between either the Yemen Arab Republic or the People's Democratic Republic of Yemen and other States and international organisations in accordance with international law which are in force on 22 May 1990 will remain in effect…"[163]

Secretary-General Javier Pérez de Cuéllar then recorded the new Republic of Yemen as a party to every single treaty for which his offices at that time served as a repository, citing the dates from which the older state, the Yemen Arab Republic, had signed them.[164] While the new, unified entity was not considered a successor state, the continuance of treaty obligations from a mechanism of succession was so seamless as to lead certain scholars to evoke the analogy that it occurred as though a singular state had merely changed its name.[165]

The handover of control of Hong Kong to China deserves mention even though it lies slightly outside the years which delimit this chapter. Although the official date of transfer took place in 1997, in accordance with the 1842 Treaty of Nanking, planning for the inheritance of legal relations began in the mid-1980s. Summarizing China's decisions to accept most treaties undertaken by Britain on behalf of its Crown Colony, Roda Mushkat argued at the time that the case "lends further support to the prevailing presumption of treaty

[162] Raymond Goy, "La réunification du Yémen," *Annuaire français de droit international*, 1990, 36.1, 249-265.
[163] Konrad G. Bühler, *State succession and membership in international organizations: legal theories versus political pragmatism*, Volume 38, (The Hague: Martinus Nijhoff Publishers, 2001), 233.
[164] United Nations Publication, Multilateral Treaties Deposited with the Secretary-General: Status as at 1 April, 2009, Volume I, Part I, Chapters I to VII, (published in) 2009, LII.
[165] Matthew Craven made this comparison, writing "A further important feature of this case is that although participation in treaties is neither linked to one or other of the former Yemeni Republics…this, in other words, is simply regarded as a case of treaty continuity and is viewed in the same manner as a case in which a State changes its name." Craven, 2009, 266.

continuity and reinforces predominant interests of an interdependent world in fostering stability in international relations."[166] Indeed, the development represented the willingness of the People's Republic of China (PRC), a communist country with repressive and anticolonial tendencies to accept the international legal relations undergirding a microcosm of market-based freedom. In 1984, the United Kingdom and China signed a Joint Declaration to spell out precisely how the handover of sovereignty would take place.[167] On the topic of treaty succession, the document was specific in certain respects: it averred that "provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force."[168] In the same spirit, China mimicked this language in the preamble to the 1990 Basic Law of the Hong Kong Special Administrative Region (HKSAR).[169] That the PRC had no intention of itself becoming a party to many of these treaties illustrated the deliberate particularity of these decisions: they were for maintaining a status quo in regional and global order that had evolved since Britain had controlled the territory. Conversely, China's international agreements that had not been signed on behalf of Hong Kong would only be applied within the territory by the Central People's Government after seeking approval from the HKSAR government.[170] The consolidation of broad-based legal continuity in Hong Kong's

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[166] Roda Mushkat, "Hong Kong and Succession of Treaties," *The International and Comparative Law Quarterly*, Volume 46, No. 1, 1997, 200-201.

[167] United Kingdom and the People's Republic of China, "Draft Agreement between the Government of the Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong" (known also as "Joint Declaration"), 26 September 1984, Available in reproduction in the *European International Law Review* ("International Law Materials, 1984, 1366, Accessed online at Cambridge Law Reports Database, available at: https://ebooks.cambridge.org/clr/case.jsf?bid=CBO9781316152195&id=C BO9781316152195A015#LGY-fn-197

[168] Ibid., see Articles 12, 13, and 14 of the Agreement.

[169] Look specifically to Article 39, The Basic Law of the Hong Kong Special Administrative Region, People's Republic of China, 4 April 1990, available in *International Law Review* ("International Law Materials") 29, 1990, 1511. Accessed online at Cambridge Law Reports Database, available at: https://ebooks.cambridge.org/ clr/case.jsf?bid=CBO9781316152195&id=C BO9781316152195A015#LGY-fn-197; See also Shin-ichi Ago, "Application of ILO Conventions to Hong Kong After 1997," *Dalhousie Law Journal*, 17, 1994, 612-623.

[170] In addition, the Chinese government undertook to "as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements." See the "Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Future of Hong Kong," 1984,

multilateral memberships and obligations eventually fell under the remit of the UK-China-Hong Kong Joint Liaison Group. This intergovernmental authority officially cited the territory's uninterrupted participation in over 30 international organizations.[171]

Ukraine as Periodized Case-Study

Following the survey of de facto treaty succession in the 1990s, the case study in this chapter examines practice from a vantage which the above broader analyses necessarily avoids. What follows is a process tracing investigation. This exercise serves the primary function of depicting particularities of de facto succession through the evaluation of detailed evidence. Yet in the context of this thesis, it can also test Craven's rudimentary explanation for dissonance between de jure interpretations of treaty succession and the practice of states between 1968 and 1995. The new government in Kiev embarked on a series of decisions regarding treaty succession which touched on numerous areas of international affairs, providing diverse data to probe the logics behind its inheritance of international obligations. It addition, it also offers an opportunity to appraise Craven's claims about the theoretical underpinnings of succession in the period under examination in this chapter. Embedded in Craven's "decolonization thesis" is the argument that newly-independent states in the 1990s mutually agreed with their treaty partners to affirm past agreements through succession largely for the sake of sustaining international order. Ukraine's independence remains situated in the empirical thrust of this claim in that its succession to treaties proved essential for the maintenance of what Craven refers to as "public order" in a global context. Rife with

Annex I, Section 11; See also: Roda Mushkat, *One Country, Two International Legal Personalities: The Case of Hong Kong*, (Hong Kong: Hong Kong University Press, 1996); as well as "International Agreements Between the United States and Hong Kong Under the United States-Hong Kong Policy Act," *Temple International Comparative and Law Journal*, 7, 167, 1993, 180.

[171] Joint UK-Chinese Liaison Group, "Joint Communiques," 35th Meeting, 9 February 1996, see section on the International Rights and Obligations Sub-Group."

frozen conflicts, Ukraine also inherited a border with the new Russian Federation, along with Soviet nuclear assets that if left unregulated by treaties could have disrupted relations between European countries as well as political entities to the east of its borders. The stakes of succession were high.

One last important parameter to address before presenting the evidence collected for this case study is the relative limitations on the materials which informed the conclusions made. Despite numerous inquiries with national archives, libraries, and academic institutions in Ukraine, few internal documents have emerged which allow for detailed analysis of the internal decision-making of the Ukrainian government regarding succession. In fact, several of these institutions recommended drawing on public statements because the archival materials that exist on questions pertaining to treaties are still so scattered that it is difficult to identify collections to review. Fortuitously for this analysis, the Ukrainian Rada and other institutions have begun to digitize and post publicly major pieces of legislation from the 1990s, including translated versions cited below. The ongoing current conflict also played a role in limiting access to research on the ground in major collections. Existing volumes of diplomatic materials available in libraries in the United Kingdom and the Netherlands were used as primary points of reference. Secondary sources were also consulted where possible.

Ukraine's General De Facto Treaty Succession

Available evidence illustrates a general trend in Ukraine's inheritance of international obligations which conforms to the behavior of other states in the period. In treaties in several areas—human rights, cultural artifacts law, and strategic affairs—Ukraine acted to sustain existing treaties for the sake of promoting regional stability and global order during the period of transition. The crucial defining factor which shaped Ukraine's succession behavior

was the country's historical relationship to the USSR, and what became the Russian Federation. This legacy defined the particularities of Ukraine's succession, and how they bore out larger trends in the period, contradicting the principles and spirit of the 1978 Vienna Convention.

Ukraine occupied a category of relatively greater sovereignty than other former satellite republics before the breakup of the USSR. Like Belarus, it was a founding member of the United Nations, and had previously invoked provisions of the 1936 Soviet Constitution to draft its own constitution which outlined powers in the domain of foreign policy. It also routinely, if not ritualistically, cited rights under the 1977 Soviet Constitution to undertake treaties with other countries outside the USSR.[172] Like the theoretical carapace of government professed by the Soviet Union, which purported to be composed of a willing federation of countries which had input in ruling the communist empire,[173] Ukraine's capacity to exercise separate treaty relations were more form than function. Directives in this area from the Central Committee of the Soviet Union were treated as supreme edicts, with decentralized acts of succession on the part of Ukraine's government constituting an afterthought in most cases.[174] Yet the existence—on paper—of separate mechanisms for treaty succession proved useful in the wake of the USSR's supranational decline.

From 1989 to 1991, the process of separation by Ukraine from the Soviet Union introduced numerous legal ambiguities in Ukraine's relationship to the new Russian Federation that were inflected in the course of Kiev's succession to treaties. In some areas of treaty law, Ukraine was able to directly assert its succession to treaties because the former Ukrainian Soviet Socialist Republic (UkSSR) had itself previously adopted the treaties. An

[172] Andrew M. Beato, "Note: Newly Independent and Separating States' Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union," *American University Journal of International Law and Policy*, 1994, 550-551.
[173] Ibid., 550.
[174] Ibid., 551-552.

illustrative bilateral example occurred with the United States, which immediately accepted upon request that 24 of 88 preexisting treaties between it and the USSR would remain intact after Ukrainian independence.[175] Multilateral obligations more often than not followed a similar course. Much like in the case of the Russian Federation, the treaty framework behind Ukrainian membership in the United Nations, as well as in bodies like UNESCO and the International Labour Organization were sustained through simple, straightforward acts of succession.[176] States with existing and emerging disputes with Ukraine over human rights violations did not question the new government in Kiev's written notice to the U.N. Secretary-General in 1991 claiming succession to the foundational treaties of fundamental rights for which his office served as a depository. Unlike in the case of the FRY, Ukraine as well as its allies and adversaries accepted the appropriateness of these existing legal frameworks as reference points for quarrels involving, for example, historical mistreatment of ethnic minorities in the country.[177] Rare deviations occurred, such as when Ukraine announced non-retroactive succession to the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969). The government considered itself unprepared to assume responsibilities entailed by this treaty before independence, and thus carefully declared its inherited membership when compliance after the date of succession was possible.[178]

[175] Arrangements for succession were most often conducted through comprehensive, lengthy Exchanges of Notes, a formal diplomatic procedure. In the case of Germany, Ukraine included a special paragraph of "Joint Declarations" which articulated succession as a primary means of cooperation between Berlin and Kiev. Craven, 2009, 241

[176] Edwin D. Williamson, Comments by the Legal Adviser for the U.S. Department of State for the Panel on 'State Succession and Relations with Federal States," American Society of International Law, APRIL 1, 1992, Gold Room, Rayburn House Office Building, Washington, D.C., Available at: http://www.state.gov/documents/organization/65716.pdf; similarly, Ukraine and Belarus had separately and independently acceded to UNESCO and the International Labor Organization. See Beato, 1994, 551.

[177] Michael P. Scharf, "Musical Chairs: The Dissolution of States and Membership in the United Nations," 28, *Cornell International Law Journal*. 29, 1995, 50.

[178] Hubert Beemelmans, "State Succession in International Law: Remarks on Recent Theory and State Praxis," *Boston University International Law Journal,* 15, 71, 1997, 89.

In a similar, if unexpected vein, Ukraine undertook a uniquely dramatic act of treaty succession surrounding claims for restitution for cultural artifacts taken during the Second World War. International legal inquiry into this topic had long represented one element of the perennial criticism of the post-war settlement, that it represented one-sided retribution against Germany.[179] Occupying countries, which had demanded German restitution obligations, remained unwilling to account for German objects that had gone missing in the wake of their armies. The Soviet Union blatantly repudiated calls for reciprocal return of what it openly referred to as "military trophies,"[180] while simultaneously refusing to acknowledge evidence of art booty for over 45 years.[181] This denial ended in 1990 when the FRG and USSR signed the Treaty on Good Neighbourliness, Partnership and Cooperation. It held "that lost or unlawfully transferred art treasures which are located in their territory will be returned to their owners or their successors."[182] With the fall of the USSR and the opening of relevant archives, it became clear that former Soviet republics retained significant shares of communist-looted art.[183] Through an act of succession to the 1990 treaty, Ukraine acknowledged and hastily returned a significant portion of the so-called "Kunstahalle collection."[184] The batch of stolen artwork had previously gained international attention when

[179] G. Gisnburgs (ed), *The Nuremberg Trial and International Law*, (Dordrecht: Martinus Nijhoff Publishers, 1990), 67; Stanley Paulson, "Classical Legal Positivism at Nuremberg," 4, 2, *Philosophy and Public Affairs*, 1975, 132.
[180] The Soviet Union consistently stonewalled critics of the behavior of its army, issuing official statements to the effect that: "Objects belonging to the Germans that were exported after the seventh of May [1945] are Soviet property, as military trophies, and there is no case of replacement…Such property and property taken by troops, especially the Red Army, is without doubt military trophies and cannot be used for replacement; it is useless to make a list for such property." See M. Kurtz, "The Allied Struggle over Cultural Restitution, 1942–1947," *International Journal of Cultural Property*, 17, 2010, 186.
[181] Tarja Långström, "'War Trophies' from World War II in Russia: Robbery or Restitution?" *Finnish Yearbook in International Law*, XI, 1998, 249.
56 Konstantin Akinsha, "Why Can't Private Art 'Trophiesl Go Home from the War?," *International Journal of Cultural Property*, 17.02, 2010, 258.
[182] "Treaty on Good Neighborliness, Partnership and Cooperation (FRG – USSR)", Article 16, 9 November, 1990, International Legal Materials, 30, 1990. Available online at: https://www.asil.org/resources/international-legal-materials.
[183] Steven Costello, "Must Russia Return the Artwork Stolen from Germany During World War II," (1997-1998) 4 *International Law Students Association Journal of Comparative and International Law*, 4, 143.
[184] Akinsha, 2010, 266.

Viktor Baldin, a former captain in the Red Army, confessed in 1982 to having transferred 364 objects from the Bremen Kunsthalle to the Soviet Union.[185] This unilateral act of succession, in which the Kiev engaged in costly restitution measures without gaining concessions, illustrated an independent, purposeful act to maintain regional order by making amends with neighboring countries over decades-old grievances.

In cases where the UkSSR had not independently acceded or succeeded to treaties signed by the USSR before its dissolution, the new government of Ukraine argued that it was one of multiple successors to the Soviet Union, challenging the Russian Federation's claim to be the sole continuer. This first became evident when Ukraine undertook the process of negotiating its succession to border treaties. In large part, Ukraine accepted previous treaties establishing its frontiers, as in the case of the amicable mutual recognition undertaken with Slovakia.[186] However, it challenged Russian claims that it was not entitled to the return of four provinces previously under the Chernihiv Governorate, which had been severed from the UkSSR by the People's Commissariat of Foreign Affairs in 1919. Similar wrangling occurred with regard to early Russian claims over Crimea as well as certain territories on the Romanian-Ukrainian border.[187] In these instances, Ukraine asserted that it was one of multiple successors to treaties which had been signed by the USSR, and therefore reserved

[185] Ibid., 258.
[186] Márquez Carrasco, "Régimes de frontières et autres régimes territoriaux face à la succession d'Etats," in Martti Koskenniemi and Pierre Michel Eisemann, *State Succession: Codification Tested Against the Facts*, (The Hague: M. Nijhoff, 2000), 493, 549–50; Steven R. Ratner, "Drawing a Better Line: *Ubi Possidetis* and the Borders of New States," *American Journal of International Law*, 90, 1996, 590; Malcom Shaw, "Peoples Territitorialism and Boundaries," *European Journal of International Law,* 8, 1997, 478; Malcom Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today," *British Yearbook of International Law*, 67, 1996, 75.
[187] International Law Association, Committee on Aspects of the Law of State Succession, "Rapport Final Sur La Succession en Matiere de Traites," New Delhi Conference, International Law Association Report, 70, 1992, 613-614.

the right to interpret and negotiate border disputes according to provisions of existing treaty documents.[188]

A far more consequential argument in this latter category of succession emerged during Ukraine's decision-making leading up to its acceptance of the Treaty on Conventional Forces in Europe (CFE). Negotiated during the final years of the cold war and signed in 1990, the document created comprehensive parameters that limited the amount of conventional military equipment maintained in states between the Atlantic Ocean to the Ural Mountains. The treaty aimed to reduce the risks associated with the proximity of military might deployed in Warsaw Pact states as well as in NATO member-states. The treaty required the demolition and removal of superfluous conventional weaponry. When the Soviet Union collapsed, an enormously complicated set of strategic questions arose about the partition of its military equipment dispersed across 15 new states. At first, these ambiguities appeared to doom ratification of the CFE.[189] Provisions of Article V of the treaty provided for Russia to maintain approximately 10 percent of its quotas in active units within the territory of both "flank zones" created by the CFE, with 85 percent elsewhere in storage.[190] Yet when the North Caucasus were transformed into a new southern border for the Russian Federation, most international lawyers agreed that the integrity of the CFE rested on the new states in this area finding a clear division of the flank equipment.[191]

[188] Torres Bernardez, "The 'Uti Possidetis Juris Principle' in Historical Perspective," in Völkerrecht zwischen normativen Anspruch und politischer Realität, Festschrift für Karl Zemanek zum 65, (Berlin: Geburtstag, Duncker & Humblot, Berlin, 1994, 417–437.
[189] Richard A. Falkenrath, *Shaping Europe's Military Order, The Origins and Consequences of the CFE Treaty*, (Cambridge: The MIT Press, 1995), 117-119.
[190] Joseph P. Harahan and John C. Kuhn, III, "On-Site Inspections under the CFE Treaty," (Washington, D. C.: The On-Site Inspection Agency, 1996), 247.
[191] Columbia International Affairs Online. Adam Boger, "The Defense Monitor," Russia and the CFE Treaty: The Limits of Coercion, http://www.ciaonet.org/pbei/cdi/cdi_2000/cdi2000_10/cdi_10b.html (accessed Jan, 11, 2005).

Like many new governments of the former satellite republics, Ukraine found urgent impetus to assemble national defenses.[192] Discord quickly emerged over which states were entitled to which equipment.[193] Seven former Soviet Republics with lands lying west of the Urals—Ukraine, Georgia, Armenia, Azerbaijan, Moldova, Belarus, Kazakhstan—began protracted negotiations with the Russian Federation to allocate Soviet weapons and other equipment, opening their discussion in earnest at the Tashkent Agreement in May, 1992.[194] Ukraine's negotiations with Russia quickly turned acrimonious. Ukraine's initial position coupled its claim to succeed to the CFE with an assertion that all Soviet military equipment on its soil now fell under the control of its new Ministry of Defense. The Russian General Staff immediately responded that the equipment should be considered the property of the CIS. However, Russia's civilian authorities countered that their government was the rightful heir to all equipment maintained by the entire corps of former officers of the Soviet Union.[195] A working solution was found in that new allocations of arms for the former satellite republics were combined with obligations to cover the costs to transfer non-allotted equipment to the Russian Federation, or to destroy equipment that Russia was unable to store due to other treaty relations. At their ad hoc meeting in Oslo in June, 1992, the new states-parties to the CFE, many of whom had succeeded just days before, accepted this basic framework.[196]

Yet disagreements between Ukraine and the Russian Federation lingered, threatening outright violations of the treaty. The CFE remained in a precarious position. In response, American supporters of the treaty in the U.S. Department of State sent messages to both sides

[192] Jeffrey D. McCausland, "The CFE Treaty: A Cold War Anachronism?" (U.S. Army War College, 1995), 10-14.
[193] John E. Peters, "The Changing Quality of Stability in Europe, The Conventional Forces in Europe Treaty Toward 2001," RAND, 2000, 23-24.
[194] John E. Peters, "CFE and Military Stability in Europe," RAND, 1997, 12.
[195] Wade Boese. "Dispute Over Russian Withdrawal from Georgia, Moldova Stall CFE Treaty," *Arms Control Today*, 34, 7, 2004, 43.
[196] Craven, 2009, 251.

pointing out that Article XX of the CFE allowed for a process of amendment. When it became clear that the CFE might not come into force by 1992, German Foreign Minister Hans-Dietrich Genscher organized a "High Level Working Group" to address dissonances in the interpretation of the treaty created by succession.[197] The Group conducted meetings not just about allotments and returns of military equipment to the Russian Federation, but also about the technological gaps in capacity borne by the new states-parties, which lacked the arms control bureaucracies which Russia inherited.[198] Ukraine epitomized this disconnect between arms and domestic capacity to utilize them, and thus benefited from the further negotiations.[199] The signing of the 1996 Flank Agreement, which diminished the restrictions specifically placed on Russia and Ukraine in the territories of Section 1, Subpart A in Article V of the treaty allowed both states to respond to threats to their security.[200] Rancorous disagreements between Ukraine and Russia over the fate of the Black Sea Fleet, led to a continuous violation of the CFE's requirements for the reduction of equipment for naval infantry and coastal defenses.[201] A division of the fleet between commands in Kiev and Moscow reached in 1993 eventually collapsed in 1996 after Pavel Grachev, then Russia's Defense Minister, objected to Ukrainian interventions over the basing of the Russian fleet.[202] Despite these disagreements and occasional abeyances, it is remarkable the extent to which the new government of Ukraine sought to comply with the CFE. When opportunities to renounce the document emerged, especially in circumstances in which intractable, legitimate

[197] Falkenrath, 1995, 191.
[198] Sarah Walking, "NATO paper outlines approach to CFE treaty 'modernization.'" *Arms Control Today*, 26, 8, 1996, 25.
[199] Auton Graeme, *Arms Control and European Security*, (New York: Praeger, 1989); Anne C. Aldis and Roger N. McDermott, *Russian Military Reform 1992-2002*, (London: Frank Cass, 2003).
[200] Senate Committee on Foreign Relations, Treaty on Conventional Armed Forces in Europe (CFE): Revision of the Flank Agreement: Hearing before the Committee on Foreign Relations, 105th Congress, 1st Session, 1997, 14-15.
[201] United States General Accounting Office, "Conventional Arms Control: Former Warsaw Pact Nation's Treaty Compliance and U.S. Cost Control," Report to Congressional Subcommittee, December, 1993.
[202] United States House of Representatives, Report of the Commission on Security and Cooperation in Europe, Section on Treaty on Conventional Armed Forces in Europe, Washington, DC, 1997.

grievances were aired, Kiev instead engaged in further rounds of negotiation. The domineering affect that Ukrainian politicians often ascribed to Russia was never linked to the sections of the 1978 Vienna Convention which sought to allow post-colonial states the opportunity to deny their consent to former treaties, thereby renouncing them.

Custodianship through Nuclear Abdication

The aftermath of Russia's 2014 annexation of Crimea has reinvigorated historical inquiry into Ukraine's two and half decades old decision to relinquish nuclear weapons previously deployed on its territory by the USSR. Kiev's inability to challenge Russian intervention militarily has highlighted the bitter consequences of this course of action. The dynamics of the decision-making process undertaken shortly after Ukraine gained independence—and its relationship to the present ongoing conflict—both bear direct relevance to questions of treaty succession. Then new country's eager acceptance of the Nuclear Nonproliferation Treaty (NPT) as a nonnuclear state as well as START I and the Anti-Ballistic Missile Treaty proved consequential two decades later. By inheriting a bundle of obligations that required the removal of weapons of mass destruction, Ukraine self-consciously gave up methods of defense that would have provided significant deterrence against invasion. The winding story behind this renunciation, which spans the period from 1990 to 1994, illustrated Ukraine's commitment to an international resolution of the dangerous realities brought about by the dissolution of a nuclear-armed superpower. Evidence reveals the consistent custodial disposition of the new government in Kiev, which sought to maintain the existing framework of non-proliferation to sustain global and regional order.

The crises posed to the international community in coping with the dissolution of the Soviet Union proved particularly critical with regard to the potential proliferation of weapons of mass destruction. As Barry Kellman observed:

> With thousands of nuclear weapons, the world's biggest chemical weapons stockpile, perhaps the world's most active and mature biological weapons capabilities, thousands of criminal organizations, and corruption throughout the government and the economy, Russia [and three of the former satellite states were] an unprecedented nightmarish mixture of superpower strength and chaos.[203]

Ukraine emerged as the epicenter of this conundrum. Estimates of its inborn fissile stockpile astounded the international community, which eventually realized Ukraine could inherit one-third of the total Soviet cache—some 2,200 warheads—attaining the world's third largest nuclear arsenal.[204] The gravity of the situation became ever more apparent as Kiev declared the details of strategic delivery vehicles left on its soil: 176 intercontinental ballistic missiles, with 46 solid-fueled SS-24 missiles and 130 liquid-fueled SS-19, as well as 44 strategic bombers capable of deploying AS-15 cruise missiles, not to mention over 2,600 tactical nuclear weapons.[205]

Accounts of Ukraine's eventual renunciation of these arms typically obscure the country's early, strident statements in favor of the NPT and ABM treaties. Historical context provides evidence of how the popular will for Ukrainian independence became wedded not only to a domestic anti-nuclear stance, but also to a belief eventually reflected in action, that the new country must take part in the international legal relations which govern nuclear affairs. Chernobyl captured that early confluence of political factors. After an accidental

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[203] Barry Kellman, "National Missile Defense in the Context of Multilateral," *Multifaceted Security*, NEXUS, 4, 73, 1999, 80.
[204] John-Thor Dahlburg, "Ukraine Votes to Quit Soviet Union: Independence: More than 90% of voters approve historic break with Kremlin. The president-elect calls for collective command of the country's nuclear arsenal," LA Times, December 03, 1991, 3-6.
[205] Steven Pifer, "The Trilateral Process: The United States, Ukraine, Russia and Nuclear Weapons," Brookings Institution, Arms Control Series, Paper 6, May 2011, 4; Steve Coll and R. Jeffrey Smith, "Ukraine Could Seize Control Over Nuclear Arms," *Washington Post*, June 3, 1993, 2-7.

power surge caused a detonation in a reactor in a Soviet nuclear power plant, positioned a little over 90 miles north of Kiev, gargantuan radioactive plumes erupted, carried by winds across the European continent, such that millions of people suffered exposure to toxic materials.[206] Still under Moscow's control, Ukrainians reacted to the disaster with outrage, linking their increasing will for greater autonomy with the belief that in areas of nuclear technology, the Soviet Union had illustrated an abiding unwillingness and inability to be a responsible member of the international community. As Mariana Budjeryn observed, Chernobyl highlighted "the pervasive corruption of the Soviet system: its negligence that led to the explosion and the duplicity with which it handled the aftermath."[207] When Ukraine began its formal struggle for independence, in the years between 1989 and 1990, its general disposition against nuclear technologies became focused on the presence of atomic weapons. In part, this related to the logic articulated by Volodymyr Vasylenko, a Ukrainian politician who prophetically argued that "you cannot have a nuclear force which is not tied to the Russian nuclear force, because of technology and control systems. By being a nuclear power we would not have full independence."[208] Yet the broader, purposeful objection to nuclear weapons on Ukrainian soil emerged in the text of the Declaration of State Sovereignty, passed by the Rada on July 16, 1990. Ivan Drach, an anti-nuclear Member of the body, capitalized on the "post-Chernobyl mood" to gather unanimous support in the chamber for what became Article IX of the Declaration.[209] It averred the newly-independent state "adheres to three non-nuclear principles: not to receive, develop or acquire nuclear

[206] Marta Dyczok, *Movement without Change, Change without Movement*, (Amsterdam: Hardwood Academic Publishers, 2000), 112; Jane Dawson, *Eco-Nationalism: Anti-Nuclear Activism and National Identity in Russia, Lithuania, and Ukraine* (Durham and London: Duke University Press, 1996), 77-79; Andrew Wilson, Ukrainian Nationalism in the 1990s: A Minority Faith (Cambridge: Cambridge University Press, 1997), 22; 149-150.
[207] Mariana Budjeryn, "The Power of the NPT: International Norms and Ukraine's Nuclear Disarmament," *The Nonproliferation Review*, 22:2, 207.
[208] John Lloyd and Chrystia Freeland, "A Painful Birth," *Financial Times*, February 25, 1992, 18.
[209] Budjeryn 2015, 209.

weapons."[210] Support for inheriting treaty obligations toward these ends flowed from this early, principled position.

Ironically, before their prolonged resolve in favor of Ukrainian nuclear disarmament, the United States and the United Kingdom tacitly accepted the USSR's initial opposition to the Rada's first attempt to succeed to the NPT as a nonnuclear state. At the 1990 NPT Review, Kiev's representative to the United Nations, Victor Batiouk, sent formal diplomatic correspondence to the conference leadership of the event indicating his government's intention to join as a successor to the treaty document, with the rights and obligations accorded to a "Nonnuclear Weapons State."[211] Still acting under the mantel of the Soviet Union, Moscow objected and successfully dissuaded the other two depository states, the United Kingdom and the United States, to remain neutral in the dispute. Russian opposition sprung from uncertainties about the unstable, decentralizing movements growing from within the regime, which had relied on the subjugation of national entities for so many decades.[212] Caution and ambivalence harbored by western states hardened into an unwillingness to recognize immediate Ukrainian succession when President George H. W. Bush responded to diplomatic notes from Kiev with a statement that United States was "not prepared to treat separate republics as fully-fledged subjects of international law."[213] Yielding to Soviet Premier Mikhail Gorbachev's wishes, he sought to avoid confrontations that might jeopardize the START I, which was then nine years in the making. Fears captured by U.S. Secretary of State James Baker's remark that the USSR could turn into a "Yugoslavia with nukes,"[214] were answered by American vows to prioritize the stability of relations with Russia. President

[210] Verkhovna Rada of the Ukrainian Soviet Socialist Republic, "Declaration of State Sovereignty of Ukraine," Government of Ukraine, 55-XI, July 16, 1990. Available online at: http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=55-12
[211] Budjeryn 2015, 209-210.
[212] William Potter, "The Politics of Nuclear Renunciation: The Cases of Belarus, Kazakhstan, and Ukraine," Henry L. Stimson Center in Washington, D.C., Occasional Paper, April, 1995, 13-14.
[213] Budjeryn 2015, 209.
[214] Keith Bradsher, "Noting Soviet Eclipse, Baker Sees Arms Risks," *New York Times*, December 9, 1991, 3-4.

Bush addressed the Rada shortly after signing START I in 1991, all but denying the possibility of early recognition of the state and its immediate succession to relevant non-proliferation treaties:

> …freedom is not the same as independence. Americans will not support those who seek independence in order to replace a far-off tyranny with a local despotism. They will not aid those who promote a suicidal nationalism based upon ethnic hatred.[215]

This characterization of Ukraine's supposedly premature attempt at statehood and succession underlined deference for Moscow's preferences, embodied in what became known at the time as America's "Russia First" policy. This initial outlook proved a fateful decision on the part of those partners Kiev needed to cooperate with in order to succeed to the treaties that would ultimately rid it of nuclear weapons.

When Ukraine tried once again to succeed to international obligations in this area, acute questions of security significantly complicated the process, requiring lengthy negotiations that lasted into the mid-1990s. The 1991 attempted coup d'état in Moscow, in which hardline Soviet military officials sought to seize power from the civilian leadership of the Russian Federation, served as a catalyst. When the Rada passed the Act of Declaration of Independence, it sought to realize equal, separate status from the Russian Federation. Mariana Budjeryn writes of Kiev's goals: "Ukraine was negotiating its relationship not only with the defunct Soviet center, but also with a fellow aspiring democracy, the Russian Federation."[216] Beginning with the phrase "proceeding from the mortal danger that gripped Ukraine during the coup d'état in the USSR,"[217] the Declaration of Independence was immediately coupled in the same legislative session with the Rada's consequential Resolution

[215] Notoriously referred as "Chicken Kiev" by William Saffire, President George H.W. Bush's speech on August 1, 1991, was officially titled: "Remarks to the Supreme Soviet of the Ukrainian Soviet Socialist Republic," Kiev, Ukraine, USSR.
[216] Budjeryn 2015, 2010.
[217] Verkhovna Rada of Ukraine, "Act of Declaration of Independence of Ukraine," Government of Ukraine, 1427-XII, August 24, 1991. Available online at: http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1427-12

on Military Units, which set up a Ministry of Defense and claimed an expansive nationalization of military assets on Ukrainian territory, comprised in part by the Soviet nuclear complex.[218] Although Ukrainian politicians felt vindicated by the newly-elevated Russian President Boris Yeltsin's statement that breakaway republics were to become "equal among equals,"[219] they were angered by his deviation from this principle with regard to Soviet nuclear arms. This occurred first in subsequent rhetoric,[220] then in unilateral transfers of weapons from Ukraine's territory to Russian military bases without forewarning, let alone the agreement of the new government in Kiev.[221]

Yeltsin's prevarication led Ukrainian deputies in the Rada, like Vyacheslav Chornovil, to respond with legislation that maintained the untrammeled will of the state to denuclearize while asserting a new legal stance that Ukraine was the "rightful heir to all material and technical resources, including nuclear weapons to be destroyed, of the former Soviet Union."[222] After Secretary Baker responded that normalization of U.S.-Ukrainian relations would occur "only when we had received specific assurance…on issues such as nuclear command and control,"[223] a position echoed by UK Prime Minister John Major,[224] the Rada reiterated its will to succeed to non-proliferation treaties despite its new status as a possessor of vestigial Soviet weaponry. On October 24, 1991, the body passed a resolution

[218] Verkhovna Rada of Ukraine, "Resolution on the Military Units in Ukraine," Government of Ukraine, 1434-XII," August 24, 1991. Availbale online at: http://zakon2.rada.gov.ua/laws/show/1431-12; also see Verkhovna Rada of Ukraine, "Law of Ukraine on Enterprises, Institutions and Organizations of Union Subordination on the Territory of Ukraine," Government of Ukraine, 1540-XII, September 10, 1991. Available at: http://zakon3.rada.gov.ua/laws/show/1540-12

[219] Michael Dobbs, "Yeltsin Promises Russia Will Not Dominate Union," *Washington Post*, September 4, 1991, 1; see also "Russian-Ukrainian Communiqué on Bilateral Relations," BBC Summary of World Broadcasts, August 30, 1991, found in Lexis Nexis Academic.

[220] "Yeltsin Offers to Transfer Nukes from the Ukraine to Russia," *Jerusalem Post*, August 29, 1991, 2.

[221] Following President George H.W. Bush's declaration on June 27, 1991, that his government would undertake unilateral redeployment of American nuclear weapons to central storage facilities from overseas bases, to provide public rhetorical cover to the Russian government to do the same thing in the former satellite republics, Ukraine made its objections to ongoing behavior on its territory known. Budjeryn 2015, 211-212.

[222] "Vyacheslav Chornovil on the Nonnuclear Status of Ukraine," *Molod Ukrajiny*, September 12, 1991, 1.

[223] James A. Baker III and Thomas M. DeFrank, *The Politics of Diplomacy: Revolution, War and Peace, 1989–1992*, (New York: G.P. Putman and Sons, 1995), 560.

[224] Ibid., 563

appropriately titled "On the Non-nuclear Status of Ukraine," which restated claims of inherited membership in the NPT, as well as the new government's position on being considered a non-nuclear state as defined by the treaty. Following this document, the Rada passed legislation proposing a multi-phased process of nuclear disarmament as a successor to START I. Proportional reductions in nuclear arms would occur first through the transfer of weapons to nuclear states, followed, second, by stages of dismantlement, whereby Ukraine would destroy remaining weapons and delivery systems with the help of "interested parties though existing multilateral mechanisms in disarmament."[225] Notably, the Russian Federation renewed its opposition to Ukraine's claim of succession in this instance, as Russian Foreign Minister Andrei Kozyrev, remarked "if Ukraine is a nuclear-free state and in the near future becomes a member of the [NPT] as a nuclear-free state, then it is absolutely unclear how it can be a side in the treaty on strategic offensive arms."[226]

Amid these circumstances, many western diplomats began to question the motives behind the seemingly paradoxical Ukrainian claims of nuclear ownership despite avowed treaty succession leading to the renunciation of the relevant weapons. Indeed, a complementary objective had emerged in Kiev. In addition to succession for the sake of support for the integrity of nonproliferation treaties, Ukrainian politicians sought comprehensive security guarantees. Once the founding meetings of the CIS at Almaty and Minsk established a unified nuclear control structure under the Russian-dominated Joint Strategic Command,[227] as well as formal plans to transfer all tactical nuclear weapons by

[225] Verkhovna Rada of Ukraine, "Statement on the Non-nuclear Status of Ukraine" and "Legislative Addenda," Government of Ukraine, 1697-XII, October 24, 1991. Available at: http://zakon2.rada.gov.ua/laws/show/1697-12

[226] "Discrepancy' in Ukraine's Claim Eyed," *Radio Mayak*, Transcript Uploaded Online: FBIS-SOV-92-071, April 12, 1992.

[227] Meeting of the Commonwealth of Independent States, "Agreement On Joint Measures on Nuclear Weapons," Register of the Legal Acts and Other Documents of the Commonwealth of Independent States, Almaty, Kazakhstan, December 21, 1991. Available at: http://cis.minsk.by/reestr/ru/index.html#reestr/view/text?doc=3

1992 and all strategic nuclear weapons by 1994,[228] Ukrainian diplomats began to harbor concerns about the long-term integrity of their new borders. In a resolution regarding the intermediate safekeeping of nuclear weapons in government facilities, the Rada introduced a formal, public request for security guarantees from western states to coincide with denuclarization.[229] Despite this new outlook, Ukraine fully complied with the July, 1992, deadline for the removal of tactical nuclear weapons to Russia.[230] After a U.S. Senate delegation to the CIS, led by Senators Richard Lugar and Sam Nunn, reported shortly afterward on Ukrainian expectations for an answer to the request for security guarantees, President Bush swiftly supplied American recognition of Ukrainian inheritance of START I and the ABM as a "successor…of the [USSR]" when the representatives of concerned parties convened in Portugal in May, 1992, to sign an annex to the former treaty. [231] After the State Department declined to provide separate security guarantees beyond reaffirming assurances promised by the UN Charter and the Helsinki Final Act of the Conference on Security and Cooperation in Europe (CSCE),[232] a deep sense of betrayal welled in political institutions in Kiev. This temporarily dissipated the resolve of policy-makers to renounce immediately strategic nuclear weapons. It also produced factionalized, minority positions on their long-term deterrent use in Ukraine.[233] Worsening Ukrainian-Russian relations added further doubt to the situation, brought on by Moscow's foray into formerly frozen conflicts in the Caucasus

[228] Meeting of the Commonwealth of Independent States, "Agreement between Member-States of the Commonwealth of Independent States on Strategic Forces," Register of the Legal Acts and Other Documents of the Commonwealth of Independent States, Minsk, Belarus, December 30, 1991. Available at: http://cis.minsk.by/reestr/ru/index.html#reestr/view/text?doc=9
[229] Verkhovna Rada of Ukraine, "Resolution On Additional Measures for Ensuring Ukraine's Attainment of Nonnuclear Status," Government of Ukraine, 2264-XII, April 9, 1992. Available at: http://zakon4.rada.gov.ua/laws/show/2264-12
[230] Budjeryn 2015, 215.
[231] "Protocol to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms," Government of the United States of America, Department of State, Lisbon, May 23, 1992. Available at: www.state.gov/documents/organization/27389.pdf
[232] Budjeryn 2015, 216-217.
[233] Verkhovna Rada of Ukraine, "Resolution on the Statement of the Verkhovna Rada of Ukraine on Decisions of the Verkhovny Soviet of Russia on the Issue of Crimea," Government of Ukraine, 2399-XII, June 2, 1992. Available at: http://zakon4.rada.gov.ua/laws/show/2399-12

and Transnistria, truculence over division of the Black Sea Fleet, rhetorical incitement of Crimean separatism combined with the Duma's formal recension of the 1954 Soviet cession of Crimea to Ukraine.[234] These developments both redoubled Ukrainian resolve for security guarantees and highlighted for the west the potential that Kiev's stalling in nuclear transfers could become indefinite.

Refreshed American efforts to assure Ukrainian succession to the NPT eventually prevailed, resulting in multilateral security assurances that left none of the parties satisfied. After President William Clinton recognized the potentially dangerous nadir into which Russian-Ukrainian-American relations had fallen on the question of nuclear disarmament, he sent Secretary of Defense Les Aspen and Ambassador-at-Large Strobe Talbott to Kiev in June, 1993. The delegation restarted negotiations to ensure the second deadline for Ukrainian renunciation of strategic weapons would be met the following year.[235] Despite this diplomatic initiative, ambiguities in Ukraine's commitment to the Minsk framework lingered, resurfacing when the CIS's Joint Strategic Command crumbled in 1993, with its head, Marshal Shaposhnikov taking a new post in the Russian Federation's Security Council. The Rada responded to his claims that all former Soviet nuclear weapons had officially fallen under the control of the Russian Ministry of Defense with a resolution regarding the country's independent foreign policy which stated that "as a result of historical events, Ukraine became the owner of nuclear weapons."[236] Infuriated by this and earlier similar

[234] John Lepingwell, "Negotiations over Nuclear Weapons: The Past as Prologue?," RFLRE Research Report 3, 4, 1994, 6; John Lepingwell, "Ukraine, Russia, and Nuclear Weapons: A Chronology," RFLRE Research Report 3, 4, 1994, 8-9.
[235] Sidney D. Drell and James E. Goodby, *The Gravest Danger: Nuclear Weapons*, (Hoover Institution Press, 2003), 78-80
[236] Verkhovna Rada of Ukraine, "Resolution on the Main Principles of the Foreign Policy of Ukraine," Government of Ukraine, 3360-XII, July 2, 1993. Available at: http://zakon2.rada.gov.ua/laws/show/3360-12

assertions,[237] the Duma supplied a legislative retort declaring that the Crimean city of Sevastopol had been and always would be a Russian city.[238]

These signals of faltering American diplomatic progress amid Russian belligerence and Kiev's hints at coming noncompliance eventually led to the to a sweeping new memorandum on security assurances that sought to reiterate past commitments to Ukrainian territorial integrity. On December 5, 1994, under the auspices of the Commission on Security and Cooperation in Europe, heads of government of the United States, Russia, the United Kingdom, Belarus, Kazakhstan, and Ukraine signed an agreement to the effect that the sovereignty of the former Soviet republics would not be infringed upon in the future. With this proclamation, succession of Ukraine to the NPT was considered complete, and the government moved ahead with the requirements to become an official nonnuclear state. France and China followed suit by issuing unilateral, weaker statements of support for this arrangement. Despite their acceptance of the Budapest Memorandum on Security Assurances, Ukrainian politicians remained deeply skeptical and unsatisfied by the outcomes of their efforts to sustain the integrity of their nascent state despite willingly giving up the most powerful means to do so. With devastatingly prescient foresight, Ukraine's first president, Leonid Makarovych Kravchuk, responded to his country's prospects under the memorandum by admitting that "if tomorrow Russia goes into the Crimea no one will even raise an eyebrow."[239]

Amid the ironies of Ukrainian nuclear disarmament in the 1990s, it is important to recall the bases for the new country's coupling of purposeful treaty succession with security

[237] Yuri Dubinin, "Ukraine's Nuclear Ambitions: Reminiscences of the Past," *Russia in Global Affairs*, April 13, 2004.
[238] Verkhovny Sovyet of the Russian Federation, "Resolution on the Status of the City of Sevastopol," Reproduced by the Government of the Russian Federation, July 9, 1993. Available online at: http://pravo.gov.ru/proxy/ips/?docbody=&nd=102024769&intelsearch=%D1%E5%E2%E0%F1%F2%EE%EF%EE%EB%FF+5359+1993>.
[239] "Kiev Scorns NPT Exchange Deal," *Moscow Times*, December 8, 1994.

guarantees. Ukraine's persistent, long-term will to inherit international obligations, even those which weakened its defenses illustrates the profound influence of its purposes to uphold regional and international order. Other more cynical, self-interested courses of action were certainly available. Rather than accepting the existing legal framework for the management of risks associated with nuclear weaponry, Ukrainian politicians who harbored grave doubts about Russian respect for their independence could have repudiated the NPT, START I, and ABM. Instead, they accepted them as acts of custodianship to the web of treaty relations into which they chose to situate themselves rather than to question or reject. The security guarantees which emerged as a central part of their decision-making process during the succession of crucial documents in this area must be understood in this context. They were in fact complementary goals which sought the same central purpose that succession did in the first place. Instead of serving a narrow calculous of self-interest, Ukraine's only partially successful attempt to receive assurances of its borders illustrates a commitment beyond merely succeeding to treaties but to the central importance of these instruments to the conduct of international affairs. In the 1990s, the system which existing legal relations sought to support, one shaped by respect for the sovereignty of nascent states, was captured the Budapest Memorandum's remedy for cases in which its terms were breached. That the Russian Federation refused to join its partners in Paris on March 5, 2014, to "consult in the event a situation arises which raises a question concerning these commitments"[240] demonstrated not only its contravention of the terms of the memorandum, but also its repudiation of the signification which Ukraine had ascribed to treaty documents in the 1990s through succession.

[240] Verkhovna Rada of Ukraine, "Law of Ukraine on Succession to the Treaty on Nonproliferation of Nuclear Weapons of July 1, 1968," Government of Ukraine, 248/94-VR, November 16, 1994; see also Pifer, 2011, 32.

PART III

CONCLUSIONS

Investigation of de jure and de facto treaty succession from 1968 to 1995 supports three broader conclusions regarding the behavior of states during the period. First, although the process of codification in the 1970s emphasized rights for new states to consent to and renounce existing obligations, their actual decisions regarding the inheritance of international obligations diverged significantly from the principles of the 1978 Vienna Convention. Second, the evaluation of a contextualized case study in this chapter provides evidence of the emergence of a telic behavior, referred to here as custodianship, in which the sustenance of legal relations became a means of maintaining regional and global order. Finally, evidence evaluated in this chapter partially confirms Craven's characterization of the behavior of states emerging during and after the dissolution of the Soviet Union, while introducing doubts about his overarching thesis which will be noted now and explored further in subsequent chapters.

As in the last chapter, the comparison of de jure and de facto treaty succession undertaken here elucidates differences between the principles articulated by international lawyers in the period and the actual conduct of new states during their significant multiplication in the 1990s. Understanding divergences between dominant prescriptions and subsequent practice requires more than setting a straightforward reading of the 1978 Vienna Convention against the facts of succession as they unfolded during and after the dissolution of the USSR. In part, this relates to the enormous ambiguities that the codification created with regard to the two categories of states which it accorded separate rights. So-called "newly independent" states, known by the drafters to be the post-colonial states of their day, were provided with sweeping rights to throw off treaty obligations signed during the course of their colonial dependence. The treaty also envisioned an enormous, concomitant responsibility of informing the international community of which particular treaties they consented to inherit.

In addition, the 1978 Convention suggested there was another category of new states, which should inherit bilateral treaties while acceding to multilateral obligations. Yet despite the efforts of multiple drafting parties, the codifiers failed to establish means by which to distinguish these states from the former "newly-independent" category. Consequential as this intellectual struggle may have appeared when the ILC brought about codification in the 1970s, the underlying principles and the spirit of the convention on treaty succession became almost entirely irrelevant to states emerging from systemic international change in the 1990s. Two features of the evidence collected and analyzed bear this out. The former satellite republics, the newly-reunified Germany, the constituents of the former Yugoslavia, and several others did not only act differently than had post-colonial states. They also engaged in omnibus inheritance of preexisting treaties, whereas post-colonial states had objected far more often to treaty succession in broad categories and in specific areas. But more importantly, states that gained independence in the 1990s also avoided invoking in the context of succession the imperial attributes that had underpinned their past positions of subjugation to outside powers. This was most clearly evinced among the former Soviet republics, which had good reason to characterize declining supranational authorities in Moscow as imperialistic. Rather than attempting to categorize themselves as "newly-independent" a la the 1978 Convention, the precipitates of the USSR's dissolution instead accepted the vast majority of preexisting legal relations, contracted under the dominion of the Soviet Union. This occurred even after the honeymoon of well-intentioned "transition," when the Russian Federation began to abandon robust, collaborative interaction with the CIS member-states. The 15 new countries that had gained independence did not apply harsh critiques of an emergent imperial Russian mood to their decisions regarding succession. The succession undertaken by the PRC with regard to Hong Kong provides a similar example of the disavowal of the intellectual and legal tensions within the 1978 Vienna Convention.

Previous legal relations were sustained en masse so that the global order into which Hong Kong had become situated would be sustained, regardless of whether these realities emerged as a result of colonial legacies.

Scrutiny of state behavior in aggregate as well as through the particularities of Ukraine's case illustrate the emergence of a telic behavior which favored nearly universal succession to treaties as a requisite component of maintaining regional and global order. With the clear absence of guidance taken from the 1978 Vienna Convention, states instead developed a procedure for the inheritance of treaties which aimed at stability, by ensuring the continuance of existing international legal relations. This phenomenon appears in both the major and lesser-known instances of succession, which provide context for the case study, as well as in the study itself. Understanding this behavior requires recognition of the avoidance of extraordinary turbulence in international affairs in the 1990s. The international community weathered the collapse of a bi-polar world order. Two superpowers had dominated global politics for nearly four and half decades, suppressing many ethnic conflicts from surfacing among would-be independent nations and ranging the interests of aligned states along divides defined by ideological differences. The dramatic change from this status quo could have unleashed enormous chaos and strife. Maintaining global and regional order emerged as a paramount goal, not just among those governments which survived the USSR, but also for their newly-sovereign peers. Treaty succession became a means of achieving this goal for newly independent states. Rather than seeking to adhere to or alter international legal interpretations, states engaged in purposeful action to continue the nexus of legal relations which they inherited after they gained independence. By accepting previous treaty relations, they sought to abet a stable system in which respect for international law and the rights of independent states would be respected. Examples emerging from the former Yugoslavia present particularly compelling evidence of the primacy of sustaining global order among

new subjects of international law in the period. After the region suffered an extended conflict resulting in the creation of new states, Serbia's neighbors and major powers did not allow the former aggressor to reap the benefits of the status that would have been conferred to it as a continuer of the SFRY, while eventually allowing it to succeed to treaties.

Lastly, the evidence collected and analyzed in this chapter provides for partial confirmation of the arguments of Matthew Craven regarding the behavior of new subjects of international law in the 1990s. Within his "decolonization thesis," he makes a series of claims about the period under examination in this chapter. First, his broadest claim that universal succession appeared to inhere in the practice of states is confirmed by the simplest reading of the evidence. He argues with regard to treaty succession:

> There was no…anxiety as to the imperial orientation of Soviet rule, no sense that international law in a broader sense needed to be reshaped in light of what had happened. Even where there might have been certain obvious parallels with what had happened during decolonization, there appears to have been an intuitive resistance to recognizing their existence.[241]

Embedded in this observation is the alternative paradigm to which he alludes. This approach requires that states inherit the vast majority of international obligations, the model previously advocated for by writers like O'Connell. Despite the intervening period of decolonization, when states departed entirely from this approach, universal succession, as a pattern of behavior rather than a dominant legal understanding, appeared to become a common feature of the decisions made by states confronted by questions of treaty succession in the 1990s. In this broad sense, his conclusions regarding this period are confirmed. Yet Craven's characterization of the shift in state practice does not cohere with the data collected in two subtle ways. First, he suggests repeatedly that this approach to succession was conceived as "practical," "pragmatic," and based on "problem solving" motives borne by the partners of

[241] Craven 2009, 256.

successors, as well as the new states themselves.[242] The analysis of states' actual decisions in Part II of this chapter illustrates that this depiction misses the enormous, often self-consciously disadvantageous risks undertaken by new subjects of the international law that emerged in the 1990s. At the smallest, most detailed level, the acceptance of states like the new Czech and Slovak Republics of retroactive application of human rights treaties to which they succeeded illustrates a pattern of behavior that amounts to more than immediately-applicable rationalizations for the inheritance of treaties. Instead, they chose maximalist interpretations of compliance required by succession, opening complicated political, economic, and legal problems for the sake of maintaining the nexus of legal relations which they aspired to uphold. In the realm of wider global politics, the decision by Ukraine to succeed to the cluster of nonproliferation treaties leading to its denuclearization similarly stands as a harbinger of purposeful action beyond answering utilitarian considerations or satisfying mere convenience. In this specific instance, the sustained process of succession required an obvious forfeiture of deterrence, even as Ukrainian-Russian relations began to decline rapidly, and long-term strategic ramifications became clear. This renunciation of nuclear arms through means of succession demonstrates that purposes were ascribed to succession unto itself, driven by the successors themselves. To a lesser degree, the Ukrainian case, in concert with others consulted to provide context, illustrates the extent to which it was the heirs to treaties that drove the outcomes of the 1990s, not their would-be treaty partners. Although some European states fashioned the inheritance of international obligations into an intermediate step in the normalization of relations with their new eastern neighbors, these formalities came after the facts of succession began to emerge. The Bush administration's "Russia first" policy similarly encumbered the actions of post-Soviet states, later leading the

[242] Ibid., 257

United States to catch up to the will of former Soviet entities in their desires to succeed to treaties.

Chapter 5

Legal Antagonism and Emergent Synthesis: the Present Fate of Preexisting Treaties (1996-2014)

"The dominant backward-looking orientation of the international law of State succession in respect of treaties and its heavy decolonization heritage…not only led to the creation of a regime that exhausted itself before its entry into force but also generated space of inconclusiveness that is very symptomatic of the whole regime of State succession…"[1]

~Jean d'Aspremont

"You have a kind of integration. Of course, Kosovo needs and wants to be a member of the international society, and so you have the acceptance of Yugoslav- and UN-signed treaties from the very start. But, more importantly, you have the rejection of existing treaties signed by Serbia. The second part is the case because showing self-determination separate from Serbia meant renouncing its unique treaties. This is why Kosovo's position is more like a post-imperial state when it comes to treaty succession; but at the same time it wants to uphold most treaties."[2]

~Gjyla Celiku, Vice President, American Academy for University Studies and Leadership, Pristina, Kosovo, Official Translator of Albanian Encyclopedia of Diplomatic Affairs and International Law

Introduction

As the last empirical section of this dissertation, this chapter will provide an account of the dominant trends in de jure thought on treaty succession from 1996 to 2014. In Part II, a contextualized case study from the same period will be examined, first surveying state practice in general and then evaluating Kosovo's inheritance of international obligations. Unlike in previous chapters, debates among international lawyers and jurists did not produce a new paradigm to address the manifold, perennial questions of treaty succession which emerged intermittently after the birth of new states. Instead, many scholars put forward

[1] Jean d'Aspremont, "Decolonization and the International Law of Succession: Between Regime Exhaustion and Paradigmatic Inconclusiveness," *Chinese Journal of International Law*, 12.2, 2013, 335.

[2] Interview with Gjyla Celiku, Ambassador Hotel and the Premises of the American Academy for University Studies and Leadership, Pristina, Kosovo, December 2, 2015. Dr. Celiku advises both the Kosovar and Albanian governments on matters pertaining to treaty law.

critiques of the 1978 Vienna Convention in light of the practice of post-Soviet states in the early- and mid-1990s. Others proposed a contentious model for the automatic succession of human rights treaties in cases of newly-independent states. All in all, contradictory arguments and discordant analytical positions defined this period which made little progress in clarifying legal conceptions of treaty succession.

Despite the stalling progress of legal frameworks to prescribe the inheritance of international obligations, nascent states continued to innovate outside the law in their decisions to accept or renounce preexisting treaties. An examination of state practice from the period illustrates the intentional amalgamation of the codes of conduct enacted by states in the two earlier periods examined in this study. On the one hand, states complied with a general principle of continuity in many situations, which they justified by citing the need to maintain international legal order. On the other hand, these same new subjects of international law also identified categories of preexisting treaties which they were unwilling to accept because doing so would contradict notions about their rights to self-determination. This synthetic approach to the fate of inherited obligations was embodied by Kosovo's Declaration of Independence, which specifically invokes its measured practice of treaty succession. The concept of fusing notions of self-determination to the sustenance of regional and global order was extended by the International Court of Justice's advisory opinion on Kosovo's independence, which was tethered closely to the state's decisions regarding its inheritance of international obligations.

PART I:
PARADIGMATIC AMBIVALENCE AND LEGAL ANTAGONISM

From 1996 to 2014, international lawyers and jurists accomplished little to advance the cause of clarifying legal rules for treaty succession. As the subtitle to Jean d'Aspremont's article engaging with Matthew Craven's principal arguments suggests, discussion of de jure understandings of the inheritance of international obligations during this period lay "between regime exhaustion and paradigmatic inconclusiveness."[3] Amid this atmosphere of torpor and contradictory positions regarding treaty succession, two notable trends emerged. First, spurred by the practice of post-Soviet states, international lawyers began the process of registering ambivalence toward the 1978 Convention, suggesting it represented an inaccurate codification of customary international law. Second, drawing on the experience of states in the former Yugoslavia, jurists and theorists debated propositions regarding the possibility of automatic succession applying in a special category of human rights treaties.

Several distinct features differentiate the period analyzed in this chapter from those in the preceding two chapters. In the earlier intervals of time discussed in this thesis, international lawyers responded with sustained efforts to distill customary law or to codify legal principles during and after episodes of wide-spread practice governing the inheritance of international obligations. In contrast, between 1996 and 2014, a similar, comprehensive attempt did not transpire. Few attempted to account systematically for the divergence between the precepts of the 1978 Convention and the practice of states after the fall of the USSR. That predicament did not provoke widespread, organized efforts to propose sweeping theoretical or juridical positions on the future of treaty succession for several reasons. In part, this may be ascribed to the understandable paralysis combined with stigma which appeared to shroud the topic, given the repeated contradictions between de jure thought and the practice

[3] Jean d'Aspremont, 2013, 321.

of states in the twentieth century. After all, by the time the 1978 Vienna Convention came into force in 1996, international lawyers attempting to discern enduring legal principles with regard to treaty succession had to contend with two distinct repudiations of the work of their predecessors. Qualified universal succession had been contradicted en masse by post-colonial states. Afterward, aspects of the clean-slate, which had been painstakingly codified in the 1978 Convention, had been effectively rejected by post-Soviet states. By 1996, it might have appeared a fool's errand to attempt to square the circles of the tumultuous, half-century-long prologue to the period under analysis here.

Yet there were also more mundane causes that prompted inattention to comprehensive challenges posed by treaty succession. First, in the wake of the 9/11 terrorist attacks, international legal experts answered calls to answer urgent questions about non-state actors and the international legal quandaries posed by American military interventions, stemming from the conduct of the so-called "war on terrorism."[4] Second, as has been noted throughout this thesis, consequential debates on treaty succession usually coincide with large-scale multiplications of new states, a characteristic largely absent from this most recent period of analysis. Although a small number of new states did emerge from 1996 to 2012, they were far fewer in number than those created by decolonization and the dissolution of the USSR. Their attainment of independence was also not strung together by a narrative of sweeping change in the international system. As a result, the topic of treaty succession appeared less significant to the international legal community than it had during and directly after earlier proliferations of new states. These perceptions by international lawyers did not, however, remove the impetus of new states to prioritize their conduct of treaty succession. As Part II of this chapter will

[4] See Fatima Ayub and Sari Kouvo, "Righting the course? Humanitarian intervention, the war on terror and the future of Afghanistan," *International Affairs*, 84.4, 2008, 641-657; and Mark Neocleous, "The police of civilization: the war on terror as civilizing offensive," *International Political Sociology*, 5.2, 2011, 144-159.

show, these most recent subjects of international law acted with careful consideration of what had come before, finding opportunities for synthesis where theorists saw only contradiction.

Finally, it is important to note that the expanse of time from 1996 to 2014 begins with a transition in the law of succession: the entry into force of the 1978 Vienna Convention. When the treaty attained the necessary fifteenth ratification in 1996, 18 years had passed since it opened for signature and accession. During this period, its text had stood as a clear statement of principles, bearing the imprimatur of the International Law Commission and the implied support of the UN General Assembly. While it represented the product of over a decade of work in legal scholarship which had aspired to lay to rest difficult questions, it did not have the force of a binding document. Oddly, the several last states to provide the necessary spate of accessions for its entry into force were those born in the early 1990s that appeared to contradict the spirit of the document, not to mention the specific rules it proposed. Among them were Bosnia and Herzegovina, Croatia, Slovakia, and Slovenia.[5] Despite gaining this greater degree of credibility, acceptance of the treaty has remained limited. Only five states have acceded to it since the document's entry into force. This transition nonetheless represents the sustenance of the treaty. [6] International Lawyers thus set about the work of trying to address its implications for the future.

Uncertainty and the 1978 Convention

The aftermath of the practice of states in the early- to mid-1990s found credence in the work of forward-looking international lawyers. They attempted to explain how the 1978 Convention could be partially salvaged. They had to contend with the obvious wide-spread evidence of its recent non-application to the situation in the 1990s. In many ways, the

[5] Matthew Craven, *The Decolonization of International Law*, (Oxford: Oxford University Press, 2009), 12.
[6] Since the 1978 Vienna Convention entered into force, only Liberia, Montenegro, Ecuador, the Czech Republic, and Cyprus have acceded to it.

discussion of state succession that transpired after 1996 followed on Paul Williams's prescient but tentative observation in 1994, that "the Convention does not reflect customary international law but rather embodies a number of customary legal rules useful for the determination of treaty continuity."[7] The distinction between the value of codification in full from its simple, if sometimes ambiguous and contradictory rules, began to gain currency as a way of understanding the document. Scholars addressing specific cases of treaty succession shortly after their conclusion, like Roda Mushkat's appraisal of Hong Kong's inheritance of international obligations, often put forward more strident claims. He argued the document could be considered as "expressing established customary norms or articulating laws grounded in consistent State practice, judicial precedent or juristic opinion."[8] Tai-Heng Cheng, a specialist in the succession of commercial obligations, went further, suggesting that codification in general might be suspect, "in light of the lack of uniform state practice and opinio juris, any positivistic rule of state succession is likely to be so broad or vague that it can be easily reinterpreted and manipulated by participants in state succession..."[9] This line of argument lingered, reaching beyond matters of political and economic treaties which are the central focus of this study. Perhaps unwittingly, in 2011, Robert D. Sloane echoed Sir Humphrey Waldock's denial of enduring institutions of succession which the Special Rapporteur had articulated as he set out to codify treaty succession. Sloane argued that "in the realm of custom, State practice as to what may broadly be denominated 'succession issues' is

[7] Paul, R. Williams, "Treaty Obligations of the Successor States of the Former Soviet Union, Yogoslavia, and Czechoslovakia: Do They Continue in Force." *Denver Journal of International Law & Policy, 23, 8, 1994, 1*.
[8] Roda Mushkat, "Hong Kong and Succession of Treaties" *International* & Comparative *Law Quarterly*, 46, 1997, 181. It is also worth noting that a similar appraisal had reemerged in 1987, in the Third Restatement of Foreign Relations Law. See Reporters Notes that, "the Convention has not been ratified by the United States and, while purporting to be a codification of pre-existing customary law, it is not in all respects in accord with the understanding and the practice of the United States and of some other states." Restatement of the Law Third,. "Foreign Relations Law of the United States," 1987, 96.
[9] Tai-Heng Cheng, *State succession and commercial obligations*, (New York: Transnational Publishers, 2006), 23; see also Tai-Heng Cheng, "State Succession and Commercial Obligations: Lessons from Kosovo," in *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, Mahnoush H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane, and Siegfried Wiessner, eds., (Hague: Martinjus Nijhoff, 2011), 675, 682.

so diverse as to render efforts to discern customary rules artificial or futile."[10] In the face of the entry into force of the 1978 Vienna Convention, these advocates for its only partial application pointed out repeatedly its relatively low number of accessions, linking this fate with the convention's contradiction in state practice. For example, Tai-Heng Cheng pointed out that the convention had never "acquired the status of customary law through widespread acceptance of its provisions, which states would have indicated by acceding to the convention."[11] These measured misgivings did not purport to overtake all arguments in favor of the resonance and reliability of certain aspects of the attempt at codification.

In another category altogether were the arguments advanced by scholars who suggested that, in the broad sweep of twentieth century treaty succession, the 1978 Vienna Convention had been revealed as a failed attempt at codification, worthy of abandonment. This school of thought, which took the important step of emphasizing the longue durée, centered on the work of Matthew Craven. Because much of the study is dedicated to reexamining his principal claims, they are not reevaluated at length here. But his work became a milestone for other scholars. They used it to measure the advancement of complementary arguments, situated in Craven's conceptualization of the resumption of universal succession in the 1990s. The most innovative example came in the form of Jean d'Aspremont's arguments looking beyond the conclusions put forward in *The Decolonization of International Law*. Focusing on Article 16 of the Convention, he accepted Craven's account, that the convention was "a regime devised at a very emotional time…in order to tackle a heavy political question of heritage from the era of dependency…but which…was a stillborn mechanism."[12] For d'Aspremont, however, these deductions about the codification

[10] Robert D. Sloane, "The Policies of State Succession: harmonizing Self-Determination and Global Order in the Twenty-First Century," *Fordham International Law Journal,* 30, 2007, 1288-1289.
[11] Tai-Heng Cheng, "Why New States Accept Old Obligations?*," University of Illinois Law Review,* 1, 12, 2011, 44.
[12] D'Aspremont, 2013, 334.

and what came afterward were not cause to set aside the 1978 Convention as a useless artifact. Admitting for example, that "this rather cynical…account should certainly not be interpreted as meaning that the codification process pertaining to the law of succession with respect of treaties must be seen as a vain exercise."[13] Instead, he concluded, "the 1978 Convention, and Article 16 in particular, will always remain a unique showcase for the anxieties of a bygone era."[14] D'Aspremont argued that the patterns of law and politics in the inheritance of international obligations were "very symptomatic of the dynamics of the whole conventional succession regime," in which "a rebellion" had taken place "against the conceptual bricks with which the international law of succession had been thought and conceptualized, i.e. in a way alien to the politics of identity."[15] From this premise, which purported to establish clear evidence for the impossibility of a formal regime of succession, d'Aspremont added another argument. He suggested that the will of international lawyers to standardize and police the birth—as well as the death—of states rested on an "illusion."[16] "Rules estranged from the identity struggles unfolding in succession crisis" would and could never be sustained, he concluded.[17] These arguments about "identity," both in legal and political terms, returned to the same analytical difficulties that had proved so complicated for figures like Daniel O'Connell and Waldock. D'Aspremont did not recommend solutions to the indeterminacies illuminated by previous scholars who critiqued legal proposals based on emphases on legal identity. Nonetheless, his accomplishment was to demonstrate the potential for a more robust legacy for the 1978 Vienna Convention. Even if it had been abandoned in practice, it could bear a significance for analyses of historical change in the inheritance of preexisting obligations by states.

[13] Ibid.
[14] Ibid.
[15] Ibid., 335.
[16] Ibid., 337
[17] Ibid., 323.

A Focus on Humanitarian Treaties

Separate from the general discussion of the credibility of the 1978 Vienna Convention, a major controversy surfaced regarding the inheritance of human rights treaties. Emerging from a particularly complex case before the International Court of Justice (ICJ), which spanned 14 years, the matter's origin lay in competing positions by two Balkan states about their succession to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. This prompted an International Court of Justice decision rife with claims and counter-claims made by the Judges about the nature of continuity of human rights obligations in general. Combined with an analysis of the behavior of post-Soviet states, the argumentation spurred by this case led some international lawyers to assert that customary law had favored "automatic succession" to human rights treaties. This position quickly drew the ire of critics, and it remains a point of debate in the law of succession.

A brief reprise of the circumstances of the case that provided the foundation for this wider dispute elucidates the integral connections between it and the fate of the 1978 Vienna Convention. In March, 1993, a nascent Bosnia-Herzegovina appealed to the ICJ to issue a ruling on whether Serbia-Montenegro, then the self-professed Federal Republic of Yugoslavia (FRY), had failed to comply with the 1948 Genocide Convention by inciting and assisting genocide against Bosnian populations from 1992 to 1993, amid the violent dissolution of the former Yugoslavia.[18] For several intervening reasons, the ICJ did not issue an opinion until 14 years after the proceedings were initiated. It ultimately held that while Serbia had violated the Genocide Convention by not averting genocide from taking place, it had not been directly involved in and thus was not fully culpable for the acts of genocide which occurred.[19] Obvious causes for delay were brought on by complications related to

[18] "Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide," International Court of Justice, Judgment Report 3.32, 26 February, 2007.
[19] Ibid. See specifically paragraphs 384 through 450.

evidence collection, the eventual separation of Montenegro from Serbia, as well as the sequencing of contiguous proceedings initiated by Croatia[20] and the intervention by NATO in 1999.[21] Yet it was early objections tied to the prima facie jurisdiction of the ICJ in the case that proved particularly intractable.[22] These disputes were tied to treaty succession, a dimension of the proceedings that would prompt unceasing uncertainties throughout the adjudication. First, the FRY claimed that the Court lacked jurisdiction because Bosnia-Herzegovina was not a party to the Genocide Convention, at either the time of the alleged genocidal acts or afterward.[23] When the FRY had become Serbia-Montenegro, it then argued to the ICJ that it had not previously been a party to the Genocide Convention, asserting that as successor states, the governments could not be held to the standard of automatic succession to the treaties undertaken by the Socialist Federal Republic of Yugoslavia. Obviously this argument lay in tension with the FRY's (and what became Serbia-Montenegro's) sustained, simultaneous claim to be the continuator of the SFRY.[24] It would

[20] "Application of the Convention on the Prevention and Punishment of the Crime of Genocide," Case Concerning Croatia versus Serbia and Montenegro, International Court of Justice, Judgment Report 1.77, 2 July, 1999.

[21] "Legality of the Use of Force," Case Concerning, Serbia and Montenegro versus Belgium, Section on Preliminary Objections, International Court of Justice, Judgment Report, 2004, 279.

[22] Although the ICJ dealt with the initial, complicated series of claims made by the FRY, which became Serbia and Montenegro, in 1996, its establishment of prima facie jurisdiction was complicated by the country's entry to the UN General Assembly as a member in 2000. Serbia and Montenegro demanded that the same issues be reevaluated due to this "new fact." Although the Court denied the appeal in 2003, it did raise once again the issues of treaty succession which Serbia and Montenegro brought to the proceedings from the outset. See "Opinion on the Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide," See sections detailing Preliminary Objections Concerning Bosnia and Herzegovina versus Yugoslavia, and Preliminary Objections Concerning Yugoslavia versus Bosnia and Herzegovina), Judgment Report 1.72, 2003, 7.

[23] See "Application of the Convention on the Prevention and Punishment of the Crime of Genocide," Judgment on Preliminary Objections, Judgment Report 1.22, 1996, 595, 604-609.

The FRY specifically disputed the legal adequacy of Bosnia and Herzegovina's accession to membership to the European Convention of Human Rights, which had taken place in April, 1992, as well as the "notification of succession" it had submitted eight months later regarding the 1948 Genocide Convention. Serbia furthermore made the convincing claim that there existed no provision in general international law that "gives Bosnia-Herzegovina the right to proclaim unilaterally that it is now a party to the Genocide Convention merely because the former Socialist Federal Republic of Yugoslavia was a party to the Convention." See the supporting materials submitted by Serbia and Montenegro in the case concerning the "Application of the Convention on the Prevention and Punishment of the Crime of Genocide," International Court of Justice, Report 2.22, 1996, 3.

[24] See "Application for Revision of the Judgment of 11th July 1996," International Court of Justice, 2003, 12.

Another strategic, legal tac undertaken by Serbia was to formally accede to the 1948 Genocide Convention in 2001, after it had gained UN membership in 2000. This approach, which it claimed was in line with the expectations set out by the General Assembly and the country's neighbors after its failed attempt to

have been hard to imagine the ICJ ruling the Genocide Convention could not have applied to unfolding events like the 1995 massacre in Srebrenica—arguably it was written to "prevent and punish" genocide during such conflicts like that which severed Bosnia and Herzegovina from the former Yugoslavia.[25] Nonetheless, early on in the proceedings, it became clear that the concerned states' status as parties to the convention would be essential for the ICJ to rule that it applied, as the Judges would not presume to suggest that the treaty of 1948 had become part of customary international law.[26] Succession therefore became vital. With regard to the FRY's first claim, that the Genocide Convention did not apply to Bosnia-Herzegovina, the ICJ did not take a definitive stance. Although it held that Bosnia-Herzegovina "could become a party to the Convention through the mechanism of State succession,"[27] it did not assess whether this had actually taken place. Invocation of Articles 17 or 34 of the 1978 Vienna Convention could have provided ground for the claim that Bosnia-Herzegovina had succeeded.[28] The Court dealt with the second question, whether the FRY was a party to the Convention by citing its proclamation of 27 April, 1992:

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claim successor status to the SFRY, implied that the Convention had not applied before the accession, and thus should not be considered applicable in relevant proceedings before the ICJ.

[25] "Reservations to the Genocide Convention," Advisory Opinion, International Court of Justice, Judgment Report 15, 1951; "General Comment by the Human Rights Committee," UN Human Rights Committee, UN Document E/CN.4/80, 1995; "Ireland versus the United Kingdom," European Court of Human Rights, Series 1, Number 25, 90, See Section 239, 1978. Also see Max van der Stoel, Address, "Preventing Ethnic Conflicts: Lessons and Prospects," 6 November, 2000, *Peace and Stability through Human and Minority Rights*, 50, 224; Max van der Stoel, Address, "Human Dimension Commitments Are Matters of Direct and Legitimate Concern to All Participating States," 28 September, 1993, 49; Oscar Schachter and O. Kimminich, "International Law in Theory and Practice," *Archiv des Völkerrechts*, 34, 4, 1996, 489-491;

[26] In order to establish jurisdiction, the ICJ accepted the implied basis of membership preceding adjudication of disputes which appears in Article IX of the 1948 Genocide Convention, which reads: "*disputes between Contracting Parties relating to the interpretation*, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. [emphasis added]"

[27] See specifically paragraphs 20 and 24 of the 1996 ICJ Opinion cited above.

[28] As discussed in Chapter 4, Article 34 of the 1978 Vienna Convention on Succession of States in Respect of Treaties provides for a general principle of succession applying to multilateral agreements. Section one reads: "when a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist…(a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed." Alternatively, as previously discussed as well, Article 17 could have been invoked, though with greater controversy due to the convention's prohibition on unilateral declarations, to suggest Bosnia and Herzegovina had invoked its right to succeed as a "newly independent state." This earlier Article provides: "a newly

> the Federal Republic of Yugoslavia, continuing the State, international and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all commitments that the Socialist Federal Republic of Yugoslavia assumed internationally in the past.[29]

Yet the question presented renewed difficulties when Serbia-Montenegro entered the UN as a new member, and subsequently acceded to the 1948 Genocide Convention so as to suggest it had not previously applied through succession.[30]

However, the ICJ resolved these questions of succession to treaties by essentially side-stepping the issue. Unprecedentedly, it recognized the applicability of the Genocide Convention as well as its jurisdiction in the case by asseting that the international obligations in question could not be read as temporally restricted, implying that the ICJ could apply them retroactively.[31] Dissenting Judges supported Bosnia and Herzegovina's claim that a principle of automatic succession applied to humanitarian treaties. For example, Judge Christopher Gregory Weeramantry argued:

> Without automatic succession to such a Convention, we would have a situation where the worldwide system of human rights protections continually generates gaps in the most vital part of its framework, which open up and close, depending on the break up of the old political authorities and the emergence of the new.[32]

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independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates."

[29] Shabtai Rosenne, "Automatic treaty succession," in *Essays on the Law of Treaties*, R. Lefeber and J. Klabbers ed., (Hague: Martinus Nijhoff Publishers,1998), 610. The FRY's insistence that it would inherit international obligations undertaken by the SFRY was first stated in its Official Note from its Mission in the United Nations to the Secretary General. See "Official Note from the Yugoslav Mission," United Nations, New York, Office of the UN Secretary General, UN Document S/23877, 27 April, 1992.

[30] Craven, 2009, 12.

[31] The ICJ observed: "the [1948] Genocide Convention…does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction ratione temporis, and nor did the Parties themselves make any reservation to that end." It concluded that "the Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia-Herzegovina." See "Application of the Convention on the Prevention and Punishment of the Crime of Genocide," International Court of Justice, Report 2.22, 1996, 617.

[32] Separate Opinion issued by Judge Christopher Gregory Weeramantry, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide," Bosnia and Herzegovina versus Serbia and Montenegro, Judgment on the Preliminary Objections, Report 2.22, 1996, 595. See also pages 646-655.

Judge Mohamed Shahabuddeen further elaborated this idea, stating the advantages of the ICJ holding that succession had occurred. He reiterated that this approach would circumvent any precedent for hiatuses between independence and accession that new states could claim to evade protections of vulnerable populations provided by humanitarian conventions.[33]

After the ICJ's opinion was finally rendered in 2007, selective readings of it began to reaffirm conclusions that international lawyers had begun to make in the wake of practice by post-Soviet states. Succession to international human rights and humanitarian treaties, these authors argued, had become "automatic." The scholar regularly credited for this idea, Menno Kamminga, argued in 1996 that:

> State practice in the 1990s strongly supports the view that obligations arising from a human rights treaty are not affected by a succession of States. This applies to all obligations undertaken by the predecessor State, including any reservations, declarations and derogations made by it. The continuity of these obligations occurs ipso jure. The successor State is under no obligation to issue confirmations to anyone.[34]

This conclusion, which was in tension with the 1978 Vienna Convention, but also the practice of certain post-colonial states, percolated among the academic communities interested in succession. It also found consonance in the jurisprudence of the dissenting members of the ICJ. As a result, Akbar Rasulov noted, "a regime of automatic succession" began to be depicted as applying to humanitarian treaties. He further asserted that the belief in this institution "was taken up by many in the academic community," who coined the term the "Kamminga Model" to encapsulate the combination of doctrine and jurisprudence that was emerging.[35] Some international bodies, such as the UN Human Rights Committee, concurred.

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[33] Judge Mohamed Shahabuddeen, Separate Opinion issued by Judge Mohamed Shahabuddeen, "Application of the Convention on the Prevention and Punishment of the Crime of Genocide," Bosnia and Herzegovina versus Serbia and Montenegro, Judgment on the Preliminary Objections, Report 2.22, 1996, 635.

[34] Menno Kamminga, "State Succession in Respect of Human Rights Treaties." *European Journal of International Law*, 7, 1996, 482.

[35] Brigitte Stern, "Rapport préliminarie sur la succession d'états en matière des traités," International Law Association, Helsinki Conference, 1996; Brigitte Stern, *La Succession D'états*, (The Hague: M. Nijhoff, 2000), 140-145; Rein Mullerson, "New Developments in the Former USSR and Yugoslavia," *Virginia Journal of International Law*, 33, 1992; Malcolm Shaw, "State Succession Revisited," *Finish Yearbook of International Law*, 5, 1994.

They issued statements in support of this specialized mechanism for inheritance applying to the body of obligations known as the "Geneva Law"—the several conventions and protocols bearing the city's name.[36] Most of the proponents of this doctrinal approach lauded it as a step forward for human rights law. That the web of international legal obligations sustaining these normative frameworks would be maintained, regardless of changes in sovereignty, suggested a new security that vulnerable populations and their advocates could operate upon.

Contesting Automatic Succession

Scholars and international lawyers skeptical of this account put forward two principal counter-arguments. The first did not question the fundamental claims of the Kamminga Model, that the practice of the 1990s might provide support for a strong assumption that human rights treaties are sustained amid the emergence of new states. They even accepted normative premises that this ought to be. Nonetheless, they argued that, for the sake of avoiding overstatement of the case for this phenomenon, caution should be exercised. Because the mechanism had no solid basis in earlier rules of customary international law, suppositions about the fate of relevant obligations should be confined to "de facto continuity." Scholars such as Stefan Oeter and Robert Jennings had become incredulous about the formalities of treaty succession, and cast wary eyes upon the collective behavior in this regard which had occurred in the 1990s. In case this interlude of practice was merely a product of new states engaging treaty relations that were more form than function, perhaps to demonstrate their capacity for statehood, the "automatic" aspect of this behavior should be

[36] United Nations Human Rights Committee, General Comment Number 26, UN Document a/53/40, Section 4, 1997.

carefully construed. Uniformities in the procedure of succession should not be wielded as evidence that succession itself was no longer necessary for a certain class of treaties.[37]

Another group of interlocutors rejected Kamminga's baseline conclusions and the model deriving from his observations. Their critiques centered on two claims regarding what they saw as the flawed bases for positing the emergence of a regime of automatic succession. First, the evidence of the 1990s was reexamine. Authors like Akbar Rusolav questioned Kamminga's empirical footing, arguing that "state practice of the 1990s invalidates [his] conclusions about the succession patterns of human rights treaties."[38] After reviewing the body of decisions involved in the acceptance of human rights treaties en masse by newly-independent countries after the fall of the Soviet Union, he pointed out that only one case suggested the "succession to a humanitarian treaty could occur *regardless of its will*. [emphasis added]"[39] He found that despite nearly universal succession to human rights documents by post-Soviet states, they still preferred and considered essential the act of succession, with the attendant procedures taking place.[40] Others skeptical of the empirical basis for automatic succession pointed out that many international organizations continued to require succession through formal processes. This suggested that claims of ipso jure succession must remain suspect for the time-being.[41] Another line of argumentation against the emergence of a regime of automatic succession came not by scrutinizing the details of the practice consulted by Kamminga, but by pointing out its limited scope. Kamminga's original

[37] See the discussion of the evidence put forward by Professor Stefan Oeter in Martti Koskenniemi, "The Present State of Research," in Pierre Michel Eisemann and Martti Koskenniemi, *State Succession: Codification Tested Against the Facts*, (The Hague: M. Nijhoff, 2000). Robert Jennings also discusses this issue in the first volume of in his *Collected Writings* (1998), 114-115.
[38] Akbar Rasulov, "Revisiting State Succession to Humanitarian Treaties: Is there a Case for Automaticity?" *European Journal of International Law*, 14, 1, 2003, 167.
[39] Ibid.
[40] Ibid., 166-170.
[41] Donna Gomien, David John Harris, and Leo Zwaak, *Law and practice of the European Convention on Human Rights and the European social charter*, Council of Europe, 1996; Mark Eugen Villiger, *Customary international law and treaties: a study of their interactions and interrelations, with special consideration of the 1969 Vienna Convention on the Law of Treaties*, Second Edition, (Boston: Brill, 1997), 128-131.

scholarly inquiry focused primarily on the experience of states in Eastern and Central Europe.[42] Positing a regime of automatic succession would require more than its accordance with a set of state practice which might represent merely a regional, temporary modification in customary international law.[43] Furthermore, scholars like Martti Koskenniemi averted that states often qualified their succession to international legal obligations, making it far more complicated to draw out a simple presumption of continuity.[44] During succession, provisos were readily inserted into the process, like the one used in the Alma-Ata Declaration: the obligations would remain continuous so long as they did not compromise the distinct constitutions of each new state, nor violate provisions upholding domestic legal order.[45]

Second, at the conceptual level, some international lawyers suggested that the history of the expansion of human rights treaties and their predecessor documents required a fundamental reevaluation of their broadening influence, specifically with regard to the theory of "acquired rights." It is perhaps fitting that, after recounting the story of legal thought on treaty succession in the twentieth century, the reader must become reacquainted with the guiding framework advanced by Daniel Patrick O'Connell. Precisely where that past conversation comes full circle, in the present, those originally prominent ideas started to emerge once again into the limelight.[46] Yet in this context, O'Connell's ideas were not wielded for the purposes he championed, namely supporting the adherence by states to universal succession. Instead, when consulting examples like the German Settlers Case, resolved by the Permanent Court of International Justice in 1923, scholars began to analogize

[42] Kamminga, 1996.
[43] Anthony A D'Amato, *International law: process and prospect*, (New York: Transnational Publishers Incorporated, 1995).
[44] Martti Koskenniemi, "The Present State of Research," 2000, 100.
[45] "The Alma-Ata Declaration," International Legal Materials, 31, 1992, 149-150. Available online at: https://www.asil.org/resources/international-legal-materials.
[46] Rasulov, 2003, 150, 165, 168. For example, Akbar Rasulov cites, among other classic texts in the pre-1978 discourse on treaty succession, Daniel Patrick O'Connell's Volume I of *State Succession in Municipal Law and International Law* (1967) as well his *The Law of State Succession* (1956). See also Carsten Stahn, "The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia." *The American Journal of International Law*, 96.2, 2002, 379-397.

the preservation of property rights attained by individuals to the sustenance international humanitarian obligations. Succession was a necessary act because it represented and reaffirmed this continuity. Just as acquired rights to land and goods could not be revoked because of changes in sovereignty, so might human rights treaties be sustained through the expectation of succession in times of changes in political authority over specific territories.[47] This acquisitional logic was taken still further, when scholars favoring the necessity of intentional procedures of inheritance of human rights treaties went so far as to invoke Ottoman capitulations. The rights of religious minorities under the rule of the Sublime Porte were protected despite changes in the sovereignty of the external guarantors. These intrusive, imperialistic instruments, it was argued, might be illustrative of the role of overt succession in sustaining contemporary human rights treaties.[48]

The debate resulting from the focus on human rights treaties produced a similar ambivalence about the fate of one category of treaties that had emerged at the macroscopic level with regard to the 1978 Vienna Convention. Rather that establishing new rules or dominant trends in de jure thought on treaty succession, the discourse among international lawyers remained steadfastly in the realm of unresolved dispute. That O'Connell's ideas were once again circulated to discuss the fate of human rights treaties illustrates that the previous, chronologically-examined struggle over the correct paradigm to apply, stalled during this period.

[47] Milenko Kreca, "Towards a New Perception of Succession of States in Respect of Multilateral Treaties." *Annals of the Faculty of Law in Belgrade Education*, 2013, 5.
[48] Talia Einhorn, "Israel-Sources of State Practice in International Law," *Sources of State Practice in International Law*, (Boston: Brill, 2014), 283-308; George K. Walker, "Principles for Collective Humanitarian Intervention to Succor Other Countries' Imperiled Indigenous Nationals." *American University International Law* Review, 18, 2002, 35.

PART II:
CONTEXT AND CASE STUDY 3: PRACTICE AS SYNTHESIS OF TELIC BEHAVIORS

Examining de facto succession in the discreet period from 1996 to 2014, both in aggregate and through a case study, entails two challenges that were significantly less problematic in the preceding investigations of this dimension of treaty succession in the twentieth century. Most importantly, the provision of context involves fewer examples of newly independent states emerging at the time of the case study. Arguably, there are only seven instances in which questions of treaty succession were significant enough to be addressed here.[49] In addition, given the relatively short duration of time that has elapsed since new states in this period gained independence and the year 2014, where this analysis ends, there are fewer records to consult. This can be partially accounted for by the obvious fact that there has been less time for treaty succession to take its course. In some cases, few official sources of data have emerged to confirm the conduct of the inheritance of international obligations, or to put verbal commitments on paper. These caveats to the data gathered and analyzed below should be borne in mind.

Case Study Context: Making the Most of Precedent

The evaluation of context in the conduct of treaty succession between 1996 and 2014 illustrates the coincidence of two purposeful behaviors on the part of states. New states accepting inherited obligations often did so while invoking the will to be a part of and to uphold regional and global order. Yet often simultaneously, several of the states examined in renounced preexisting treaties in order to act upon notions of self-determination, occasionally by citing legacies of colonial dependency. In this sense, the context in Part II of this chapter

[49] These are: East Timor, Afghanistan, Montenegro, Serbia, Iraq, South Sudan, and Kosovo.

is more integrally-linked to the corollary case study than the same pattern of analysis in previous chapters. The processes involved are more complex and require deeper evaluations in order to fully understand them. Because the states that gained independence between 1996 and 2014 were not clustered in regional groups, the examples addressed here appear in roughly chronological order.

In presenting the context surrounding the case study, it is possible to address several unorthodox instances of state practice pertaining to treaty succession. For example, certain scholars have suggested that American interventions in Afghanistan and Iraq, beginning in 2001 and 2003 respectively, have raised significant questions in this area.[50] In reality, only one significant point of protest was raised by the actual exercise of succession by Afghanistan. In the east of the country, a century-old dispute over its border with Pakistan resurfaced, relating to the renunciation of an international obligation. Outside powers urged Afghanistan to resolve the issue. Significant concerns regarding the security of that particular boundary were expressed by the International Security Assistance Force (ISAF).[51] A public controversy emerged after President Hamid Karzai alluded to the colonial heritage of the so-called Durand Line, named after the British diplomat Sir Mortimer Durand, who established the demarcation in 1893 to arbitrate disagreements between two princely imperial vassals in the region. Karzai accurately maintained that this geography had become part of the terrain associated with foreign intrigue when the Russian and British Empires jockeyed to expand their spheres of influence.[52] In part, he claimed, these legacies influenced Afghanistan's post-

[50] George Walker claims in his survey of international legal questions raised by the war in Iraq that "treaty succession principles have again become important as new States have emerged," Yet he does not reach the specifics of Iraq's practice of treaty succession, and so it is difficult to ascertain whether these are purely theoretical. See George K. Walker, "Occupation in Iraq: Issues on the Periphery and for the Future: A Rubik's Cube Problem." *International Legal Studies*, US Naval War College, 86, 2010, 219.
[51] Frederic Grare, "Pakistan-Afghanistan relations in the post-9/11 era," Carnegie Paper 72, Washington, DC: Carnegie Endowment for International Peace, October, 2006.
[52] William Kerr Fraser-Tytler, *Afghanistan: A study of political developments in Central Asia and Southern Asia*, (London: Oxford University Press, 1953), 44-46.

invasion government to maintain its disputes regarding the Durand Line.[53] As in the past, Afghanistan maintained that the partition of British India in 1947 led to the cancellation of the treaty, because succession was not undertaken by parties at the time.[54] In factual and legal terms, this position contradicts rational interpretation of the status of the agreement.[55] Nonetheless, this decision has played a part in disallowing the implementation of security measures in Pushtunistan, resulting in armed clashes between Pakistani and Afghan forces, increased drone strikes conducted by outside powers, as well as the advent of a 1,100-kilometer trench fortified by Pakistan along the Balochistani sections of the Durand Line.[56] The border remains somewhat disputed, in part because of the Afghan government's trenchant unwillingness to accept the sustenance of relevant preexisting treaty relations.

East Timor provides a clearer contemporary example of a new state avoiding succession to certain international obligations. Having suffered a long history of violent repression orchestrated by the Republic of Indonesia, which had annexed the territory in 1976,[57] the island nation voted in 1999 in a popular referendum supported by the UN to split from the western half of Timor. After a severe campaign of violence by pro-Indonesian forces in the province, an international peacekeeping force was deployed, led by Australia. After several months, authority over East Timor was handed over to the UN Transitional Administration in East Timor.[58] In May, 2002, with the return of over 200,000 refugees, the

[53] Council on Foreign Relations, Transcript of interview between President Hamid Karzai and Fareed Zakaria, New York, United States, 21 September, 2006.
[54] Rahman Pazhwak, "An article on Pakhtunistan: A new state in Central Asia," (London: Royal Afghan Embassy, 1960), Reprinted by the International Institute for Strategic Studies (2010).
[55] For a clear repudiation of these claims, see Ahmad Shayeq Qassem, "Afghanistan–Pakistan relations: border controversies as counter-terrorist impediments," *Australian Journal of International Affairs*, 61.1, 2007, 65-80. Also see Bijan Omrani and Frank Ledwidge, "Rethinking the Durand Line," *The Royal United Services Institute Journal*, 154, 5, 2009.
[56] Qaiser Butt, "1,100km trench built alongside Pak-Afghan border in Balochistan," *The Express Tribune*, Pakistan Edition, June 20, 2016. Available online at: http://tribune.com.pk/story/1126353/1100km-trench-built-alongside-pak-afghan-border-balochistan/
[57] "The United Nations and East Timor - A Chronology," The United Nations, Online Resources, the United Nations Transitional Administration in East Timor, accessed August 6, 2016. Available online at: http://www.un.org/en/peacekeeping/missions/past/etimor/Untaetchrono.html
[58] Ibid.

country's independence was formally declared, followed quickly by its accession to UN membership.[59] The government of East Timor accepted the implementation of a general principle of legal continuity. As Jean d'Aspremont notes "[the clean-slate paradigm of the 1978 Vienna Convention] was not even invoked when the time came to solve the legal issues arising out of the succession to treaties concluded by the United Nations administering the territory of East-Timor in the process of exercising its right to self-determination."[60] Yet an examination of the records of those multilateral treaties for which the UN Secretary-General's Office serves as a depository indicates that accession, rather than succession, became Dili's chief means to fulfill this commitment.[61] One important preexisting obligation was renounced and renegotiated outright: the "Treaty between Australia and the Republic of Indonesia on the zone of cooperation in an area between the Indonesian province of East Timor and Northern Australia." This document had been negotiated to allow coordinated exploitation of petroleum in sections of seabed claimed by both signatories.[62] Rather than accept a series of amendments to this treaty, the independent government of East Timor demanded the creation of a new agreement, resulting in the Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea.[63] The progress of this negotiation illustrated East Timor's unwillingness to accept certain interstate obligations undertaken on its behalf by Indonesia. Instead it sought economic stability through the pursuit of its own international legal agenda.

[59] "East Timor: More than 1,000 refugees return since beginning of month," *ReliefWeb*, 10 May, 2002.
[60] D'Aspremont, 2013, 333.
[61] See online archive of United Nations Human Rights, Office of the High Commissioner, "Ratification Status for Timor-Leste," accessed June 23, 2016. Available online at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=174&Lang=EN
[62] Samuel de Sousa, "Denunciation of CMATS Treaty by Timor-Leste and future of the Timor Gap Cooperation Zone," Executive Director at Correia de Sousa Investment Group, De Sousa Investment Group, May 26, 2015
[63] John Braithwaite and Hilary Charlesworth, and Adérito Soares, "Networked governance of freedom and tyranny: peace in Timor-Leste," *ANU Press*, 2012; Laura Grenfell, "Legal pluralism and the rule of law in Timor Leste," *Leiden Journal of International Law*, 19.02, 2006, 305-337.

Perhaps the most important contextual example of treaty succession which occurred in the period under analysis is Montenegro, as it borders the state which serves as a case study. Montenegro exhibited both of the codes of conduct illustrated by earlier newly-independent states. Its fourteen-year separate union with Serbia, from 1992 to 2006, came to an end with a referendum. When it forged a new constitution with Serbia in 1992, this document included Montenegro in the status of continuator of the Socialist Federal Republic of Yugoslavia.[64] The 2002 constitutional reorganization of the Federal Republic of Yugoslavia produced the framework for the "State Union of Serbia and Montenegro," providing the latter with the right to secede after three years, [65] as well as significant decision-making power in foreign affairs.[66] Following the fulfilment of referendum criteria recommended by the EU,[67] the Montenegrin National Assembly officially passed a Declaration of Independence.[68] In less than a month, it was recognized by several states, including Serbia, and joined the UN.[69] Anticipating this prospect, the former union's constitution required the seceding state to become a new subject of international law, while the other state would retain the legal personality of Serbia-Montenegro.[70] After the secession occurred, Serbia's National Assembly passed a resolution declaring its government the

[64] Declaration on the Formation of the Federal Republic of Yugoslavia, Joint Session of the National Assemblies of the Federal Republic of Yugoslavia, accessed through UN online Archive, U.N. Document S/2387, 27 April, 1992.
[65] Agreement on Principles of Relations Between Serbia and Montenegro within the Framework of a Union of States, Joint Session of the National Assemblies of the Federal Republic of Yugoslavia, Belgrade, 14 March, 2002.
[66] Constitution of the State Union of Serbia and Montenegro, Joint Session of the National Assemblies of the Federal Republic of Yugoslavia, Belgrade, 14 March, 2002. See Article 2, Article 14, Article 15.
[67] Stefan Oeter, "The Dismemberment of Yugoslavia: An Update on Bosnia and Herzegovina, Kosovo and Montenegro", *German Yearbook of International Law*, 50, 2007, 518; Jure Vidmar, "Montenegro's Path to Independence: A Study of Self-Determination, Statehood and Recognition," *Hanse Law Review*, 3, 1, 2007.
[68] Act on Declaring of Independence of the Republic of Montenegro, National Assembly of the Republic of Montenegro, Government of Montenegro, Podgerica, 3 June, 2006.
[69] Admission of the Republic of Montenegro to membership in the United Nations, UN General Assembly Resolution, Plenary Session of the 60th Session of the General Assembly, UN Document A/Res/60/264, 28 June, 2006. Available online at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/264
[70] Constitution of the State Union of Serbia and Montenegro, Joint Session of the National Assemblies of the Federal Republic of Yugoslavia, Belgrade, 14 March, 2002. See Article 60 Section 1 and 60 Section 5.

"successor state,"[71] and immediately conveyed a letter to the UN Secretary-General to this effect.[72] Montenegro only accepted this position in part. In its first series of decisions regarding treaty succession, the newly-sovereign government in Podgorica requested the ICJ no longer consider it a respondent in the case concerning genocide discussed at length above. On the grounds that it had not succeeded to the 1948 Genocide Convention, Montenegro claimed it could not still be considered a party in the case,[73] a position rejected by Bosnia and Herzegovina.[74] Only in its final judgement did the ICJ broach the issue, accepting Montenegro's temporary renunciation of its treaty obligations, which demonstrated its separate status from the former union.[75] The Court further ruled that "the Republic of Montenegro does not continue the legal personality of Serbia and Montenegro; it cannot therefore have acquired, on that basis, the status of Respondent..."[76]

Outside of the consequences surrounding this case, however, the new country engaged consistently in certain forms of bilateral and multilateral treaty succession. In its Declaration of Independence, the National Assembly undertook that "the Republic of Montenegro shall accept and adopt all international contracts and treaties that were concluded and ratified by the State Union of Serbia and Montenegro…in accordance with its legal order."[77] As Patrick Dumberry and Daniel Turp noted, this provision left some ambiguity in that "it does not indicate its willingness to 'succeed' to these treaties, but rather its decision to

[71] Resolution on Obligations of Public Authorities of the Republic of Serbia in Assuming Powers of the Republic of Serbia as Successor State to the State Union of Serbia and Montenegro, National Assembly of the Republic of Serbia, Government of Serbia, June 5, 2006.
[72] Letter Concerning Succession of the Former States Union of Serbia Montenegro, President of the Republic of Serbia to the UN Secretary-General, UN Document S/33/AD204, 3 June, 2006.
[73] "Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide," International Court of Justice, Judgment Report 3.32, 26 February, 2007. See Paragraphs 70, 72, and 73.
[74] Ibid., Paragraph 71.
[75] Ibid., Paragraph 75.
[76] Ibid., Paragraph 76.
[77] Act on Declaring of Independence of the Republic of Montenegro, National Assembly of the Republic of Montenegro, Government of Montenegro, Podgerica, 3 June, 2006. See Article 3.

'adhere' to these treaties."[78] They note, nonetheless, that Montenegro has more or less performed this commitment through accession and occasionally through succession.[79] It has done so in accordance with the purpose identified in its initial commitment to sustaining bilateral legal ties: "[on] the basis of principles of international law, accepting the rights and obligations stemming from existing arrangements and shall continue with active policy [sic] of good-neighbourly relations and regional cooperation.[80]

With regard to multilateral treaties, its position has been clearer and has been followed with more precise legal action. The Declaration of Independence held not only that the newly-independent country would pursue membership within multilateral organizations, but also that it "shall accept and adhere to the rights and obligations that arise from existing arrangements."[81] After a lengthy process of compiling and evaluating treaty documents, by a method which continues to this day,[82] Montenegro's Ministry of Foreign Affairs filed a notice with the UN Secretary-General that in the area of multilateral obligations, the new state had "decided to succeed to the treaties to which the State Union of Serbia and

[78] Patrick Dumberry and Daniel Turp, "State Succession with respect to Treaties in the Context of Secession: From the Principle of Tabula Rasa to the Emergence of a Presumption of Continuity of Treaties," *Baltic Yearbook of International Law*, 2013, 25.
[79] Ibid., 26-27.
[80] Act on Declaring of Independence of the Republic of Montenegro, National Assembly of the Republic of Montenegro, Government of Montenegro, Podgerica, 3 June, 2006. See Article 3.
[81] Ibid.
[82] The Ministry of Foreign Affairs of Montenegro has produced several documents pertaining to its accession and succession to international treaties. It asserts on its wesbsite that "…the Ministry of Foreign Affairs of Montenegro undertook activities to determine the manner of taking over international multilateral conventions, agreements and protocols, which the State Union of Serbia and Montenegro accessed, and which Montenegro has interest to access. In the first phase, the Ministry of Foreign Affairs commenced the procedure for accessing to relevant multilateral documents…[then]…in the second phase the procedure for accessing to relevant multilateral conventions deposited with the UN Secretary General was initiated, which contracting party or signor also was the State Union of Serbia and Montenegro i.e. FRY. In the third phase the procedure was initiated for accessing to multilateral conventions which depositories are individual countries." This information remains posted, and lists of documents Montenegro has succeeded and acceded to are available online at: http://www.mvpei.gov.me/en/search/163416/A-A-Pejovic-Montenegro-has-crossed-a-considerable-chunk-of-its-European-journey.html

Montenegro was a party or signatory."[83] The Council of Europe[84] and UNESCO soon received similar correspondence.[85]

The practice of South Sudan constitutes the last significant contextual example of treaty succession emerging from the birth of a new state in the period under analysis. The travails of this nascent state did not end with the establishment of its government in Juba in 2011, following a referendum. It remains exceptionally difficult to establish precisely which treaties it has succeeded to and which commitments to do so remain unfulfilled due to the civil war which broke out in the country in 2013.[86] Nonetheless, a set of documents issued by the government illustrate the framework which South Sudan has begun to construct in order to accept and renounce preexisting international obligations. Prior to gaining UN membership, the would-be government of South Sudan authored a "Handbook" with the assistance of the Public International Law and Policy Group, a non-governmental organization based in Washington, DC. With careful reference to the vocabulary of the 1978 Vienna Convention, this document, published in 2009, indicated that "the Republic of Sudan [the rump state to the north] will be considered the 'continuing state' and Southern Sudan will be considered a newly independent or 'successor state.'"[87] The use of the term "newly independent state" unequivocally invoked the first category of nascent states created by the 1978 Convention, subtly suggesting that South Sudan was in a similar position to

[83] Letter of Reservations and Declarations, Minister of Foreign Affairs of the Republic of Montenegro to the UN Secretary-General, Labeled: Multilateral Treaties Deposited with the Secretary-General, 10 October, 2006. Available online at: http://www.bayefsky.com/pdf/montenegro_t2_cat.pdf. Also viewed in the UN Online Library, available in incomplete form in the "Historical Information" Section of the archive of Multilateral Treaties Deposited with the Secretary-General: http://treaties.un.org/pages/HistoricalInfo.aspx

[84] Accession of the Republic of Montenegro to the Council of Europe, Opinion from the Committee of Ministers, Parliamentary Assembly, Council of Europe Document 10968, 22 June, 2006. Available online at: http://www.coe.int/en/

[85] Notification de succession par le Monténégro, Minister of Foreign Affairs of the Republic of Montenegro, Government du Monténégro, Lettre Informé le Directeur General, UNESCO, 26 April, 2007. Available online at: http://portal.unesco.org/fr/ev.php-URL_ID=38670&URL_DO=DO_TOPIC&URL_SECTION=201.html

[86] "South Sudan profile – Timeline," *BBC*, 2 August, 2016. Available online: http://www.bbc.com/news/world-africa-14019202

[87] "Southern [sic] Sudan: A Guide to Critical Post-2011 Issues – A Handbook," Government of Southern Sudan**,** Office of the President Ministry of Presidential Affairs, in Conjunction with the Public International Law and Policy Group, 2009, 52.

postcolonial states. Laying down principles for South Sudan's inheritance of international obligations, the Handbook reads:

> An examination of international legal principles demonstrates that a successor state…has the option of choosing which treaties signed by the predecessor/continuing state (the Republic of Sudan) it would like to uphold. However, based on recent state practice, the international community would likely expect an independent Southern Sudan [sic] to continue the Republic of Sudan's treaty obligations.[88]

Here the handbook captured the tension between South Sudan's representation of itself, its intentions regarding the inheritance of international obligations, and the responsibilities it ascribed to it by the international community. It cited the latter as a means of illustrating its willingness to accept preexisting treaties. Yet South Sudan's limited expression of self-determination through treaty succession was expressed by the confined number of causes for renunciation identified by the government-in-waiting: "exceptions to this presumption of continuity occur when: (1) both parties agree otherwise, (2) the treaty is not relevant to the new state's territory, or (3) continuity would frustrate the treaty's object and purpose."[89] South Sudan has thus far followed the plans to uphold these positions which were articulated in the Handbook.[90] It has furthermore accepted borders created before it gained independence, despite considerable political dissent. For example, South Sudan inherited the Comprehensive Peace Agreement Between the Government of the Republic of Sudan and the

[88] Ibid., 52-53.
[89] Ibid., 54.
[90] The Handbook recommended that South Sudan examine all specific treaties that fall under the categories for acceptance and renunciation cited earlier in the text (pages 61-65). Then it recommended that it notify other states of its "intentions to abide by the terms of the predecessor State's treaty obligations as part of the process of achieving international recognition and establishing diplomatic relations." The execution of these plans is also explained in Duncan B. Hollis, *The Oxford guide to treaties*, (Oxford: Oxford University Press, 2012), 398. See footnote 19.

As a result, when discussing this procedure in the context of bilateral trade agreements, Justin A. Fraterman argues "…a Cooperation Agreement, as well as a series of supplementary agreements concerning a number of subject matters…were also concluded between the north and the south. Because the secession of South Sudan was mediated by the CPA and the supplementary agreements, many of the succession-related ambiguities that have been…at least in theory, been formally resolved." Justin A. Fraterman, "Secession, State Succession and International Arbitration," *State Succession and International Arbitration*, March *7*, 2013, 8.

People's Liberation Movement/Sudan People's Liberation Army.[91] It has faced difficulty fulfilling these objectives due to the constraints imposed by the ongoing conflict there.

Kosovo as Periodized Case Study

Examining Kosovo's inheritance of international obligations in greater depth allows for process tracing that will center on the specific diplomatic relations which led to the acceptance and renunciation of preceding legal relations. Because this chapter pertains to a period which is not examined by Craven, the secondary purposes served by the previous case studies, to test his explanation for differences between de facto and de jure treaty succession in the twentieth century, are less relevant to this inquiry. Nonetheless, to the extent that Craven makes limited claims about the future based on his analysis of historical instances of treaty succession, the following case study remains salient to the critique of his "decolonization thesis" advanced in this dissertation. Published in 2009, his arguments could not have taken into account several developments discussed in this section. But if his overarching claims were to hold, the relevance of the practice of post-colonial states would be marginal in Kosovo's case, which should bear little resemblance to that first period in the twentieth century in which treaty succession took place among a large number of newly-independent states.

Research for the case study in this chapter has also proceeded differently than it has for those in the preceding chapters. Investigation on-the-ground in Kosovo took place between October, 2015, and July, 2016. Interviews with current and former government officials informed much of the analysis in the case study, marking a significant departure from the largely document-based analyses in the preceding chapters. This shift in the kind of

[91] Fraterman, 2013, 9-10.

evidence evaluated in part reflects the fact that the developments covered in this section belong to a time not long past. Kosovo's independence remains a contested change not only in the Balkans, but also within Europe, and in the wider world, where many states continue to refuse recognition or deny the country's right to exist.[92] The government of Kosovo's decisions regarding the inheritance of international obligations often touch on sensitive issues of bilateral and increasingly multilateral relations. As a result, the state maintains mounting concerns about avoiding public declarations or publishing relevant documents that might jeopardize its sometimes precarious position at the intersection of regional and global politics. Although oral testimony has been collected and analyzed here in the absence of historical documents, the claims of interviewees have been crossed checked where possible.

It is also important to note the limitations of the state's records. The apparent disarray of Kosovo's National Archives serves as a prime example. Requests for access from this researcher were repeatedly left unanswered. The institution's aid-funded compound remains largely inaccessible, and when this researcher approached the front door after a car accident brought down a section of the perimeter fence, no directions were given to request document review despite a face-to-face request, interpreted in Albanian, with someone who appeared to be employed there.[93] In early January, 2016, a fire was observed on the top floor of the eastern-most building on the compound. Despite the archive's position across from the

[92] The list of countries and political entities that have chosen not to recognize Kosovo remains significant, compared to other new states. It includes members of the EU as well as a significant majority of states in the Eastern Balkans. In alphabetical order, these are: Abkhazia, Africa, Algeria, Angola, Argentina, Armenia, Azerbaijan, Bahamas, Bangladesh, Barbados, Belarus, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Cambodia, Cameroon, Cape Verde, Chile, China, Cuba, Cyprus, Democratic Republic of the Congo, Ecuador, Eritrea, Ethiopia, Georgia, Greece, Grenadines, Guatemala, Equatorial Guinea, the Holy See, India, Indonesia, Iran, Iraq, Israel, Jamaica, Kazakhstan, Kenya, Kyrgyzstan, Sri Lanka, Laos, Lebanon, Madagascar, Mali, Mauritius, Mexico, Moldova, Mongolia, Morocco, Mozambique, Myanmar, Nagorno-Karabakh, Namibia, Nepal, Nicaragua, Nigeria, Northern Ossetia, Palestine, Paraguay, the Philippines, Romania, Russia, Rwanda, Sahrawi, Seychelles, Singapore, Slovakia, Somaliland, Spain, South Sudan, Suriname, Syria, Tajikistan, Trinidad and Tobago, Tomé, Transnistria, Tunisia, Turkmenistan, Uganda, Ukraine, Uruguay, Uzbekistan, Venezuela, Vietnam, St. Vincent, Zambia, and Zimbabwe.

[93] "Meeting with Staff at the Kosovo National Archive," The National Archives of Kosovo, Pristina, Kosovo, Brief Interview Conducted on February 15, 2016.

European Union Rule of Law Mission in Kosovo, which is guarded around the clock by security forces within sight of the flames and smoke, the incendiary episode continued for nearly three hours before emergency responders arrived. The records of Kosovo's Ministry of Trade and Industry, to which this researcher was given special access, remain, for the most part, unsorted and without any system for filing or cataloguing that precedes the year 2014. In the orderly files that do exist, much of the relevant, formal bilateral correspondence with other states conducted by the Ministry were confirmed to have been omitted or discarded.[94]

Finally, before undertaking the forgoing evaluation of the case, the preference of this author to adhere to orthodox academic sources, rather than relying on WikiLeaks documents, should be addressed upfront. The primary reason why citations of WikiLeaks materials do not appear in this manuscript, is because their supposed revelations about Kosovo's independence simply do not pertain specifically to treaty succession, the subject of this dissertation. The negotiation of interstate minutia, and the lengthy bartering for support of the Ahtisaari Plan among European governments unrelated to the fate of inherited treaties is certainly an interesting area. Yet it bears little relevance to the subjects at hand. Numerous searches were undertaken to seek out any relevant materials to treaty succession in the caches of released documents and none were noteworthy enough to be included.

In addition, at the risk of sounding pedantic, it is worthwhile to state this author's additional reasons for eschewing WikiLeaks materials. First, they are of questionable value in an academic study of this kind. Although the veracity of these documents has not been questioned by governments, namely the United States, they also have never been confirmed to be accurate. Unlike carefully curated archival materials, it is much more likely that some

[94] From December through March, 2016, this researcher would occasionally evaluate and have translated materials available in the files of the Ministry of Trade and Industry, and some very limited materials held by the Kosovo Investment and Enterprise Support Agency, which is an organ of the Ministry. Headquarters Address: Ministry of Trade and Industry, Government of the Republic of Kosovo, Muharrem Fejza str. n.n., Lagja Spitalit,10000 Prishtinë, Republic of Kosovo.

WikiLeaks documents may be counterfeits or contain intentionally masked falsehoods. The role of the organization in the 2016 U.S. Presidential Election underscores the likelihood of ulterior motives in the orchestration of supposedly leaked materials. In many cases, collections of documents also constitute a representation of the agenda of a specific leaker, who has selected certain documents, while editing out the history contained in others. In the operation of foreign policy surrounding Kosovo, which was and remains an enormously controversial topic within and outside the U.S. government, such intentions could have colored the release of available, pilfered documents. Lastly, these technical reasons for avoiding citation of the WikiLeaks materials do not even begin to touch on the unresolved ethical quandaries regarding WikiLeaks materials that universities have begun to consider. The use of stolen materials remains a dubious proposition.

Prelude to Succession Behavior

Evidence collected in this case study illustrates an amalgamation of notions of self-determination and custodianship in decisions regarding treaty succession. In part, this behavior aimed at synthesizing past forms of practice on the part of newly-independent states grew out of Kosovo's uniquely complicated origin, as a state born out of domination, ethnic cleansing, and international intervention, geographically positioned to aspire to projects of European integration. Understanding this historical position of the state is a prerequisite to deciphering the pattern in its inheritance of international obligations, which might otherwise appear to be executed on ad hoc or incoherent bases.

Kosovo's relationship to Serbia remains the most salient feature of the historical developments leading up to its independence. In the disputed history of ongoing territorial disagreements in the Balkans, it is worth noting that the borders of what is known today as

the Republic of Kosovo were roughly drawn within the Socialist Federal Republic of Yugoslavia in 1946, when it was first recognized as an administrative unit of the constituent Socialist Republic of Serbia, itself part of a larger Yugoslavian polity.[95] Like the dynamics leading to territorial separation elsewhere in the region in the 1990s, the smallest western Balkan state's struggle for self-determination has roots in the 1980s. Although inter-ethnic tensions flared in the region throughout the twentieth century, they became particularly intense with the reversal of the decentralization of authority which occurred in Yugoslavia in the 1960s. After this process culminated with the 1974 Constitution, authorities in the States Councils of Yugoslavia began to roll back the provisions for autonomy in certain provinces, like Kosovo. Its special status as the Socialist Autonomous Province within Yugoslavia's complex system of governance coincided with demographic changes and fluctuations in nationalist sentiments which pitted a majority of ethnic Albanians, most of whom were Sunni Muslims, against other ethnic and religious groups, especially ethnic Serb Orthodox Christians. Throughout the 1980s, the government in Belgrade began to answer claims of oppression made by Serbs residing in Kosovo.[96] These trends reached their first crescendo when on June 28, 1989, President Slobodan Milošević addressed a crowd of co-ethnics in Gazimestan, supposedly to commemorate the sixth centennial anniversary of the Battle of Kosovo, while also sounding a dog whistle to Serbs throughout the Balkans of a change in Belgrade's priorities. Shortly afterward, he began a campaign of fear and political pressure to achieve his two primary goals for governing Kosovo. At the time, the President of Serbia sought to persuade central Yugoslav authorities to lessen Kosovo's autonomy, while reshaping local institutions to engage in economic, political, and cultural oppression of ethnic

[95] Miranda Vickers, Between Serb and Albanian: A History of Kosovo (New York: Columbia University Press, 1998), 223-224.
[96] Noel Malcolm, Kosovo: A Short History (New York: New York University Press, 1998), 195-196.

Albanians.[97] Underlying this change was systematic revocation of previous political concessions to Albanian leaders in the region. Measures included banning the Albanian language in public primary and secondary schools. Kosovar Albanians who lived through the period commonly characterize these policies as constituting a form of "apartheid."[98]

In response, a long-standing, non-violent movement for independence began among Kosovar Albanians in the 1990s, led by Ibrahim Rugova, who would eventually become the first president of the country. Although an initial attempt to attain sovereignty occurred in 1992, it failed to gain recognition by any other state than Albania. The question of Kosovo's independence was left largely unanswered by the international agreements which ended major conflicts elsewhere in the Balkans.[99] By 1996, the local Albanian populations had shifted their support to a violent mode of opposition to Serbian rule, conducted by the Kosovo Liberation Army. Armed resistance persisted through the late 1990s, answered by progressively worsening repression from Serbian security forces. After the collapse of a cease-fire orchestrated by the United States in 1998, a multilateral conference was convened in 1999 which resulted in the Rambouillet Accords. This agreement required greater autonomy for Kosovo.[100] Once Serbia rejected its terms, a bombing campaigned commenced, through which NATO sought to compel Milošević to withdraw all armed military units from Kosovo. Open war raged between Albanian militias, under the direction of the KLA, and

[97] From the period, see the "What's next for Slobodan Milošević?" *The Economist*, U.S. Edition, 5 June, 1999, 24. For a broader analysis of this turning point, see Carole Rogel, "Kosovo: Where It All Began," *International Journal of Politics, Culture, and Society*, 17, 1, 2003, 167-180.

[98] This tendency is cited by the historical surveys of the period cited above, and it was confirmed in the majority of the interviews that this researcher conducted. Without prompting, the subjects of these interviews would put forward this characterization, and discuss how it influenced the new government's policies and disposition toward Serbia.

[99] The Kosovo Memory Book Database (KMBD), Humanitarian Law Center, continually updated, accessed online for the last time on July 7, 2016.

[100] Larry Minear, Ted van Baarda, and Marc Sommers, "NATO and Humanitarian Action in the Kosovo Crisis," Occasional Papers Series, 36, Thomas J. Watson Jr. Institute for International Studies, Brown University, 34-35.

Serbian forces. Although statistics about casualties from the conflict remain contested,[101] the most commonly cited figure remains that proffered by the Humanitarian Law Center. It suggests that 13,517 persons were killed during the armed conflict in Kosovo. Approximately 1,886 persons remain missing, and discoveries as late as 2013 of mass graves with hundreds of Albanian bodies suggest the final death count will continue to rise.[102] Human rights violations by Serbian forces against Albanians during the conflict spanned many aspects of life which have only recently been addressed. The international community's renewed attention to the survivors of sexual violence during the war is but one example.[103]

After years of fighting, Belgrade relented. Milošević's government relinquished direct control of the region shortly after the UN Security Council passed Resolution 1244 in June, 1999. It created a UN Mission (UNMIK) to administer transitional authority in the province. Although the resolution set out greater autonomy for Kosovo, authorizing a NATO peacekeeping force to implement these measures, it also reaffirmed the territorial integrity of the Federal Republic of Yugoslavia (Serbia), of which Kosovo legally remained a province.[104] Intermittent episodes of unrest, punctuated by riots and coinciding with the mass

[101] For academic, rather than political critiques of the death toll count, see Elizabeth Minor, *Toward the recording of Every Casualty: Policy Recommendations and Analysis from a Study of 40 Casualty Recorders*, Policy Paper, Oxford Research Group, 2014.

[102] "EULEX: Human remains found in Rudnica," *Tanjug Report for Reuters*, December 13, 2013, see online at: http://www.b92.net/eng/news/crimes.php?yyyy=2013&mm=12&dd=13&nav_id=88656

[103] For information regarding the belated international response to the legacy of sexual violence during Kosovo's war of independence, see Siobhan Hobbs, "Designing a Reparation Programme for Victims of Conflict-Related Sexual Violence in Kosovo Principles, Practices and Recommendations," UN Women, Report Commissioned by the Government of Kosovo, 2016, 2-6. The 2016 establishment and building of a war memorial in downtown Pristina for these victims, across from the commemorative "NEWBORN" sculpture, which uses the moniker "Heroines" in Albanian, served a symbolic commitment to pursuing justice for them in the years to come.

While much of the investigation of human rights violations during the decade after the conflict centered on the crimes of the Serbian state and its security forces, atrocities committed by Albanian forces have begun to take a more pronounced position in Kosovo's society, and in its relations with the European governments and the United States. See Marija Ristic, "Council Adopts Kosovo Organ Trafficking Resolution," *Balkan Insight*. 25 January 2011, 1-4. See also: Marija Ristic, "Serbia Locates Alleged Organ Trafficking Doctor," *Balkan Insight*, 2 Sep 2014, 2.

[104] On this latter point, Resolution 1244 read "Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act." See United Nations Security Council, Resolution 1244, New York, Adopted by the Security Council at its 4011th meeting, 10 June, 1999.

exodus of ethnic Serbs, served as a prelude to contentious negotiations which began in 2006 regarding Kosovo's "final status," as had been prescribed by the UN Security Council. The appointment of Martti Ahtisaari as UN Special Envoy in February, 2006, led to a lengthy period of exchange among international stakeholders about how Kosovo would be governed in the future. Leaders in Belgrade and Pristina, which had become the center of local government in the territory, stridently disagreed about the extent of self-rule that Kosovo should be accorded. The Special Envoy submitted a "plan" for independence "supervised by the international community" a year after his appointment.[105] This document, which enumerated guiding principles for Kosovo's integration into the international community, aimed to serve as framework for action by the UN Security Council to fulfill the end goal proposed by Ahtisaari. Among these precepts was that "Kosovo shall continue to be bound…by all international agreements and other arrangements in the area of international cooperation that were concluded by UNMIK for and on behalf of Kosovo..."[106] Russian opposition ensured that a Security Council Resolution implementing the Ahtisaari Plan never passed.[107] Violation of state sovereignty remains the principle objection cited by Moscow's

[105] U.N. Secretary-General, Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, U.N. Doc. S/2007/168, 27 March, 2007, 5.
[106] Ibid., 9.
[107] See Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence*, (Oxford: Oxford University Press, 2009), 123-125.

Russia's late opposition to these plans came after a Troika made up of representatives from its government, as well as from the European Union and the United States engaged in a series of negotations lasting three-months. In the ad hoc, intergovernmental body's report to the UN Secretary-General, the governments jointly argued that "the parties were unable to reach an agreement on Kosovo's status," stating that "neither side was willing to yield on the basic question of sovereignty." See Records of the Depository of the UN Secretary General, "Report of the European Union-United States-Russian Federation Troika on Kosovo," Annexed to the UN Document S/2007/723, submitted 4 December 2007. As a result, Secretary General Ban Ki-moon reiterated the position sustained in the letter sent from his Office on March 26, 2007. It stated to the President of the Security Council that "having taken into account the developments in the process designed to determine Kosovo's future status, I fully support both the recommendation made by my Special Envoy in his report on Kosovo's future status and the Comprehensive Proposal for the Kosovo Status Settlement." See report Annex number for the Report from the Special Envoy. The International Court of Justice noted in its Advisory Opinion on Kosovo's independence that it was Russia's opposition amid these developments that led the drafters of the Security Council Resolution in pursuance of the Ahtisaari Plan—France, Italy, the United States, Belgium, and the United Kingdom—to withdraw the measure from consideration. See "Accordance with international law of the unilateral declaration of independence with respect to Kosovo, Advisory Opinion," International Court of Justice, Report 1.4, 71, 22 July, 2010. Available at: http://www.icj-cij.org/docket/files/141/15987.pdf

Permanent Representative, who has consistently threatened to veto Security Council Resolutions that would end UNMIK, despite strong support for doing so among the original intervening parties.[108]

Declaring Independence and the ICJ's Legitimation

Kosovo's transition to full independence and its early decisions regarding treaty succession were profoundly shaped by its Declaration of Independence and the advisory opinion issued by the International Court of Justice on the "accordance" of its independence with international law. These two developments became uniquely and counterintuitively interwoven. After more than nine years of UN administration, Kosovo definitively and unilaterally proclaimed its independence on February 17, 2008. A group of individuals who belonged to a broad array of institutions in the UN-administered Kosovar government drafted and submitted the document to the highest governing body of the country, which quickly passed it, thereby marking the beginning of their formal, complete separation from Serbia. With perambulatory phrases addressed to "the years of strife and violence in Kosovo, that disturbed the conscience of all civilized people,"[109] they sought to establish the basis of their claim to independence. The Declaration characterized the new, sovereign land as "a special case arising from Yugoslavia's non-consensual breakup,"[110] adding that it "is not a precedent for any other situation."[111] Before discussing what specifically the new state undertook by declaring independence, the signers noted that the document "reflects the will of [the] people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement."[112]

[108] Henry H. Perritt, *The Road to Independence for Kosovo: A Chronicle of the Ahtisaari Plan* (New York: Cambridge University Press, 2010), 42-45.
[109] Ibid.
[110] Ibid.
[111] Ibid.
[112] Ibid.

Atypically, the Declaration went on to address treaty succession specifically. Paragraph 9 of the document claimed that the new state would:

> Undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration in Kosovo and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia [SFRY] to which we are bound as a former constituent part...[113]

Noticeable, of course, was the absence of any commitment to succeed to treaties signed on Kosovo's behalf by Serbia-Montenegro or the Republic of Serbia, when they had subsequently emerged from the SFRY. As previously noted, the government in Belgrade failed in its claim for the FRY to be the continuation of the SFRY, and afterward assumed a separate legal identity, signing, ratifying, acceding, and succeeding to numerous treaties which applied to the territory of Kosovo because it was not yet independent. Paragraph 12 reaffirmed the commitments to succession stated earlier in the Declaration:

> We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244. We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship.[114]

These undertakings, bound to Kosovo's future at the moment it declared its independence, were unique for two reasons. First was the obvious incomplete nature of the assertion of nearly universal succession to treaties signed on its behalf by outside powers. Embedded in the relevant sweeping provisions was the blaring omission of any such commitment for those obligations brought into force during the intervening period between the demise of the SFRY and the establishment of UNMIK. The international obligations signed by Serbia during these seven years, when Kosovo was one of its provinces, were singled out to occupy a space of

[113] Ibid.
[114] Ibid.

legal ambiguity, their continuance neither confirmed nor denied. Second, the claims in the Declaration fell into a category which made them particularly tentative. Because Kosovo made no claim to be considered a "newly-independent state" as defined by the 1978 Vienna Convention, it thus fell into that treaty's second category of new states. According to Article 9 of the treaty, unilateral announcement of succession to treaties by such states cannot definitively determine the fate of potentially-inherited obligations. This provision reads:

> Obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States Parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.[115]

Yet this article does not rule out that unilateral declarations could be part of the process of succession; it only states that such public assertions are not sufficient. In order to execute the patter of inheritance of international obligations it signaled in its Declaration of Independence, Kosovo needed to solicit other actions by partnering states, with which it aimed to continue bilateral and multilateral legal ties.

In its practice of treaty succession, Kosovo acted to follow the intentionally incomplete universal succession. Kosovo's failure to earn recognition and membership in crucial multilateral institutions, such as the UN, has led its diplomatic corps to concentrate on succession to bilateral legal relations. Shortly after it was established in 2009, the Ministry of Foreign Affairs of Kosovo began sending Notes Verbales to every Embassy of each successive state that has granted recognition, as well as to Liaison Offices and other accredited diplomatic and non-diplomatic foreign government posts. These sets of formal correspondence included requests for comprehensive lists of treaties signed by these states

[115] UN General Assembly, Vienna Convention on Succession of States in respect of Treaties, Adopted 22 August, 1978 by the United Nations Conference on the Succession of States in respect of Treaties, opened for signature at Vienna 23 August 1978 to 28 February 1979, Entered into force 6 November, 1996, Article 9, Section 1.

and either with the SFRY, or in certain cases, with UNMIK.[116] This tactic induced rapid responses from states in Kosovo's neighborhood, such as Austria, Bulgaria, the Czech Republic, Germany, Italy, Lithuania, and Switzerland, as well as states outside its vicinity, such as Colombia, Japan, Panama, Peru, the United Arab Emirates, and the United States.[117] Reviewing these documents in great detail, the Ministry immediately sent Exchanges of Notes specifically pertaining to treaty succession to Belgium, Austria, Finland, Germany, the Czech Republic, and the United Kingdom. Slowly, the Ministry prioritized international obligations signed by the SFRY and UNMIK with other states such that the scope of succession was steadily increased. From 2010 to 2011, a second wave of Exchanges of Notes finalized the initial round of succession of the enormous body of treaties which the Ministry had reviewed and which comported with the pattern articulated in the Declaration of Independence. It did not seek to succeed to treaties signed by Serbia after the period that the SFRY fell and before UNMIK's establishment.[118]

One notable exception to this pattern was in the area of boundary commitments, in which Kosovo departure significantly from the 1978 Vienna Convention. In some respects,

[116] Qerim Qerimi and Suzana Krasniqi, "Theories and Practice of State Succession to Bilateral Treaties: The Recent Experience of Kosovo," German Law Journal 14, 9, September 2013, 1639-1643.
[117] Among the other states that responded quickly, within two months, were: Belgium, Ireland, Norway Luxembourg, Monaco, the Netherlands, the United Kingdom. Ibid.
[118] In chronological order, see Ministry of Foreign Affairs, Government of Kosovo, "Decree for Ratification of the Agreements," Exchange of Notes, bilateral correspondence between the Republic of Kosovo and the Kingdom of Belgium, 23 February, 2010. Available online through the *Official Gazette of Kosovo* (stable url not available); Ministry of Foreign Affairs, Government of Kosovo, "Decree for Ratification of the Agreements," Exchange of Notes, Republic of Kosovo-Czech Republic, 20 March, 2011. Available online through the *Official Gazette of Kosovo* (stable url not available); Ministry of Foreign Affairs, Government of Kosovo, "Decree for Ratification of the International Agreements," Exchange of Notes, bilateral correspondence between the Republic of Kosovo and the Republic of Austria, 9 June, 2011. Available online through the *Official Gazette of Kosovo* (stable url not available); Ministry of Foreign Affairs, Government of Kosovo, "Decree for Ratification of the Agreements," Exchange of Notes, bilateral correspondence between the Republic of Kosovo and the Federal Republic of Germany, 2 September, 2011. Available online through the *Official Gazette of Kosovo* (stable url not available); Ministry of Foreign Affairs, Government of Kosovo, "Decree for Ratification of the Agreements," Exchange of Notes, bilateral correspondence between the Republic of Kosovo and the Republic of Finland, 2 September, 2011. Available online through the *Official Gazette of Kosovo* (stable url not available); Ministry of Foreign Affairs, Government of Kosovo, "Decree for Ratification of the Agreements," as well as appended "List of Agreements from Exchange of Notes," Exchange of Notes, bilateral correspondence between the Republic of Kosovo and the United Kingdom. Available online through the *Official Gazette of Kosovo* (stable url not available).

the Ahtisaari Plan anticipated the difficulty the government of Kosovo would have in accepting preexisting obligations pertaining to its border. Article 3, Section 2 of the Special Envoy's plan held that:

> The territory of Kosovo shall be defined by the frontiers of the Socialist Autonomous Province of Kosovo within the Socialist Federal Republic of Yugoslavia as these frontiers stood on 31 December 1988, except as amended by the border demarcation agreement between the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia on 23 February 2001.[119]

In reality, the border demarcation between the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia of February 23, 2001, required significant amendment to be tolerable to Kosovo's electorate. The population remained sympathetic to the aspirations of ethnic Albanian communities that resided on the Macedonia side of the border.[120] Although amending this boundary to the south involved far more complicated issues of repatriation and swaps of lands surrounding villages, the status of Kosovo's border to the northwest has proven even more contentious. A lengthy fact-finding process, culminating in a new treaty with Montenegro, have both remained enormously politically-charged topics since independence. The new document has not yet been ratified by Kosovo's Parliament, which was bombed the day the bill was brought to the floor.[121] Both of these sets of negotiations

[119] U.N. Secretary-General, Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, U.N. Doc. S/2007/168, 27 March, 2007, 16.

[120] Sinisa-Jakov Marusic, "Macedonia Mulls Kosovo Border Agreement," *Balkan Insight,* 16 October, 2009, 2. Contentious claims over the border between Kosovo and Macedonia, although not publicly consequential for the domestic politics of either country, led to the Republic of Macedonia's decision to initiate only informal diplomatic relations in October, 2008, after recognizing Kosovo the day after it declared independence the year before. Only after Kosovo signed a fresh treaty altering the border with its southern neighbor, in October, 2009, did authorities in Skopje upgrade their representation in Pristina to formal diplomatic status. Macedonia sent and Ambassador in November of that year, and converted the Liaison Office from their government into Embassy.

[121] Although far less was at stake in the negotiation of its border with Kosovo, the population, incited by the country's political opposition, spurned the demarcation that was eventually reached through bilateral negotiations, and approved by an international panel of experts in international law. In part, this represented a clever tactic by opposition leaders to suggest erroneous linkages between the new border agreement and an unrelated allotment of special rights for an Association of Serbian Municipalities in the north of the country. Nonetheless, the issue remained exceptionally contentious for several months from December, 2015, to March, 2016, inspiring large-scale protests in the capital, Pristina. See Dusica Tomovic, "Montenegro to Seal Border Deal with Kosovo," *Balkan Insight*, 23 December, 2015, 1; and Dusica Tomovic and Erjone Popova, "Border

contradicted the 1978 Vienna Convention. Articles 11 and 12 state that existing borders, established by treaties predating a new country's independence, should be succeeded to by the new state.[122] That Kosovo's approach to inherited obligations regarding boundaries was anticipated by the Special Envoy illustrates that the push to alter borders grew out of longstanding disagreements over preexisting international legal instruments.

The government of Kosovo's decisions regarding commercial treaties further illustrates the amalgamation of notions of custodianship and self-determination. Under the administrative structure created by UN Security Council Resolution 1244, UNMIK eventually undertook to negotiate a diverse array of international commercial treaties to enhance Kosovo's economic development amid dire obstacles to market growth. These included but were not limited to free trade agreements with Bosnia and Herzegovina, Macedonia, Croatia, and Albania.[123] UN officials also successfully sought on Kosovo's behalf to sign the treaty documents necessary for it to join the Central European Free Trade Agreement (CEFTA).[124] As Tai-Heng Cheng noted in his work on Kosovo's succession to economic treaties: "issues concerning the continuity or disruption of these treaties when Kosovo declared independence have not generally arisen," adding "this is not surprising…UNMIK had concluded these commercial treaties on behalf of Kosovo."[125] However, the grounds for seamless succession have been different in certain cases. For

Deal Confirmation Angers Kosovo Opposition Kosovo: opposition parties voiced outrage after a commission of international experts approved the controversial border demarcation agreement with Montenegro," *Balkan Insight*, 31 March, 2016, 2-3.

[122] UN General Assembly, Vienna Convention on Succession of States in respect of Treaties, Adopted 22 August, 1978, Articles 11 and 12.

[123] See statements issued previously in 2008 and 2009 by the Kosovo Customs Agency, Ministry of Finance. These are summarized on the Kosovo Customs Agency's website, in the "History" section. This official account of the transition from UN administration states that, after independence, "the new Customs Code was adopted on 11 November 2008 by the Kosovo Assembly, this code enabled transition." Available online at: https://dogana.rks-gov.net/en/History#History

[124] Ibid.

[125] Tai-Heng Cheng, "State Succession and Commercial Obligations: Lessons from Kosovo," in *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, Mahnoush H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane, and Siegfried Wiessner, eds., (Hague: Martinjus Nijhoff, 2011), 682.

example, members of the CEFTA, two of which have not recognized the newest constituent of the Area, have chosen to assert that the collective relationship should be maintained to include Kosovo because UNMIK, the original signatory, is still in existence.[126]

Where Kosovo's preexisting legal ties pertaining to economic matters have faltered, the consequences came about through a series of intentional renunciations of obligations created by Serbia. The high cost of renouncing certain documents can be understood not only in monetary terms, but also in the severe domestic political consequences of slow economic growth. The Ministry of Foreign Affairs decided against undertaking Serbia's 2008 agreement with the EU which allowed citizens to enter the Schengen area without a visa, even though there were potential legal claims to succeed, given the years of prior negotiation by Serbia. As a result, over the course of eight years, Kosovo had to demonstrate fulfillment of 96 criteria which the European Commission asserted were necessary for a separate agreement. Only this year did Kosovo attain the limited victory of an official recommendation from the European Commission that its citizens be granted visa free travel.[127] Yet the historic deluge of refugees across EU borders, as well as the upsurge in media coverage of Islamic radicalization in Kosovo have dampened this outcome. French, German, and Belgian delegations have promised their opposition to the recommendation when it is considered by the European Parliament and the European Council, both of which must approve it.[128]

In addition, after the initial disintegration of the SFRY, Belgrade had concluded 34 separate bilateral investment treaty negotiations with its neighbors in Central, Eastern, and Southeastern Europe for the purpose of enhancing trade relations. Its partners principally

[126] Ibid., 683.
[127] "European Commission proposes visa-free travel for the people of Kosovo," Press Release from the European Commission, Brussels, 4 May, 2016. Available online at: http://europa.eu/rapid/press-release_IP-16-1626_en.htm
[128] Gabriela Baczynska, "EU puts brake on visa liberalization for now amid immigration fears," *Reuters, 1 June, 2016.* Available online at: http://www.reuters.com/article/us-europe-migrants-eu-visas-idUSKCN0YN56F

included Hungary, Ukraine, Greece, and Poland. In addition, Serbia ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[129] Kosovo succeeded to none of these agreements. Serbia also undertook to assure several international organizations governing regional trade, that appropriate documents establishing that prerequisites to cross-border trade, such as International Business Quality Standards, would apply to its territory. At the time, this legal process covered the lands making up what would become the Republic of Kosovo. This category of treaties requires significant verification measures for accession which Kosovo has not yet been able to complete, in part because of the enormous expense required to demonstrate compliance. These decisions have extremely harsh consequences for economic development. Fifty percent of Kosovo's population lives in poverty, and 40 percent remain unemployed or chronically underemployed.[130] These circumstances, created in part by the course of treaty relations after independence, are particularly embittering for entrepreneurs because Kosovo has the most competitive minimum and average wages in Europe. And yet it cannot utilize its comparative advantage where it exists in the regional economy because of the enormous costs of negotiating new treaties that would allow for a higher volumes of diverse exports.[131] The over-extended staffs of the Ministry of Foreign Affairs and the Ministry of Trade and

[129] Tai-Heng Cheng, "The Succession of Kosovo and Minimum Public Order," *Opinio Juris*, Academic Web Log of the University of St. John, February 21st, 2008, Accessed on 5 May, 2016. See the "Investment Treaties" section of the analysis. Although electronic sources have largely been avoided in this analysis, Cheng provides here a specific insight which is unavailable in his other writings on the same subject. The "About" section of the Web Log cites its academic orientation: "*Opinio Juris* is a forum for informed discussion and lively debate about international law and international relations. It was founded by Chris Borgen, a law professor at St. John's University Law School, who started the site with Peggy McGuinness, also of St. John's University Law School."

[130] Kosovo Investment and Enterprise Support Agency, Ministry of Trade and Industry, "What is the Average Wage in Kosovo?" Government of Kosovo, last updated March 20, 2016. Available online at: http://www.invest-ks.org/en/What-is-the-average-wage-in-Kosovo. This informational page specifically notes: "The main advantage of the Kosovar labor force is its low operating cost. With the average monthly wage estimated at €360, it is the most competitive in Europe." At the time of this citation, the minimum wage in Kosovo was €170 per month.

[131] The World Bank Group in Kosovo, "Kosovo Country Snapshot," Pristina, Kosovo (Published in Washington, DC), April 2015, 4-8. See the section titled "Recent Political, Economic, and Sectoral Developments."

Industry lack the capacity to coordinate these efforts amid domestic political pressures.[132] Despite these circumstances, the government in Pristina has made enormous strides through the negotiation and ratification of an EU Stabilisation and Association Agreement (SAA) in December, 2015. As Johannes Hahn, EU Commissioner for European Neighbourhood Policy and Enlargement Negotiations, noted: "[the SAA] will help Kosovo make much needed reforms and will create trade and investment opportunities. It will put Kosovo on the path of a sustainable economic growth and can lead to much needed jobs for its citizens, especially the young."[133]

Similarly, Kosovo did not succeed to the treaties signed by Serbia which established the Regional Cooperation Council (RCC) of the Balkans in 2008. This decision led to the country's exclusion from engagement in the intergovernmental relations for which the RCC serves as a platform. Despite these circumstances and the intermittent objections of representatives from Serbia, Kosovo's Ministry of Foreign Affairs and Ministry of Trade and Industry were able to pursue a process of accession to the organization's sub-bodies, leading to full membership in November, 2015.[134] In aggregate, these decisions regarding treaties and other legal regimes influencing commercial relations illustrate that Kosovo is willing to bear the burdens of renunciation and separate accession in certain categories of legal ties.

Following on the Declaration of Independence and the practice that occurred afterward, the International Court of Justice's advisory opinion supporting Kosovo's bid for separation from Serbia expanded and legitimated the synthesis of succession behaviors which

[132] Interview with Besian Mustafa, General Director, Kosovo Investment and Enterprise Support Agency, Ministry of Trade and Industry, Republic of Kosovo, 15 December, 2016. This interview took place in Paris when I was accompanying Mr. Mustafa and the Ministry's Chief of Staff for meetings at the OECD.
[133] Council of Europe, the European Union, "Stabilisation and Association Agreement (SAA) between the European Union and Kosovo signed," Press Release of the European Council, Foreign Affairs and International Relations, 762/15, Brussels, Belgium, October 27, 2010. Available online at: http://www.consilium.europa.eu/en/press/press-releases/2015/10/27-kosovo-eu-stabilisation-association-agreement/
[134] Interview with Kreshnik Thaqi, Senior Investment Promotion Officer, Kosovo Investment and Enterprise Support Agency, Ministry of Trade and Industry, interview took place at the Agency's Headquarters, Pristina, Kosovo, 11 December, 2016.

the new country undertook. Although addressing this judicial proceeding may seem ill-suited to a discussion of de facto succession in the case-study under analysis, the opinion was so closely-linked to what Kosovo actually did with regard to inheriting treaties that it is important to discuss it in this context. The case had been sent to the ICJ at the behest of Serbia. The ICJ ruled that Kosovo's Declaration of Independence did, in fact, "accord" with international law.[135] Its long and complicated decision involved numerous arguments pertaining to a multitude of issues stemming from Kosovo's unilateral declaration of independence. The majority of 10 Judges were concerned not to create a positive right to secession which could be operationalized by other movements, some of them violent, which seek to legitimate claims for status akin to that which had been afforded to Kosovo. In an attempt to limit the opinion's scope, the text included an assertion, early on, that "the Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it."[136] In seeking to avoid the erosion of the territorial integrity of states, the ICJ touched on issues like treaty succession which ordinarily would have been relevant only to a state whose independence was not at stake.

Specifically, the majority of Judges argued that paragraphs 9 and 12 of Kosovo's Declaration of Independence were among the document's "operative" clauses. As a result, they argued, by declaring succession to particular treaties, the representatives of the Kosovar people who had written and passed the Declaration of Independence "did not seek to act within the standard framework of interim self-administration of Kosovo, but aimed at

[135] See Accordance with International Law of the Unilateral Declaration of Independence with respect to Kosovo, Advisory Opinion, ICJ Report 1.4, 1. July 22, 2010. available at: http://www.icj-cij.org/docket/files/141/15987.pdf
[136] ICJ Kosovo Advisory Opinion, ICJ Report 1.4, 56.

establishing Kosovo 'as an independent and sovereign State.'"[137] This argument responded to a major contention put forward by Kosovo's detractors, that declaring independence constituted a violation of the prescribed constitutional powers of local government created by UNMIK.[138] There was the immediate, inescapable paradox in the ICJ's claim, adverted by authors like Duncan French, who points out that "this position is somewhat controversial, as it derives the representativeness of those who declared independence from their posts in the institutions of self-government and yet establishes they acted outside of the institutions of self-government."[139] Setting this aside, there is the larger point made by the Court's argumentation, which also responded to the Kosovar government's ongoing "Written Contributions" submitted before, during, and after the case was being heard.[140] The ICJ implicitly accepted that a pattern of succession to treaties consolidated Kosovo's international legitimacy as an independent state. This inverted established logics of treaty succession, that it is a matter for states already independent, not that it is a means to prove or legitimate their independence. The implication, of course, cannot be avoided: that by selecting and declaring which treaties Kosovo would inherit, the new state was engaging in an act of self-determination, validating its independence. Kosovo has continuously invoked this paradoxical idea in its discussion of treaty relations.[141]

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[137] "ICJ Kosovo Advisory Opinion," ICJ Report 1.4, 105. July 22, 2010.
[138] Ibid, 106.
[139] Jure Vidmar, "Unilateral Declarations of Independence in International Law," in *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, ed Duncan French, (Cambridge: Cambridge University Press), 2015, 66.
[140] In written arguments submitted intermittently to the Court, Kosovo consistently presented the progress it had achieved in treaty relations. For examples, see "Written Contribution of the Republic of Kosovo," April 17, 2009, 1 2.40, available at: http://www.icjcij.org/docket/files/141/15678.pdf; "Further Written Contribution of the Republic of Kosovo," 17 July 2009, 2.17, available at http://www.icj-cij.org/docket/files/141/15708.pdf.
[141] In their article on linkages between notions of self-determination and Kosovo's foreign policy, Edward Newman and Gezim Visoka argue that "Kosovo has strengthened its international personality through signing over 100 international bilateral and multilateral agreements, including over seventy involving the process of treaty succession…In 2009, Kosovo was admitted as a member of the International Monetary Fund and the World Bank, with approximately 100 states voting in favor of Kosovo's membership in those two organizations. Subsequently, Kosovo was admitted as a full member in the European Bank for Reconstruction and Development (in 2012)." See Edward Newman and Gezim Visoka "The Foreign Policy of State Recognition: Kosovo's Diplomatic Strategy to Join International Society," *Foreign Policy Analysis*, 01, 2016, 16-17.

Officials and advisors that shaped Kosovo's treaty succession recall the purposeful and historically-engaged nature of the synthetic approach which was adopted. As the quotation by Gjyla Celiku cited at the beginning of the chapter suggests, the creators of the country's first foreign policy agenda consulted not just the law, but also past state practice. They were influenced, the professor suggests, by the experience of both post-Soviet as well as post-colonial states when deciding the fate of treaties that the new state could inherit. When describing their renunciation of obligations signed by Serbia during the intervening period between the existence of the SFRY and UNMIK, she drew a direct analogy to the behavior of post-colonial states. But combined with this approach, she discussed Kosovo's consistent attempt at intentionally incomplete, universal succession. Emphasizing the importance of embedding itself in the fabric of regional and global order, she went on to argue that Kosovo's relationship to the European Union has remained an important impetus for its commitments to succeed to treaties. The desire to uphold and become a part of the systems of governance, trade, free movement, and political progress that the European Union represents, continues to motivate its succession.[142] Dr. Naser Rugova, a founding Deputy of the Kosovo Assembly, and a close advisor to Kosovo's first president and, subsequently, a sub-cabinet official to the first Prime Minister, echoed these sentiments. He argues that on the one hand, Kosovo used succession to enter the international legal frameworks of Southeastern Europe, the continent as a whole, and the wider world as a "sui generis case." On the other hand, he insisted, "its purposes were defined by its unique birth as a sovereign state resulting from an intervention to end a violent conflict, in which many died for the sake of self-determination." He added that "renouncing some treaties which were concluded against our will, as a form of domination in some cases, would have been unacceptable."[143]

[142] Interview with Gjyla Celiku, Ambassador Hotel and the Premises of the American Academy for University Studies and Leadership, Pristina, Kosovo, 2 December, 2015. These points were reiterated to me in a follow up skype call on 3 March, 2016.
[143] Interview with Naser Rugova, Prince's Cafe, Pristina, Kosovo, 4 November, 2015.

Nonetheless, during the course of his account of succession decisions undertaken by his country, he returned to the central point that:

> This experience, however, cannot shut us off from the vast expanses of international law as they existed before Kosovo came into being…there are larger questions at stake, and we wanted to be a part of a system that will make cases like ours less likely to happen in the future. Adhering [and succeeding] to past treaties was and is one of the few ways we can do that.[144]

These reflections by advisors and policy-makers who took part in crafting Kosovo's early foreign policy, which shaped its outlook toward treaty law, illuminate the purposefulness of the action which has been documented earlier in this chapter. They illustrate that an amalgamation of notions of self-determination and custodianship was not a contradictory enterprise. It was conceived by engagement with past practices by diverse states, and it resolved apparent internal theoretical and legal contradictions by clearly defining which treaties would be renounced and which would be sustained.

[144] Ibid.

PART III:
CONCLUSIONS

Evidence collected and analyzed in this chapter provides for one observation and two conclusions. First, clear differences emerged between the prescriptions lawyers began to draw about the future of treaty succession and how states behaved between 1996 and 2014. But this dissonance between de jure and de facto treaty succession is harder to establish robustly in the period examined and must therefore be cast as a tentative observation. Second, when confronted with decisions regarding treaty succession, states acted to fuse together the preceding telic behaviors documented in this study, adding aspects of custodianship to the necessities of self-determination. Finally, contrary to arguments about the irrelevance of post-colonial practice since the advent of post-Soviet succession, states invoked not only the memory of predecessors emerging from positions of dependency, but also engaged, in limited contexts, in the patterns of decision-making these forbearers charted.

In comparing dominant de jure conceptions of treaty succession to the actual conduct of states, this chapter can only put forward a qualified observation rather than a firm conclusion, like those advanced after the same investigation was conducted in previous chapters. This analytical result stems from the nature of legal debates from 1996 to 2014 regarding the inheritance of international obligations. Evaluation of trends in this thought does not provide clear predominant notions about how the law should function. That the legal discourse on treaty succession largely descended into indeterminate disputes and general ambivalence about the 1978 Vienna Convention does not provide the basis to assess whether new states in the period forsook or complied with the law. For example, one could argue that, on balance, evidence emerged that new states accepted the primacy of human rights treaties in the conduct of succession, tending toward automatically accepting these obligations. In large part, the new states that emerged honored these obligations immediately. However,

outliers, like East Timor, accepted these obligations through accession rather than succession, and many other examples involved deliberate acts of inheritance, occasionally involving prolonged procedures. Thus whether an institution of automatic succession to these obligations has been further evinced by the practice of states from 1996 to 2014 is difficult to confirm or deny in a conclusive sense. Similarly, the collective ambivalence toward the 1978 Vienna Convention, expressed by numerous international lawyers in different capacities, is so varied that it would be difficult to observe it in state practice. Finding evidence that states followed the principles embedded in these highly-conceptual and theoretical arguments remains extremely difficult to ascertain. Nonetheless, it appears state practice was just as deliberate in the period under examination as it was in past intervals.

A firm conclusion that may be drawn from the empirical analysis in this chapter relates to how new states in the period engaged in syntheses of earlier codes of conduct emerging from post-colonial and post-Soviet practice by states. From 1996 to 2014, nascent states used succession both to autonomously define their relationship to the international community, as well as to uphold regional and global order. This took the form of the careful categorization of treaty relations in contextual examples, like Montenegro. But it is more clearly illuminated by the examination of policies set out in the case study, embodied by Kosovo's Declaration of Independence. In order to exercise their newly-established rights to self-determination, states renounced certain treaties. Yet often in at the same moment, and within the same agenda for the inheritance of international obligations, these same new subjects of international law accepted other bodies of treaties through succession because they sought to entrench themselves within and to support regional and global order. This complex practice by states was not considered by them to be contradictory or inconsistent. Instead, it cohered with their purposes in deciding which treaties to accept and which to renounce.

Lastly, a second conclusion may be derived from the examination of state practice in this chapter. This relates to the lingering influence of the 1978 Vienna Convention. By detecting the salience of post-colonial practice in the behaviors of new states from 1996 to 2014, the analysis of de facto succession in this interval has brought to the surface the relevance of the attempt at codification described in the fourth chapter. That is to say, in a weaker sense, this inference can be drawn indirectly. If both the contextual examples and the case study in Part II illustrate that states were influenced by decisions of their twentieth-century forbearers emerging from positions of dependency, then the document which attempted to ascribe to those predecessors special rights to a clean-slate should be considered to have renewed relevance for the present. The document might not have been cited often or in explicit terms, but its guiding principles which curtailed unbound expectations of continuity have persevered in state behavior. But in a stronger sense, the evidence analyzed in this chapter suggests that states for the first time appealed directly to the spirit of the document as well as the categories it created for the birth of new states. Examples like Afghanistan's opposition to succession which would sustain the Durand Line, South Sudan's balance of international expectations against its desire to determine its own international position, as well as Kosovo's particularized renunciation of treaties signed by Serbia on its behalf demonstrate the relevance of limited self-determination which international lawyers previously codified. That South Sudan described itself specifically as a "newly independent state" echoed this occasional tendency to evoke the category for post-colonial states created by the 1978 Vienna Convention. This conclusion may be drawn not simply because certain historical circumstances of the latest interval analyzed in this dissertation bore direct resemblances to those faced by postcolonial states. The purposeful acceptance of preexisting obligations undertaken by new states from 1996 to 2014 illustrates how the codification of

the 1970s captured certain themes that have turned out to be relevant to the conduct of treaty succession in the present.

Chapter 6

Conclusions

The structure of this study, heavily dependent on the chronology of past developments and responsive to sequential multiplications of new states, perhaps belies the current and future relevance of understanding the inheritance of international obligations. Long past is the stasis of the cold war era and the peerless influence enjoyed by the United States in its unipolar moment, where the fourth chapter concludes. In many formerly stable regions, territorially-contiguous states and their relationships among one another no longer exhibit assured constancy. Domestic forms of nationalism and other destructive sentiments threaten the permanence of political authority and the shape of borders across the world. These systemic shifts relate to the establishment of new states. The precarious position of governments dissolved and reestablished in the aftermath of the Arab Spring as well as through the expansion of the Islamic State suggest that questions of succession will arise amid the reconstitution of countries in the Middle East and North Africa. New states could similarly enter the international system in coming decades, either through violent secessions—in South Ossetia, Chechnya, or the Republic of Srpska—or through peaceful referendums within states long beset by independence movements—in Canada, India, France, Spain, and the United Kingdom, to name just a few. Of course, the electorate of the last country mentioned in the second abbreviated grouping has brought to the fore several fundamental questions regarding the continuity of treaties. The exercise of Article 50 of the Treaty on European Union, which would begin the United Kingdom's departure from institutions of European integration will destabilize past legal relations among itself, member-states, and numerous third parties. Political developments have not alone portended the significant role treaty succession will play in future interstate relations. The legal theorists

and practitioners cited in Part I of the last empirical chapter often put forward potentially dire consequences for stable legal relations that could accrue from ineffectual understandings of treaty succession. A reprise of the central arguments of this thesis suggests that there is reason to be optimistic about the capacity of analysts to understand oncoming occurrences of treaty succession in holistic terms.[1]

This thesis has investigated what guides states in the inheritance of international obligations. In part, this aim derives from the premise that an awareness of the historical, political dimensions of treaty succession will continue to inform its practice among states. From the beginning of the study, the central problem in this area of international law has been cited, addressed, and repeatedly appraised: the cyclical contradiction between what lawyers, scholars, and jurists have prescribed versus what states have actually done. The analysis of three periods has illustrated the development of two distinct telic behaviors. Examining the law and practice of treaty succession during early and intermediate stages of decolonization elucidated a code of conduct enacted by new states seeking to define independently their relationship to the international community through succession. They exhibited a guiding notion of self-determination, which shaped their renunciation of certain treaties. The purposeful decision-making on the part of post-colonial states repudiated dominant, customary law regarding treaty succession. They contradicted an updated paradigm of universal succession in order to discharge treaties contracted during the course of their colonial dependence. In the aftermath of this period, a separate, unique code of conduct emerged. Scrutinizing de jure and de facto treaty succession in the period directly following the drafting of the one treaty governing the inheritance of international obligations through the fall of the USSR, shed light on this alternate telic behavior. This loosely procedural code

[1] For a more ambitious example than those previously cited, see Robert Sloane's admonitions in "The Policies of Self-Determination: Harmonizing Self-Determination and Global Order in the Twenty-First Century," 30, Fordham Journal of International Law, 2007, 1288-1316.

of conduct emanated from the desire on the part of post-Soviet states to sustain existing legal ties. By doing so, they sought to maintain regional and global order, accepting existing international obligations to promote stability provided by consistent and thorough treaty succession.

The last period, beginning with the entry into force of the 1978 Vienna Convention, exhibited altogether different phenomena. The proximity of these events to the present make them the most salient to future quandaries regarding the inheritance of international obligations by new states. The tension between the two preceding, purposeful notions of treaty succession—self-determination implying certain forms of renunciation and custodianship entailing wide-ranging inheritance—were surmounted by states born during the period from 1996 to 2014. Instead of being guided entirely by one or the other, states acted to fuse these codes of conduct regarding succession together. By identifying certain categories and varieties of preexisting legal ties as restricting their capacity to define their relationship to the international community, these states invoked the experience and the practice of former colonies. Like these predecessors, new states renounced relevant treaties. Yet often within the same period, they also acted to sustain vast bodies of legal relations by succeeding to them. Citing the importance of regional and global order, they orchestrated succession to treaties for the purposes of embedding themselves within and upholding legal frameworks. This synthesis illustrates that new states are becoming more resourceful, rather than less, in understanding and applying ideas about succession from the past. When new states emerge in the future, the body of historical practice will provide a rich set of examples for them to draw on. The necessities summoned by notions of self-determination, destructive to preexisting legal nexuses, may be confined to only specific areas of treaty relations, rather than applying to and potentially undermining all, somewhat arbitrarily. Similarly, the concept of qualified universal succession as a means of preserving regional and global order may be maintained,

without new states perceiving this behavior as a constraint, nor necessarily discarding mechanisms of succession due to the expectations of earlier treaty partners.

The Resonance of Post-Colonial Practice

Taken together, the three empirical chapters of this study provide the basis to question inferences made by Matthew Craven about systemic changes in international law given the transition between post-colonial and post-Soviet inheritance of international obligations. Namely that the practice of post-colonial states and the 1978 Vienna Convention remain relevant to the future of treaty succession. After discussing trends in post-Soviet state practice in thematic, rather than regional terms, he extends his argument that:

> …it is apparent that in concentrating on the position of "newly independent states" the [1978 Vienna] Convention gave articulation to one obvious category distinction which no one really questioned: that between the "continuing" metropolitan State and the secessionist enterprise seeking its independence. This, of course, was to codify within the convention a Manichean divide between the "self" and the "other": the selfhood of the metropolitan power being contrasted with the otherness of the decolonized population….[2]

Craven contrasts this approach to what occurred in matters of succession during the 1990s: "no question arose, therefore, as to the discontinuity of rights and obligations on the part of the 'continuing' colonial power and this itself was to place the focus squarely upon the situation of the 'newly independent State.'"[3] In the conclusion to his chapter on "New Beginnings," a title which suggests the emergence of a new epoch for succession after the dissolution of the Soviet Union, this contrast between the periods is purported to demonstrate a transformation in international law more broadly. Craven characterizes the 1990s as "a time of anxiety as to how precisely these intuitions [of succession] could be shaped within the

[2] Craven, 2009, 257.
[3] Ibid., 217.

existing discourse of international law."[4] This is the point in the text when he begins to introduce the idea that treaty succession's history of opposing practice among states demonstrates something larger. He claims that

> ultimately, it was evident that all such practice was open to quite contrasting conclusions which, of course, was to infuse all speculation as to the existence or otherwise of rules of continuity or even non-continuity with a polemical character. What appeared to matter, more than anything else, were the questions of policy...[5]

The implication of these claims are that succession as it occurred in the 1990s demonstrated a larger change in international law in general. Specifically, that the questions of imperial power relations and self-determination that became so central to the codification of the 1970s dissipated, and have become largely moot. They were subsumed in the wide ripples of what states decided was appropriate "policy," separate from the narrow confines of debate regarding the inheritance of international obligations. In the narrative of *The Decolonization of Law*, this is where the story ends: the 1978 Vienna Convention fell victim to trends of state practice, which had moved decisively toward resembling universal succession. This conclusion demonstrates Craven's respect and preference for this supposedly resurgent legal paradigm. Yet a critical reader cannot help but acknowledge that his enormous contribution to the study of treaty succession ends at a period now past, when universal succession appeared to inhere once again in de facto succession. This thesis questions his insistence that this historical trend indicates that state practice has settled into an equilibrium in its relation to existing law.

The data collected and analyzed in this study provides the beginnings of empirical bases to question Craven's bold claims. Two brief, if obvious observations are important when trying to understand if the transition in succession behavior augurs something greater

[4] Ibid., 257.
[5] Ibid., 258.

for international legal relations among states. First, the static legal documents which constituted the body of treaties which states inherited in the 1990s had not themselves undergone a systemic change from past decades. In fact, the vast majority, concerning human rights and other areas, were the same as those which were considered in the foreign ministries of post-colonial states. If the actual substance had not shifted in these obligations, then perhaps Craven is right that it was an alteration in the "rules about the rules." That is to say that the states reformulated among themselves the appropriate course of succession, regardless of the substantive legal matters involved. However, taken with the additional observation offered below, this intermediate insight offered by him appears deeply flawed as well.

Second, although treaty succession by post-Soviet states was not defined by tensions between metropolitan centers and former dependencies, that certainly does not mean these tensions were altogether absent from succession decisions at the time, and in subsequent periods. In fact, the second and third case studies illustrate that succession favored continuity in treaty relations despite what Craven describes as the "imperial orientation" of the Soviet Union, and the later, dangerous nationalism of Serbia. Ukraine not only faced manifold legal quandaries emanating from its past relationship with the USSR concerning control over lands. Ukraine also found itself embroiled in legal struggles given the problematic recurrent behavior the Russian Federation began to exhibit in the mid-1990s. Similarly, although Kosovo may not have been the constituent of a larger, supranational set of institutions, it considered itself formerly under the control of a domineering, external government. When it became independent, it refused to accept treaties signed on its behalf by Serbia for the sake of demonstrating its newly-established separate status. Thus, it would appear that the "rules about the rules" have not shifted as significantly as Craven would suggest. Instead, in the experience of new states in the 1990s as well as in the birth of recent, newly-independent

states, the will for self-determination has emerged and reemerged, leading them to confront complex questions regarding their inheritance of international obligations. The final case study further demonstrates that the record of practice of post-colonial states, as well as their purposes, remain salient for states born into circumstances which have parallels to aspects of decolonization.

In this regard, this study suggests that the arguments of critical theorists deserve equal attention in ongoing analyses of treaty succession. Evidence collected supports the existence of lingering heuristics of domination maintained by new states emerging in the last two decades. Their reaction to their position vis-à-vis inherited obligations should be examined in light of the findings of those scholars who are most concerned with excavating problematic vestiges of colonial complicity in international law. Authors such as Nathaniel Berman, Martti Kokenniemi, and Anthony Anghie do not assert that frameworks of recognition, legal personality, statehood, or unequal treaties themselves constituted an intentionally-derived system for imperialism. Instead, they point out how concepts in international law, such as rules and customs about when and how states are expected to sustain acquired rights to land and natural resources have been defined largely by Western powers. In place of this monolithic category—the collection of European states with the capacity to engage in imperial projects—this thesis suggests critically examining the role of larger and more powerful entities engaged in succession, including rump states and former confederations surviving secessions, or treaty-partners negotiating succession after the birth of new states. The final case study, Kosovo, elucidates how new states continue to view these entities in terms of past grievances and unequal power relations. Contextual examples from the final period analyzed support inferences that international legal paradigms of succession remain ill-equipped to accommodate or inform decisions about the inheritance of international obligations.

Personality, Pactum, and International Society

A consistent theme of historical debates in the law of treaty succession in this study has been the conspicuous absence of an enduring, independent concept of legal personality that describes the position of states in relation to treaties. At base, this reflects the commitment to legal positivism borne by international lawyers arguing for or against versions of universal succession and the clean-slate. This branch of analytical jurisprudence suggests broadly that the rules of international law are defined by the will of states, and that states direct and regulate the integrity of these rules among themselves. Yet the cluster of principles required to maintain this approach creates inherent difficulties for addressing the position of nascent states. When, in chapter three, Daniel O'Connell acknowledged that international law had not created a concept of a collective identity for individual states to which legal rights and duties could be considered automatically attached, he was identifying this central problem. The unresolved disputes among governments at the conferences convened to finalize the 1978 Vienna Convention related to the same quandary, leading to the redaction of the article distinguishing new states entitled to consent under the treaty and those that were not. In a less expansive sense, it was this same tension which underlay disagreements over automatic succession to human rights treaties discussed in chapter five. Without a broad consensus, let alone a definitive answer to this conceptual difficulty, international lawyers will continue to struggle, as they always have, to establish when new states are transgressing recognized rules. If it cannot be established whether new states have accepted or were subject to those rules in the first place, their violation or acceptance of rules of inheritance of treaties will remain difficult to assess.

This central problem confronting the law of succession, for which there remains limited prospects for resolution, connects the fate of inherited treaties to broader discourses in the English School of international relations. In a narrow sense, the legal positivism that has

governed discourses in this area shares a deep conceptual communion with theorists advocating a pluralist vision of international society. Prescriptions of authors from Hedley Bull to Robert Jackson that the maintenance of international order is best served by a thin set of rules which accommodate the rich diversity of states and their differing conceptions of interstate institutions[6] matches closely with the idea that succession must be drawn from rules widely-accepted by states. Yet the contemporary history of succession illustrates profoundly that in the inheritance of treaties, states exhibit a will to grapple with questions of justice which transcend the confines of baseline rubrics which international lawyers have attempted to establish. The purposes evinced by new states, even when they have been in support of regional and global order, have suggested that logical processes of succession have not yet uncovered comprehensive means to address their aspirations to define their relationships to the international community.

English School theorists are uniquely equipped to evaluate international law from a necessarily more critical vantage.[7] They should seek to incorporate the concerns for autonomy and justice exhibited by states in a robust understanding of rules of succession. Future projects by international lawyers attempting to gather consensus around customary rules of succession and the continued interpretation of the 1978 Vienna Convention would benefit greatly from such analyses. Understanding the present and future course of treaty succession requires an awareness of how states negotiate rudimentary normative principles—advanced through practice—and the rules promulgated by lawyers and jurists attempting to organize or bracket these behaviors. This endeavor will demand more than merely the

[6] Hedley Bull, *The anarchical society: a study of order in world politics,* (New York: Palgrave Macmillan, 2012); Robert H. Jackson and Roger Epp, "The Global Covenant: Human Conduct in a World of States," *International Journal,* 56.3, 2001, 533.

[7] See, for example, Peter Wilson, "The English School's approach to international law," in Navari, Cornelia, (ed.) *Theorising International Society: English School Methods*, (New York: Palgrave Macmillan, 2009) 167-188. For an expansive view of the English School's capacity to move beyond classical pluralist-solidarist divides see Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society*, (New York Oxford University Press, 2007).

legitimation international legal structures for the sake of order. Laws of succession and their interpreters should aim for coexistence with the identified modes of self-determination, custodianship, and the integration of the two which this dissertation has documented.

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