

# WHY NEW STATES ACCEPT OLD OBLIGATIONS

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*This Article builds on prior legal and policy appraisals of what happens to commercial obligations upon state succession. The author analyzes two recent successions in Kosovo and Iraq, testing the predictive and normative aspects of a policy-oriented approach. Thus, this Article contributes fresh insight into the continued use of the policy-oriented approach to state succession. Specifically, this Article confirms that international legal rules governing the transmission of debt obligations to successor states still do not exist. Policy considerations will inform the decision whether to bind new states to the agreements of their predecessor's. The author also shows that application of the policy-oriented approach is not necessarily triggered by the formal attainment of statehood, but can be prompted by calls for self-determination by people of a territory. The formal distinction between state and government succession has eroded to the point that a new framework of analysis is supplanting that distinction. The author concludes that, in some disputes, alternative configurations of statehood may, or at least ought to, replace Westphalian statehood in order to accommodate competing policies of self-determination and global stability.*

## I. LAW WITHOUT LAWS

Deciding when a successor state should be bound by its predecessor's commercial treaties and international contracts, even though the successor never consented to them, is a trenchant problem in world affairs. This problem was acute when former Eastern bloc states disintegrated. It may become more intense in the years ahead because there are many secessionist movements in the post-Cold War world. Eschewing futile attempts to derive purported laws, which would ultimately lack controlling authority, legal scholars increasingly favor policy-oriented so-

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lutions to this problem that are descriptively more accurate and normatively more attractive. Yet, because the policy-oriented approach to succession was proposed only half a decade ago,<sup>1</sup> further theoretical work and practical analysis remains to be completed.<sup>2</sup> Two recent successions, Kosovo and Iraq, have not been fully appraised.<sup>3</sup> This Article carries out the appraisals and deepens the policy-oriented approach to state succession and commercial obligations. Broadly speaking, it makes three contributions to the extant literature about the effect of succession on commercial obligations.

First, the succession of Kosovo both confirms and modifies the policy-oriented solution. It confirms that international laws governing the transmission *vel non* of international commercial obligations to successor states still do not exist, and there is little hope of such rules ever coming into existence. Absent rules, geopolitical factors with varying degrees of authority and control may configure the behavior of decision makers and outcomes with some consistency. In general, decision makers will be guided by the necessity of protecting international arrangements supporting international trade and capital markets, balanced against the need to avoid debilitating the successor state. The balance may be approximated through negotiated outcomes formalized in international agreements, or by courts and international commissions called to adjudicate disputes or render opinions.

The Kosovo incident also modifies the policy-oriented approach. Based on prior post-Cold War successions, it was hitherto postulated that adjustments to commercial obligations would be sequenced after succession. In Kosovo, the international decision-making process distributed commercial obligations even before final resolution of whether succession occurred. A lesson from Kosovo is that the policy-oriented

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1. See TAI-HENG CHENG, *STATE SUCCESSION AND COMMERCIAL OBLIGATIONS* 26–35 (2006) [hereinafter CHENG, *STATE SUCCESSION*]; see also Tai-Heng Cheng, *Renegotiating the Odious Debt Doctrine*, 70 *LAW & CONTEMP. PROBS.*, Summer 2007, at 7, 21–29 [hereinafter Cheng, *Odious Debt*]; Tai-Heng Cheng, *State Succession and Commercial Obligations: Lessons from Kosovo*, in *ESSAYS IN HONOR OF W. MICHAEL REISMAN* (M. Arsanjani et al. eds., forthcoming 2010).

2. See, e.g., Roger P. Alford, Book Review, 23 *ARB. INT'L* 511, 517–18 (2007) (reviewing CHENG, *STATE SUCCESSION*, *supra* note 1) (suggesting research avenues at “the intersection between state succession and international dispute resolution”); Mark A. Drumbl, Book Review, 6 *CHINESE J. INT'L L.* 254, 256 (2007) (reviewing CHENG, *STATE SUCCESSION*, *supra* note 1) (“[The policy-oriented approach] might [be] integrate[d] . . . more closely with other substantive areas of international law, in particular, international trade law . . .”).

3. See Gregory W. Bowman, *Seeing the Forest and the Trees: Reconceptualizing State and Government Succession*, 51 *N.Y.L. SCH. L. REV.* 581, 592 (2006–2007) (reviewing CHENG, *STATE SUCCESSION*, *supra* note 1) (“[D]oes [the policy-oriented] approach hold up in the context of the 2003 regime change in Iraq?”); Henry H. Perritt, Jr., Book Review, 25 *WIS. INT'L L.J.* 129, 134 (2007) (reviewing CHENG, *STATE SUCCESSION*, *supra* note 1) (“One can only hope that international and local decision makers involved with Kosovo read and heed his book [on the policy-oriented approach] . . .”); Robert D. Sloane, *The Policies of State Succession: Harmonizing Self-Determination and Global Order in the Twenty-First Century*, 30 *FORDHAM INT'L L.J.* 1288 (2007) (reviewing CHENG, *STATE SUCCESSION*, *supra* note 1) (describing the Iraq succession “as still in progress and therefore one that it would be premature to appraise” at that time).

approach is not necessarily triggered by the formal attainment of statehood, but by claims of statehood and attendant demands to adjust commercial obligations.

Second, the succession in Iraq has eroded the formal distinction between state and government succession when decision makers need to decide whether to adjust commercial obligations. The prevailing Westphalian orthodoxy has hitherto been that government successions do not affect a state's obligations. Following the proposals of scholars, policy makers and courts are increasingly applying the policy-oriented approach to government successions as well to adjust the successor government's international obligations. In the regime change in Iraq, an international decision-making process occurred that discounted Saddam-era debt to help Iraq rebuild its economy while preserving the global economic order. A recent U.S. federal court has also rejected the distinction between state and government succession when deciding if a successor should be responsible for its predecessor's debts.<sup>4</sup>

Third, to the extent that the policy-oriented approach fails to adequately promote the well-being of communities that undergo succession, this Article proposes that the scope of inquiry should be broadened beyond adjusting commercial obligations. The challenges posed to a war-torn state with limited resources, no infrastructure, and weak government are often simply too great to overcome, even if burdensome international commercial obligations are terminated. Maximizing well-being of territorial communities may require a more holistic view of succession. Jurists may need to invent alternative configurations of territorial autonomy other than statehood, whereby the territorial community abdicates some attributes of sovereignty to patron states or international organizations in exchange for economic and military assistance. This Article proposes some alternatives and suggests that the existing international legal order could already accommodate them.

Whenever a state is created, its territory changed, or its government fundamentally altered, its government and the international community face a problem about what to do with international commercial arrangements that were in place before state succession occurred. This problem is recurring, serious, and technically intractable.

Many indications suggest the problem is recurring. The pace of succession accelerated after the Cold War geopolitics that held states in stasis broke down. Russia, Czechoslovakia, Yugoslavia, East Timor, Hong Kong, Macau, Afghanistan, Iraq, Bosnia, and Kosovo have all undergone variants of succession in the last two decades. Successions are unlikely to stop. There are persistent flashpoints in Taiwan, Quebec, Tibet, Northern Cyprus, the Basque region, and the Northwest Frontier Provinces in Pakistan. Relatively newer secessionist movements, cradled within the

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4. See *infra* Part III.

global human rights and self-determination program, are agitating with vigor. Kosovo is one example that has resulted in a declaration of independence. Other incipient successions, both inchoate and virtually choate, include South Ossetia, Abkhazia, Chechnya, Kurdistan, Transnistria, the Republic of Srpska, Western Sahara, Puntland, and Somaliland.<sup>5</sup> The potential for Islamist transformation in some countries also remains present, although it is unclear whether Al-Qaeda in the Middle East and the Taliban in Afghanistan and Pakistan are any closer to achieving their revolutionary goals.

The problem is serious because the amount of state debt at stake when a state breaks up often runs into the tens or hundreds of millions of dollars.<sup>6</sup> Global trade and investment is also threatened because they lean on the struts of international trade, currency, and investment agreements that bound the predecessor state and that its successor may question.<sup>7</sup> Even private contracts that provide the basis for business interactions may face the risk of falling apart.<sup>8</sup> If these concerns seem abstract, they unfold in human dimensions. People in transitional states need jobs, food, education, healthcare, and shelter that are imperiled without international aid, investment, and trade. Workers and shareholders in banks and international corporations worry about bad loans to failed states that translate into lower stock values in retirement and college savings. Fisherman and traders in neighboring states vex over how to ply their regional trades without treaties on fishing and tariffs in place.

The problem is technically intractable because a state is only bound to a treaty or a contract through its consent.<sup>9</sup> International commercial arrangements, ranging from sovereign debts, investment treaties, trade agreements, and development projects are all created by treaties and contract. The new government or state replacing its predecessor never consented to those treaty or contractual obligations and, in some instances, did not even benefit from the commercial arrangements or loans. The virtual impossibility of devising controlling and authoritative legal

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5. For a humorous and insightful report of on the ground experiences in some of these territories, see generally Graeme Wood, *Limbo World: They Start By Acting Like Real Countries, Then Hope to Become Them*, FOREIGN POL'Y, Jan.-Feb. 2010, at 48.

6. See Joanna Chung & Stephen Fidler, *Restructuring Under Fire: Why Iraq Debt Is No Longer a Write-Off*, FIN. TIMES, July 17, 2006, at 15 (discussing scale of Iraqi debt on succession); Azez J. Hassan, Deputy Minister of Fin., Remarks at the Meeting with Iraq's Commercial Claimants, Dubai (May 4, 2005) (on file with author) (same); see also Bureau of W. Hemisphere Affairs, *Cuba's Foreign Debt*, U.S. DEP'T OF STATE (2003), available at <http://2001-2009.state.gov/p/wha/rls/fs/22743.htm> (noting that the economy in Iraq is riskier than in Cuba, making it one of the riskiest economies in the world).

7. See, e.g., CHENG, STATE SUCCESSION, *supra* note 1, at 243-47 (discussing various commercial treaties that were confirmed, modified, or terminated upon the dissolution of Czechoslovakia).

8. See, e.g., 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia, 218 F.3d 152, 157 (2d Cir. 2000); *Petrotimor Companhia de Petroleos Sarl v Commonwealth of Austl.*, (2003) 197 ALR 461; Guiseppe di Vittorio, [1998] 1 Lloyd's Rep. 136 (Ct. App.) (Eng.).

9. See Vienna Convention on the Law of Treaties art. 51, May 23, 1969, 1155 U.N.T.S. 331. *But see* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, ¶ 76 (Feb. 26, 2007), <http://www.icj-cij.org/docket/files/91/13685.pdf> (limiting notion of consent as prerequisite to being bound).

rules governing the disposition of commercial obligations when state succession occurs is borne out by history. The world community spent decades after World War II drafting two treaties on the subject, but one never entered into force and the other has only a handful of signatories.<sup>10</sup> There has also never been sufficient state practice and *opinio juris* to create customary laws on this subject.<sup>11</sup> Domestic laws governing contracts almost always command *renvoi* to international law to determine whether or not a successor state or government is the continuing legal personality of the original contracting party.<sup>12</sup>

Confronted with the persistent problem of state succession and the futility of prior efforts to devise rules on succession and commercial obligations, in the aftermath of post-Cold War succession, scholars began devising a new approach to provide guidance to international decision makers about what might happen upon succession and what to do. Rather than try to direct international decision makers with technical legal rules that do not exist, lawyers could provide guidance by identifying when the problem of state succession and commercial obligations is likely to present itself based on past trends and conditioning factors determining how actors are likely to behave, and by proposing processes and arrangements that would restore international order and protect the interests of actors and the world community.<sup>13</sup>

Studies of post-Cold War successions up until 2003 yield iconoclastic conclusions.<sup>14</sup> Even if international laws on state succession and commercial obligation did not exist, there was a legal process to stabilize international commercial arrangements that was guided by the conflu-

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10. Vienna Convention on Succession of States in Respect of Treaties art. 51, Aug. 23, 1978, 1946 U.N.T.S. 3 [hereinafter 1978 Convention]; Vienna Convention on Succession of States in Respect of State Property, Archives, and Debt, Apr. 7, 1983, U.N. Doc. A/CONF.117/14, 22 I.L.M. 306 [hereinafter 1983 Convention].

11. See P.K. MENON, THE SUCCESSION OF STATES IN RESPECT TO TREATIES, STATE PROPERTY, ARCHIVES, AND DEBTS, at v (1991) (“State practice has been singularly marked with inconsistency and contradiction.”); Matthew C.R. Craven, *The Problem of State Succession and the Identity of States Under International Law*, 9 EUR. J. INT’L L. 142, 149–51 (1998); Sloane, *supra* note 3, at 1297 (agreeing with this author that prior theories of succession “still less offers anything like binding international law on the subject”).

12. See *Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Ger.*, No. 05 Civ. 10669(GEL), 2007 WL 2822214, at \*9 (S.D.N.Y. Sept. 27, 2007), *aff’d*, 615 F.3d 97 (2d Cir. 2010); *Yucyco, Ltd. v. Republic of Slov.*, 984 F. Supp. 209, 217 (S.D.N.Y. 1997); Guisepppe di Vittorio, [1998] 1 Lloyd’s Rep. at 150.

13. See CHENG, STATE SUCCESSION, *supra* note 1, at 26–35.

14. Iconoclasm, in law as in religion, involves the destruction of images that ossify and distort living virtues of a higher order. See *Epitome of the Definition of the Iconoclastic Conciliabulum, Held in Constantinople, A.D. 754*, reprinted in *The Seven Ecumenical Councils of the Undivided Church* (Henry R. Percival ed., 1900), reprinted in A SELECT LIBRARY OF NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH, VOLUME XIV, at 543, 546 (Philip Schaff & Henry Wace eds., 2d Series 1905) (“If anyone shall endeavour to represent the forms of the Saints in lifeless pictures with material colours which are of no value (for this notion is vain and introduced by the devil), and does not rather represent their virtues as living images in himself . . . [L]et him be anathema[!]”). The first act of Muslim iconoclasm occurred in AD 630, when deities in Ka’ba and Mecca were destroyed. Idolatry is banned in the Hadith. See G.R.D. King, *Islam, Iconoclasm, and the Declaration of Doctrine*, 48 BULL. SCH. ORIENTAL & AFR. STUD. 267, 268 (1985).

ence of self-interest and good policy to ensure the continuity of obligations that remained relevant without debilitating the transitional state or government that underwent succession.<sup>15</sup> Although this process was not completely controlling and authoritative, unlike, perhaps, traffic laws requiring drivers to stop at red lights or criminal laws prohibiting murder, it nonetheless exerted sufficient control and authority such that decision makers could be confident that future successions would proceed in this fashion.

The policy-oriented proposals also radically challenged the prevailing doctrine that state succession was different than government succession.<sup>16</sup> When a government was toppled, such as through revolution, the state remained responsible for its international obligations. The problems of state succession occurred only when the legal entity of the state itself changed. Yet this Westphalian distinction between states and governments failed to account for contemporary government successions in which international commercial arrangements were questioned and ultimately adjusted or terminated. In a previous book monograph, the author proposed that to fully manage the commercial disruptions of succession, the distinction between state and government succession should be rejected and decision makers need to be prepared to adjust international commercial arrangements whenever a state's internal structures are fundamentally reorganized.<sup>17</sup>

Iconoclasts oppose orthodoxy at their peril,<sup>18</sup> and only a few escape unscathed.<sup>19</sup> The policy-oriented proposals received attention from jurists and decision makers worldwide,<sup>20</sup> who have both embraced and criti-

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15. CHENG, STATE SUCCESSION, *supra* note 1, at 5.

16. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 n.2 (1987) ("International law sharply distinguishes the succession of states, which may create a discontinuity in statehood, from a succession of governments, which leaves statehood unaffected."); Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1206 (2007) ("A line is often drawn, sometimes drawn very sharply, between governmental succession (when the state itself remains intact) and state succession (when the state undergoes some territorial change).").

17. CHENG, STATE SUCCESSION, *supra* note 1, at 3–5.

18. History is replete with examples of iconoclasts drawing ire from the church and state. In two famous incidents, Pope Gregory II convened a papal synod in AD 731 to condemn and excommunicate iconoclasts, *see* 2 THE NEW CAMBRIDGE MEDIEVAL HISTORY 364 (Rosamond McKitterick ed., 2006); in AD 787, the empress Irene, as regent to Constantine VI, convened the Second Council of Nicaea, which rejected iconoclasm and "issued four anathemas against the iconoclasts," *see* CHRISTOPHER M. BELLITTO, THE GENERAL COUNCILS: A HISTORY OF THE TWENTY-ONE CHURCH COUNCILS FROM NICAEA TO VATICAN II, at 31–33 (2002).

19. Perhaps luck, divinity, or powerful supporters were on the side of the first Christian iconoclasts, for Pope Gregory II's efforts against them in AD 731 were thwarted when Byzantines intercepted and killed in Constantinople messengers carrying papal letters excommunicating the iconoclasts. FRANCESCO GIOIA, THE POPES: TWENTY CENTURIES OF HISTORY 41 (2005).

20. *See, e.g.*, MATTHEW CRAVEN, THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES 215 & n.44 (2007); Buchheit et al., *supra* note 16, at 1205 & n.4.

cized its methodology,<sup>21</sup> as well as its normative position.<sup>22</sup> Courts have quoted it as authoritative,<sup>23</sup> lawyers have relied on it,<sup>24</sup> international civil servants have studied it, and foreign governments have consulted it.<sup>25</sup> For half a decade, the international response has churned. With the successions in Iraq and Kosovo providing new data to test the policy-oriented proposals, and in the interests of continuing the conversation among scholars, policy makers, and lawyers, this Article provides a comprehensive response to the discussions about the policy-oriented approach to state succession.

This Article proceeds in three further parts. Part II discusses the international process to adjust international commercial arrangements when state succession occurs in the absence of applicable rules of international law. It next responds to scholarly commentary on the policy-oriented proposals and tests the proposals against the succession of Kosovo. It concludes that the Kosovo experience revalidated the policy-oriented proposals, and the proposals will probably provide predictive guidance to decision makers in future successions. Part III discusses the distinction between state and government succession and the view that commercial arrangements should be insulated from government succes-

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21. Compare Drumbl, *supra* note 2, at 256 (“Although Cheng recognizes the different forms that succession can take, he does not flesh out whether this diversity, in turn, should trigger diversity in terms of the form of the substantive law, in particular, any predisposition towards continuity.” (citation omitted)), with Bowman, *supra* note 3, at 591 (“[D]rawing distinctions based on the *type* of state succession event adds little or no richness to the analysis, since at the end of the day what matters is the commercial interest, not the form of the event through which it is continued or repudiated.”). Craven pithily encapsulates the divide: “A further obvious consequence of this pragmatic mindset . . . was that it was set against reliance upon the kind of formal categories that had hitherto marked the discipline.” CRAVEN, *supra* note 20, at 215; see also *infra* Part II.B (discussing other methodological debates).

22. See *infra* Part IV (discussing normative debates). Compare Jeremy Leong, Book Review, 11 SING. Y.B. INT’L L. 356, 357 (2007) (reviewing CHENG, STATE SUCCESSION, *supra* note 1) (“Critical legal scholars may even doubt the soundness of Dr. Cheng’s fundamental proposition that international law in this area should aim to balance the two policies of global order and the maintenance of the right to self-determination.”), with Christiana Ochoa, *From Odious Debt to Odious Finance: Avoiding the Externalities of a Functional Odious Debt Doctrine*, 49 HARV. INT’L L.J. 109, 130 (2008) (“From a normative perspective, this article is in agreement with the position that in addition to the validly desirable policies of predictability and stability, ‘international law should manage state successions to . . . facilitate . . . and support the legitimate aspirations of territories that undergo succession.’” (quoting CHENG, STATE SUCCESSION, *supra* note 1, at 13)).

23. In *Mortimer Off Shore Services, Ltd. v. Federal Republic of Germany*, the U.S. District Court for the Southern District of New York dismissed Mortimer’s attempts to enforce Prussian Bonds against Germany and quoted *State Succession and Commercial Obligations* as the sole authority for one of its holdings. *Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Ger.*, No. 05 Civ. 10669(GEL), slip op. at 2 (S.D.N.Y. Apr. 9, 2008) (order denying motion to amend judgment), *aff’d*, 615 F.3d 97 (2d Cir. 2010).

24. In its appeal to the U.S. Court of Appeals for the Second Circuit, Mortimer also relied on *State Succession and Commercial Obligations* in its brief. See Brief for Appellant, *Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Ger.*, Nos. 08-1783-CV (L), 08-2358 CV (XAP), at 1 (2d Cir. July 26, 2010).

25. Tai-Heng Cheng, *A Renaissance Career in International Law*, in CAREERS IN INTERNATIONAL LAW: A GUIDE TO CAREER PATHS IN INTERNATIONAL LAW 7, 9 (V. Onorevole ed., Am. Soc’y of Int’l Law 2009-2010 ed. 2009) (describing use of *State Succession and Commercial Obligations* by the Office of the President and the International Civilian Office in Kosovo).

sion. It surveys the rising tide of scholarly opinion in support of policy-oriented proposals that seek to move away from the artificial distinction between state and government that is increasingly obsolete in policy terms. It also tests this view by examining the succession in Iraq and a recent court decision in the United States. These studies reveal a shift toward a policy-oriented approach that examines a succession in light of its context and away from formalistic distinctions between state and government succession. Part IV discusses the normative implications of the policy-oriented proposals. It acknowledges the criticism that the proposals may not do enough to help transitional states achieve sustainable well-being, but points out that delimiting the problem as one of state succession and commercial obligations is too narrow to address the plethora of difficulties faced by transitional states. It suggests that a new set of proposals is required to reconceptualize statehood in a way that allows territorial communities to achieve different forms of sustainable autonomy beyond the traditional strictures of statehood if Westphalian statehood may not enable the community to effectively function under the existing world order.

## II. LAW AS PROCESS

Prior theories of state succession and commercial obligations have not gained universal acceptance.<sup>26</sup> Most of these theories have attempted to deduce legal rules from interpretations of past successions,<sup>27</sup> but these ex post derivations have not controlled ex ante the disposition of commercial obligations when state succession occurs.

Since the nineteenth century, many theories of state succession have distinguished between state and government succession.<sup>28</sup> State succession involves a change in the territory or international legal personality of a state.<sup>29</sup> Government succession involves a change in government, even a revolutionary reconfiguration of the internal power structures and personalities, without an accompanying change in the international legal personality of a state.<sup>30</sup> According to the positivists, government successions are not thought to affect preexisting international commercial obligations.<sup>31</sup>

In contrast, jurists are divided on whether state succession disrupts international obligations. Universal succession theorists in general pro-

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26. See Drumbl, *supra* note 2, at 254 (“International law has not yet satisfactorily delineated the legal effects of State succession, especially on commercial obligations.”).

27. See *id.*

28. See 1 D.P. O’CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW: INTERNAL RELATIONS 5 (1967) (“Until the middle of the nineteenth century both [state and government succession] were assimilated, and the problems they raised were uniformly solved.” (citing, *inter alia*, Grotius and Pufendorf)).

29. See Buchheit et al., *supra* note 16, at 1206 & n.6.

30. See *id.*

31. See *id.* at 1205–06.

pose that obligations that are not extinguished from the predecessor state now bind the successor state.<sup>32</sup> They advance various justifications, ranging from their selection and interpretation of state practice to references to natural law and equitable notions of unjust enrichment.<sup>33</sup> Clean-slate theorists in general propose that obligations of the predecessor state do not bind the successor state, except by the successor's election.<sup>34</sup>

Contemporary state practice does not fully support the universal theories or the clean-slate theories.<sup>35</sup> In the dissolution of the Soviet Union, Russia claimed to be automatically bound by the entire liabilities of the Soviet Union, in part to support its claim to the entirety of Soviet assets, military arsenal, and seat in international organizations, such as the U.N. Security Council.<sup>36</sup> Although some actors initially opposed this claim, such as Ukraine, which had an interest in the Black Sea Fleet,<sup>37</sup> Russia's position eventually prevailed with creditors, or successor states to the Soviet Union, and third parties.<sup>38</sup> In contrast, when East Timor achieved independence, the commercial treaty that Indonesia had entered into with Australia to divide the spoils from energy resources extracted from the Timor Gap did not automatically continue to bind East Timor.<sup>39</sup> Instead, the U.N. Transitional Administration in East Timor

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32. See ERNST H. FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION 25–30 (1931) (discussing Grotius's theory); H. GROTIUS, II DE JURE BELLI AC PACIS, ch. IX, §§ VIII, XII (1625), translated in 2 HUGO GROTIUS, OF THE RIGHTS OF WAR AND PEACE 221–22, 229–30 (1715); ARTHUR BERRIEDALE KEITH, THE THEORY OF STATE SUCCESSION: WITH SPECIAL REFERENCE TO ENGLISH AND COLONIAL LAW 2–3 (1907) (discussing classical universal succession theories); Buchheit et al., *supra* note 16, at 1204–05.

33. PATRICK DUMBERRY, STATE SUCCESSION TO INTERNATIONAL RESPONSIBILITY 263–79 (2007) (discussing unjust enrichment).

34. Craven, *supra* note 11, at 148; see also KEITH, *supra* note 32, at 58–77 (arguing that successor states are not *ipso jure* bound by the obligations of the predecessor state, although for reasons of expediency, in some instances, the successor may opt to be bound); YILMA MAKONNEN, THE NYERERE DOCTRINE OF STATE SUCCESSION AND THE NEW STATES OF EAST AFRICA 53–73 (1984) (explaining that the newly independent state may opt to renew any lapsed obligations by exercising its legally autonomous choice); Yilma Makonnen, *Namibia: Its International Status and the Issues of Succession of States*, 3 LESOTHO L.J. 183, 198–203 (1987) (discussing the Nyerere Doctrine).

35. Ochoa, *supra* note 22, at 126 n.89 (“[N]either of these absolutist theories is appropriate at this time.” (citing CHENG, STATE SUCCESSION, *supra* note 1, at 13–25)).

36. See BENEDICTE VIBE CHRISTENSEN, INT'L MONETARY FUND, THE RUSSIAN FEDERATION IN TRANSITION: EXTERNAL DEVELOPMENTS 24–25, 34–36 (1994); Paul Williams & Jennifer Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 HARV. INT'L L.J. 355, 380–83 (2001); see also Patrick Juillard, *The Foreign Debt of the Former Soviet Union: Succession or Continuation?*, in DISSOLUTION, CONTINUATION AND SUCCESSION IN EASTERN EUROPE 67, 69–74 (Brigitte Stern ed., 1998); Stefan Oeter, *State Succession and the Struggle Over Equity: Some Observations on the Laws of State Succession with Respect to State Property and Debts in Cases of Separation and Dissolution of States*, 38 GER. Y.B. INT'L L. 73, 77–83 (1995).

37. See CHENG, STATE SUCCESSION, *supra* note 1, at 352–53; Williams & Harris, *supra* note 36, at 378–82.

38. See CHENG, STATE SUCCESSION, *supra* note 1, at 353–55.

39. See Exchange of Notes Constituting an Agreement Between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) Concerning the Continued Operation of 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 of 11 December 1989, [2000] ATS 9 (Austl.); see also VIVIAN LOUIS FORBES, CONFLICT AND COOPERATION IN MANAGING MARITIME SPACE IN SEMI-ENCLOSED SEAS 219–20 (2001); Ivan Shearer, *A Pope, Two*

(UNTAET) and Australia negotiated a new treaty that more equitably divided Timor Gap revenues between Australia and East Timor,<sup>40</sup> which the government of East Timor accepted upon its independence.<sup>41</sup> These two case studies could be interpreted to support contradictory theories of succession.

Other contemporary incidents of succession are more ambiguous and could each be interpreted to favor either the clean-slate or universal succession theories. During the dissolution of the Czech and Slovak Federal Republic (CSFR) into the Czech Republic and Slovakia, the respective successor states divided up the preexisting debt between them and accepted these debts by express agreement or notification to the creditors, such as the International Monetary Fund (IMF), World Bank, and Paris and London Clubs.<sup>42</sup> This outcome could support the universal succession theory, because the CSFR's debts were in fact accepted by its successor states. It could also support the clean-slate theory, because if the debts were transmitted *ipso jure*, no further acts or confirmations by the successor states should have been necessary.

In the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), the successor states eventually accepted their respective proportionate shares of the SFRY's external debts in the 2001 Agreement on Succession Issues Between the Five Successor States of the Former State of Yugoslavia (2001 Yugoslavia Agreement).<sup>43</sup> This outcome indicates a tendency toward universal succession. Yet the need for an international agreement to finally resolve a succession dispute that raged on for almost a decade equally supports an argument that, upon succession, commercial obligations do not automatically pass to successor states except by their consent.

When Hong Kong reverted from the United Kingdom to China, the parties confirmed with treaty partners that many of the commercial treaties entered into by the United Kingdom concerning Hong Kong contin-

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*Presidents and a Prime Minister*, 7 ILSA J. INT'L & COMP. L. 429, 439 (2001); Michael White & Jeffrey Weeks, *Australian Maritime Law Update: 2000*, 32 J. MAR. L. & COM. 371, 382-84 (2001).

40. See Press Release, United Nations Transitional Administration in East Timor, Timor Sea Arrangement, Negotiated by UN, Approved by East Timor Cabinet (July 3, 2001), available at <http://www.un.org/peace/etimor/news/N030701.htm> [hereinafter UNTAET Press Release].

41. Timor Sea Treaty Between the Government of East Timor and the Government of Australia, Austl.-Timor-Leste, May 20, 2002, 2258 U.N.T.S. 3.

42. Constitutional Law on the Division of CSFR Property Between the Czech Republic and the Slovak Republic of November 13, 1992 (Constitutional Act No. 541/1992), reprinted in CENTRAL & EASTERN EUROPEAN LEGAL MATERIALS, RELEASE 19 (Vratislav Pechota ed., 1993); see also Paul R. Williams, *State Succession and the International Financial Institutions: Political Criteria v. Protection of Outstanding Financial Obligations*, 43 INT'L & COMP. L.Q. 776, 805 & n.176 (1994) (citing Letter from Jan Klak, Minister of Finance of the CSFR, Ivan Kacarnik, Deputy Prime Minister and Minister of Finance of the Czech Republic, and Julius Toth, Minister of Finance of the Slovak Republic, to Lewis Preston, President of the World Bank Group (Dec. 4, 1992)).

43. Agreement on Succession Issues Between the Five Successor States of the Former State of Yugoslavia, June 29, 2001, 41 I.L.M. 3 (2002); see also Arthur Watts, *Introductory Note to Agreement on Succession Issues Between the Five Successor States of the Former State of Yugoslavia*, 41 I.L.M. 1 (2002).

ued to apply to Hong Kong after its handover.<sup>44</sup> Like the 2001 Yugoslavia Agreement, the acts and outcomes during the succession of Hong Kong support both universal succession and clean-slate theories. Using contemporary incidents of state succession to derive purported legal rules governing the transmission *vel non* of commercial obligations upon succession is fraught with the perils of interpretative argument—as any seasoned advocate in court well knows.

The absence of customary law guiding the disposition of commercial obligations following state succession is not alleviated by treaties on the subject.<sup>45</sup> In 1961, the U.N. General Assembly asked the International Law Commission (ILC) to study state succession as a pressing international problem.<sup>46</sup> After decades of discussions, the ILC finally proposed draft articles on state succession in respect of treaties and on state succession in respect of property, archives, and debts, in 1978 and 1983, respectively.<sup>47</sup> These two sets of articles proposed elaborate taxonomies of types of state succession and rules governing the effect of each category of succession on treaties, property, archives, and debts.<sup>48</sup> With some modifications, U.N. member states voted to finalize these provisions as the Vienna Convention on Succession of States in Respect of Treaties of 1978 (1978 Convention) and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983 (1983 Convention).<sup>49</sup>

Neither of these treaties resolves the issue of state succession and commercial obligations, however. The 1983 Convention lacks the requisite number of state parties and never entered into force.<sup>50</sup> The 1983 Convention therefore does not formally bind any state. The 1978 Con-

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44. See XIANGGANG JIBEN FA art. 153 (H.K.) (The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China) (providing that "[i]nternational agreements to which the People's Republic of China [PRC] is not a party," but which were previously implemented in Hong Kong prior to its restoration to the PRC, would continue to have legal effect in the Hong Kong Special Administrative Region after the handover).

45. See generally CHENG, STATE SUCCESSION, *supra* note 1, chs. 3 & 4 (discussing the Vienna Convention on Succession of States in Respect of Treaties of 1978 and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983, respectively).

46. G.A. Res. 1686 (XVI), ¶ 3, U.N. Doc. A/RES/1686(XVI) (Dec. 18, 1961).

47. United Nations Conference on Succession of States in Respect of State Property, Archives and Debts, Volume II, Vienna, Mar. 1-Apr. 8, 1983, *Draft Articles on Succession of States in Respect of State Property, Archives and Debts Adopted by the International Law Commission at Its Thirty-Third Session*, U.N. Doc. A/CONF.117/4 [hereinafter 1983 Conference]; United Nations Conference on Succession of States in Respect of Treaties, Volume III, Vienna, Apr. 4-May 6, 1977 and July 31-Aug. 23, 1978, *Draft Articles on Succession of States in Respect of Treaties with Commentaries Adopted by the International Law Commission at Its Twenty-Sixth Session*, U.N. Doc A/CONF.80/4 [hereinafter 1978 Conference].

48. See 1983 Conference, *supra* note 47; 1978 Conference, *supra* note 47.

49. See 1978 Convention, *supra* note 10; 1983 Convention, *supra* note 10.

50. 1983 Convention, *supra* note 10, art. 50(1). Only Croatia, Estonia, Georgia, Liberia, Slovenia, Macedonia, and Ukraine have acceded to this treaty. U.N. OFFICE OF LEGAL AFFAIRS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, VOLUME I, at 141, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009) [hereinafter MTDSG I].

vention did enter into force, but to date it has only twenty-two parties.<sup>51</sup> The 1978 Convention binds its parties, but successor states will not be treaty parties prior to their succession. The 1978 Convention does not therefore address whether it binds successor states, thus it may not control whether successor states are bound by its substantive provisions on the continuity or discontinuity of treaties upon succession.

Neither the 1983 Convention, which has seven parties,<sup>52</sup> nor the 1978 Convention, which has twenty-two parties,<sup>53</sup> have acquired the status of customary law through widespread acceptance of its provisions, which states would have indicated by acceding to the convention.<sup>54</sup> They do not therefore bind any successor state as a matter of customary law.

The situation is no clearer as regards to a state's responsibility for contractual obligations once succession occurs. At the time of this writing, the most recent decision on this question appears to be *Republic of Serbia v. ImageSat International NV*.<sup>55</sup> ImageSat, an Israeli spy-satellite company, brought an arbitration against Serbia arising from an arbitration clause in a contract entered into with the State Union of Serbia and Montenegro in 2005 to rent two spy satellites for 45 million.<sup>56</sup> Ten days after ImageSat served a request for arbitration on the State Union, Montenegro declared itself independent of Serbia.<sup>57</sup> After the arbitrator issued an award against Serbia, Serbia sought an order from the English High Court to set aside the award on the basis that it was a successor state to the original contracting party and was not bound by the arbitration agreement to which it never consented.<sup>58</sup> Mr. Justice Beatson decided the case on grounds unrelated to state succession, but added in *obiter dictum*: "It appears from the international law materials that there is no extensive and uniform state practice or *opinio juris* as to the liability of a successor state for its predecessor's private contractual liabilities to a private person or entity."<sup>59</sup>

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51. 1978 Convention, *supra* note 10, art. 49(1). Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Dominica, Ecuador, Egypt, Estonia, Ethiopia, Iraq, Liberia, Montenegro, Morocco, Republic of Moldova, Serbia, Seychelles, Slovakia, Slovenia, St. Vincent and the Grenadines, Macedonia, Tunisia, and Ukraine have all ratified, acceded, or succeeded to this treaty. U.N. OFFICE OF LEGAL AFFAIRS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, VOLUME III, at 541, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009) [hereinafter MTDSG III].

52. See MTDSG I, *supra* note 50.

53. See 1978 Convention, *supra* note 10; MTDSG III, *supra* note 51.

54. Francesco Parisi, *Spontaneous Emergence of Law: Customary Law*, in 5 ENCYCLOPEDIA OF LAW & ECONOMICS: THE ECONOMICS OF CRIME AND LITIGATION 603, 613 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000).

55. Republic of Serb. v. ImageSat Int'l NV, [2009] EWHC (Comm) 2853, [3] (Eng.).

56. *Id.* ¶ 2, 138; see also IMAGESAT INTERNATIONAL, <http://www.imagesatintl.com> (last visited Nov. 21, 2010).

57. *ImageSat*, [2009] EWHC (Comm) 2853, [2].

58. *Id.* ¶ 1, 10, 13.

59. *Id.* ¶ 139 (citation omitted).

### A. *A Policy-Oriented Approach*

Even though there is limited positive law on the disposition of commercial obligations when state succession occurs, policy makers and corporate officers nonetheless have to decide the status of debts, contracts and commercial treaties when succession occurs, with or without default legal rules. Their legal advisors, in-house attorneys, and outside counsel may decide that their role is purely to provide advice on positive law. There being none, they may conclude that there is no role for law or lawyers in a problem they characterize as a purely political or business issue. Although this is a possible approach, it does not provide significant assistance in resolving a persistent and important problem.

An alternative is to think about problem solving more broadly and to systematically analyze prior successions to provide guidance for future successions, which implicate legal relationships and are thus reasonably within the province of law, even if there are no bright-line answers prescribed by hard legal rules. Lawyers can provide policy makers and corporate executives useful guidance by extrapolating from past succession incidents likely outcomes in future successions based on the presence or absence of similar interests and pressures in the succession at issue, and appraising these trends against relevant policy preferences.<sup>60</sup> A multifaceted analysis, including an appraisal of five interlocking factors affecting succession outcomes, has been mapped in the book monograph *State Succession and Commercial Obligations*,<sup>61</sup> and a distilled exposition is provided here in lieu.

#### 1. *Density of Relationships*

Contemporary successions indicate that a baseline trend in succession issues relating to commercial arrangements is to promote global order by avoiding the complete disruption of preexisting arrangements.<sup>62</sup> The explanation for this trend also has normative appeal: states and non-state actors are so interconnected and mutually dependent that totally destroying preexisting commercial arrangements would impose tremendous and unacceptable costs to all parties. The denser the preexisting relationships, the stronger the impulse to avoid tearing them apart through succession.

The associative relationships among the policy (promoting world order), the factor (density of relationship), and the trend (protecting international arrangements) apply to commercial treaties. In the restora-

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60. See Perritt, *supra* note 3, at 132 (“[G]ood lawyers analyze politics and economics as well as law.”).

61. CHENG, *STATE SUCCESSION*, *supra* note 1, at 382–99; see also Bowman, *supra* note 3, at 588 (discussing factors); Drumbl, *supra* note 2, at 255 (same); Leong, *supra* note 22, at 356–57 (same); Perritt, *supra* note 3, at 131–32 (same).

62. See CHENG, *STATE SUCCESSION*, *supra* note 1, at 382–87.

tion of independence of the Baltic States in the early 1990s, even though preexisting commercial treaties had been imposed by their Soviet overlords, the Baltic States nonetheless elected to confirm those treaties as continuing to apply to them so long as their commercial purposes were still relevant.<sup>63</sup> In the dissolution of the CSFR, a contentious dispute emerged between Hungary and Slovakia concerning the potential or termination *vel non* of the Gabčíkovo-Nagymaros Project on the Danube River, which was partially constructed pursuant to an international agreement entered into by their communist predecessors.<sup>64</sup> The International Court of Justice (ICJ) ruled that the obligations to properly construct the dam remained in force<sup>65</sup> and explained that the alternative would cause unacceptable environmental damage and disruption to the populations along the entire stretch of the Danube River.<sup>66</sup>

This importance of global order does not, however, translate into the slavish continuation of all prior commercial treaties on their old terms. Because the *raison d'être* in commercial negotiations following succession is often the pragmatic pursuit of mutual interests, commercial treaties that are still relevant tend to remain in force, obsolete treaties are terminated, and treaties that need adjusting to accommodate new economic and political realities are modified. These legal outcomes may be achieved through various procedures, ranging from confirmation by an exchange of letters, unilateral declarations of continuity, or formally acceding to the treaty at issue. For example, the succession of Hong Kong had minimal impact on commercial obligations as commercial treaty obligations were generally preserved. Article 153 of the Basic Law of the Hong Kong Special Administrative Region provides that international agreements to which the People's Republic of China is, or becomes a party to, would apply to Hong Kong if so decided by the government of the People's Republic of China after seeking the views of the Hong Kong government.<sup>67</sup>

Macau is another example. Macau was a member of the World Trade Organization (WTO) prior to its succession and remained a member after it dissolved to China on December 20, 1999.<sup>68</sup> Macau also remained bound by the General Agreement on Tariffs and Trade (GATT) to which it was a party as of January 1991.<sup>69</sup>

During the dissolution of the Soviet Union, “[t]he treaty partners of Russia and the Soviet Union wished to continue to benefit from prior arrangements involving the Soviet Union, and recognizing Russia as the

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63. *See id.* at 359–60.

64. Gabčíkovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 7, 14–28 (Sept. 27).

65. *Id.* at 71–72, ¶ 123.

66. *Id.* at 77–78, ¶ 140.

67. XIANGGANG JIBEN FA art. 153 (H.K.).

68. *See* WTO, *Trade Policy Review: Macau, China 2001*, at 12, 18 & n.22, WT/TPR/S/82 (July 2001).

69. *See id.* at 18.

continuity of the Soviet Union provided a basis on which to give legal effect to these intentions.”<sup>70</sup> “Many states accordingly supported Russia’s claim to be the continuing international legal personality of the Soviet Union.”<sup>71</sup>

The preservation of commercial obligations after succession applies to private contracts as well. For example, in *Russian Federation v. Pied-Rich B.V.*, the Dutch Court of Appeals held that Russia had succeeded to the rights and obligations of the Soviet Union and was bound by the Soviet Union’s guarantor obligations under its contract with Pied-Rich, an Amsterdam company.<sup>72</sup>

The trend toward general continuity is also apparent in succession to public debts. In every succession since the end of the Cold War, successor states have divided the predecessor’s debts among themselves when the predecessor disintegrated.<sup>73</sup> In the dissolution of the Soviet Union, Russia accepted the entirety of Soviet debt.<sup>74</sup> In the dissolution of CSFR, the Czech Republic and Slovakia divided up IMF, World Bank, and Paris Club debts in a ratio of roughly two to one, reflecting their relative populations.<sup>75</sup> In the dissolution of the SFRY into five successor states, eventually each state accepted its equitable share of Yugoslavia’s debt.<sup>76</sup> In the regime change in Iraq, the new government became responsible for the prior regime’s debt.<sup>77</sup>

## 2. *Human Rights and Self-Determination*

The trend toward continuity to promote global order is not, however, absolute, nor does it constitute an inviolable rule. Minimum requirements of human rights are generally aligned with the self-interest of state and nonstate actors to avoid global disruptions from states failing.<sup>78</sup> These considerations often compel counterparties in commercial ar-

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70. CHENG, STATE SUCCESSION, *supra* note 1, at 356.

71. *Id.*

72. *Russian Fed’n v. Pied-Rich B.V.* (HR 1993) (Neth.), 1994 NETH. Y.B. INT’L L. 512. *But see* 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia, 218 F.3d 152, 159–63 (2d Cir. 2000) (holding question of successor state’s liabilities of Yugoslavia’s rent obligations in New York were not justiciable).

73. See CHENG, STATE SUCCESSION, *supra* note 1, at 18–19.

74. See Williams & Harris, *supra* note 36, at 382–83.

75. See *supra* note 42 and accompanying text.

76. See *supra* note 43 and accompanying text.

77. See Hassan, *supra* note 6, at 2 (noting the agreement reached with Iraq’s Paris Club creditors providing “for an 80% cancellation of claims”); Press Release, Paris Club, Paris Club and the Republic of Iraq Agree on Debt Relief (Nov. 21, 2004); Press Release, Republic of Iraq, Ministry of Fin., Iraq Announces Launch of Debt-for-Debt Exchange Offer (Nov. 16, 2005) (discussing terms) [hereinafter Iraq Debt Settlement Documents]; Press Release, Republic of Iraq, Ministry of Fin., Iraq Announces Terms of Commercial Debt Settlement Offer (July 26, 2005) [hereinafter Terms of Settlement]; Trust Indenture Republic of Iraq-JP Morgan Chase Bank (Nov. 16, 2005) (providing terms) [hereinafter Trust Indenture].

78. *But cf.* CHENG, STATE SUCCESSION, *supra* note 1, at 405 (stating continuity of commercial arrangements may be disrupted when continuity would involve gross injustice).

rangements and debtors with loans to avoid burdening successor states with untenable commercial obligations.<sup>79</sup> Thus, the public debts inherited by Russia,<sup>80</sup> as well as the five successor states of the SFRY, were respectively rescheduled to extend the repayment timeline.<sup>81</sup> They were also discounted through claims settlements when it became apparent that the repayment of preexisting debt became practically impossible.<sup>82</sup> When Iraq underwent regime change, Iraq's debt was deeply discounted in an effort to enable Iraq to repay its loans within an extended time frame that was necessary to avoid undermining its economy and, ultimately, its ability to repay outstanding debts and to transition to a stable state.<sup>83</sup>

International commercial arrangements that are wholly unjust yet serve some commercial purpose may be adjusted to distribute economic benefits more fairly. During the process through which East Timor gained independence, the Timor Gap Treaty was renegotiated to increase East Timor's benefits from the Timor Gap exploration with Australia.<sup>84</sup>

### 3. *Supervening Political Factors*

Supervening political factors may distort the trends to preserve international commercial arrangements and to adjust them if necessary to prevent a successor state from failing in its transition to full and effective statehood. International commercial disputes are not often resolved in isolation from other geopolitical issues surrounding succession. Russia's insistence on assuming the entirety of Soviet debt was not motivated purely by a desire to preserve preexisting commercial arrangements; it was principally to stake a claim over the Soviet nuclear and conventional arsenal, as well as the Soviet Union's position in key international decision-making bodies like the U.N. Security Council.<sup>85</sup> The delays in distributing the SFRY's debt among its five successor states was caused by the alienation of Serbia while Slobodan Milošević was in power and committing genocidal acts on Muslim minorities, which was unacceptable to the international community.<sup>86</sup> When state succession implicates greater interests or global policies than commercial arrangements, commercial disputes may become an instrument in broader negotiations and

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79. See *id.* at 29–35 (discussing the five policies that harmonize apparent conflicts between the fundamental values of global order and self-determination).

80. See *id.* at 355 (discussing IMF and World Bank's use of fresh loans as leverage "in ensuring that Russia continued to service Soviet Union debt").

81. See Cheng, *Odious Debt*, *supra* note 1, at 23–24.

82. See *id.* at 24 ("In 2005, Serbia and Montenegro accepted their portion of SFRY debt and effectively rescheduled it by refinancing it with bonds due in 2010 and 2024." (citing Republic of Serbia Offering Circular (Mar. 7, 2005))).

83. Iraq Debt Settlement Documents, *supra* note 77.

84. See CHENG, STATE SUCCESSION, *supra* note 1, at 198–99; Cheng, *Odious Debt*, *supra* note 1, at 25; UNTAET Press Release, *supra* note 40.

85. See CHENG, STATE SUCCESSION, *supra* note 1, at 350–51.

86. See *id.* at 280–82.

their final resolution is likely to be contingent upon a wider geopolitical settlement.

The sequencing of events can affect the influence of geopolitical factors over questions about commercial arrangements. When a succession is anticipated and the relevant state and nonstate actors have ample time to plan for the succession, the adjustment of preexisting commercial arrangements is more likely to be orderly and immunized from sharp geopolitical disagreements. In the transfers of Hong Kong and Macau from the United Kingdom and Portugal, respectively, to China, the predecessor states negotiated and planned the transfers years in advance, and addressed many questions regarding the continuity or termination of commercial and other treaties.<sup>87</sup> Expectations of continuity or adjustment were crystallized through exchanges of letters and other diplomatic communications.<sup>88</sup> Consequently, upon the successions of Hong Kong and Macau, international commercial agreements were seamlessly adjusted, minimizing disruptions to the global economy.<sup>89</sup>

By the end of 1991, the Czech and Slovak Republics realized that the constitutional framework set up under the CSFR would no longer serve the interests of either individual republic.<sup>90</sup> On August 27, 1992, Vladimir Meciar, the Prime Minister of the Slovak Republic, and Vaclav Klaus, the Prime Minister of the Czech Republic, agreed that the CSFR would dissolve into two separate republics on January 1, 1993.<sup>91</sup> “In preparation for the dissolution of the CSFR, the two republics concluded over 25 intergovernmental agreements concerning the division of federal powers and obligations and the basis of their cooperation after dissolution.”<sup>92</sup>

In the succession of East Timor from Indonesia’s occupation, the transition to independence was managed by UNTAET, pursuant to U.N. Security Council Resolution 1272, under Chapter VII of the U.N. Charter.<sup>93</sup> UNTAET administered East Timor from 1999 to 2002.<sup>94</sup> During this period of time, it renegotiated the Timor Sea Agreement so that the arrangements between Australia and an independent East Timor were in

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87. See Draft 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, Sept. 26, 1984, 23 I.L.M. 1366; Gov’t Printing Bureau, Macao Special Admin. Region, Joint Declaration of the Government of the People’s Republic of China and the Government of the Republic of Portugal on the Question of Macao (1987), <http://bo.io.gov.mo/bo/i/88/23/dc/en/Default.asp#jd>.

88. See Note from Qin Huasun, Permanent Representative, People’s Republic of China, to Kofi Annan, Sec’y-Gen., United Nations (June 20, 1997), 36 I.L.M. 1675; Note from John Weston, Permanent Representative, United Kingdom, to Kofi Annan, Sec’y-Gen., United Nations (June 20, 1997), 36 I.L.M. 1684.

89. See CHENG, STATE SUCCESSION, *supra* note 1, at 216–22, 225–26 (discussing the impact of the successions of Hong Kong and Macau, respectively, on commercial obligations).

90. See *id.* at 240.

91. See *id.* at 240–41.

92. *Id.* at 241; Williams & Harris, *supra* note 36, at 401.

93. S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

94. S.C. Res. 1410, U.N. Doc. S/RES/1410 (May 17, 2002).

place almost immediately upon independence and largely insulated from animosity against Australia's complicity with Indonesia's occupation of East Timor.<sup>95</sup> There is much to commend about such a planned approach to succession.

Not all successions proceed smoothly, however. Often successions emerge from popular uprisings. In such instances, disputes among the predecessor and successor states over the division of debt may be acrimonious and drawn out. In the case of the SFRY, no resolution could be reached over the question of succession to debts until Milošević was no longer in power, years after the SFRY had dissolved.<sup>96</sup>

#### 4. *Relative Power and Authority of Decision Makers*

The balance among the density of relationships, minimum requirements of human rights, and supervening geopolitical factors is mediated by the relative power and authority that decision makers apply in pursuing their own policy preferences and interests. In the restorations of Hong Kong and Macau to China from the United Kingdom and Portugal, respectively, the interests of predecessor states, territories undergoing succession, the successor state, investors, and corporations were generally aligned toward minimizing disruptions to commercial arrangements.<sup>97</sup> Thus, the power and authority of decision makers supported, and achieved, continuity in commercial obligations.<sup>98</sup>

In the dissolution of the SFRY, the interests of most of the successor states and creditors were to minimize disruptions to commercial arrangements so that the successor states could meaningfully participate in the global economy. The Federal Republic of Yugoslavia (FRY), however, did not share these interests and had the power to stall resolution on the issue of SFRY's debt because global settlement could not be achieved with one successor state holding out.<sup>99</sup> It was only when Milošević was no longer in power and Belgrade sought to reintegrate itself into the community of nations that settlement was achieved with relative speed.<sup>100</sup>

Another clear example of the distorting effects of power and authority is the dissolution of the Soviet Union, in which there was no dis-

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95. See CHENG, STATE SUCCESSION, *supra* note 1, at 199 ("On July 5, 2001, UNTAET and Australia signed a memorandum of understanding on the 'Timor Sea Agreement.' Under the Timor Sea Agreement, East Timor and Australia would share the production of oil or gas in the ratio of 9:1. This ratio compared very favorably to the Timor Gap Treaty, which shared production between Australia and Indonesia equally."). Compare 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, Austl.-Indon., Dec. 11, 1989, [1991] ATS 9 (Austl.), 29 I.L.M. 475 (1990), with Timor Sea Treaty Between the Government of East Timor and the Government of Australia, *supra* note 41.

96. See CHENG, STATE SUCCESSION, *supra* note 1, at 304-05.

97. See *id.* at 229-30.

98. See *id.* at 233-36.

99. See *id.* at 274-75.

100. See *id.* at 304-05.

tribution of debts among the successor states. Russia was overwhelmingly powerful, and it was thus able to deploy its immense power and authority to secure control over Soviet assets together with the entirety of its debts, which creditors had to reschedule on terms acceptable to Russia.<sup>101</sup>

### 5. *Collective Decision Making*

To fully account for power and authority that mediates between human rights, world order, and the interests of decision makers, collective decision making must be considered. Collective decision making can be part of the process to achieve an outcome in state succession. Interested parties, through negotiations, may reach explicit agreements on the continuity or termination of prior commercial arrangements, such as when the Czech Republic and Slovakia each confirmed through diplomatic notes with CSFR's treaty partners the international agreements that remained in force, including many treaties' commercial matters.<sup>102</sup>

Implicit collective decision making may also significantly influence outcomes. In recent state successions, the IMF and World Bank have had a strong influence on the division of the predecessor state's debt among its successor states. Following the dissolution of the CSFR, the IMF and World Bank allocated its debts to the two institutions between the Czech Republic and Slovakia in a two to one ratio.<sup>103</sup> Although other private creditors were free to distribute their CSFR debt differently, the IMF and World Bank allocations implicitly provided a decision to follow, and allowed for a smooth transition of private debts according to the IMF allocation.<sup>104</sup>

### B. *Scholarly Responses*

Scholars have responded vigorously to the methodology and normative commitments of the policy-oriented approach to state succession and commercial obligations described above. Regarding methodology, attitudes can be roughly divided into two categories: positivists have expressed skepticism, whereas scholars sympathetic to process-oriented theories of international law have been receptive.<sup>105</sup> Professor Matthew

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101. *See id.* at 353–54.

102. *See id.* at 259–61.

103. *Id.* at 259.

104. *See id.* at 260–61.

105. Craven, looking back on the scholarly arc on state succession, observes that the author's approach reflects a similar orientation to the late Oscar Schachter's. CRAVEN, *supra* note 20, at 214–15 & n.44 (discussing Oscar Schachter, *State Succession: The Once and Future Law*, 33 VA. J. INT'L L. 253 (1993)). Interestingly, Schachter was a leading scholar of the international legal process movement, not the policy-oriented approach, and he has been critical of the latter. *See* Remarks by Oscar Schachter, *McDougal's Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC'Y INT'L L. PROC. 266, 268–69 (1985). Yet, Craven's observation supports a view that the two approaches have a similar orientation. *See generally* TAI-HENG CHENG, *WHEN INTERNATIONAL LAW WORKS: REALISTIC IDEALISM*

Craven, writing in the positivist tradition, has characterized the policy-oriented approach to state succession as a “pragmatic” standpoint that involves “thinking about the issue of succession in terms of ‘problem solving.’”<sup>106</sup> He describes the approach as “a radical enough suggestion,” but concedes that it also underscores a general perception that “[positivistic distinctions] were as much part of the problem as the solution.”<sup>107</sup> Jeremy Leong is more critical, however. Reflecting the positivistic emphasis on state consent as a touchstone of international law, he states:

[S]ome may find that [the] thesis detracts from the primacy of the ceding state and the primacy of consent as the basis to modern international law. . . . [The] emphasis on affording . . . third parties palpable roles in the international decision making process is neither necessarily accurately reflective of contemporary practice nor prescriptively sound.”<sup>108</sup>

Leong ultimately reveals that his methodological critique is also a normative concern “insofar as [the thesis] recognises that the relative power and authority of decision makers as well as the possibility of collusion between these decision makers, serves to legitimise the exercise of hegemonic or oligarchic power upon new states through the international legal order.”<sup>109</sup>

Surely, however, the potential for abuse of power by hegemonic or oligarchic power is ever present in international affairs, whether or not jurists explicitly acknowledge this possibility.<sup>110</sup> An advantage of accounting for the role of power in the international decision-making process is that it focuses the policy makers on the potential for abuse and encourages scholars to make recommendations to prevent or rectify abuses.<sup>111</sup> Leong assumes, wrongly however, that accounting for the power of nonstate and state actors to influence commercial arrangements

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AFTER 9/11 AND THE GLOBAL RECESSION ch. 2 (forthcoming 2011) (proposing that policy-oriented jurisprudence and the international legal process movement both embrace process-driven concepts of law, that they share a common genealogy tracing back to Myres S. McDougal and Harold Lasswell, and that they have been synthesized together by leading second-generation jurists, such as Rosalyn Higgins, who prepared her doctoral thesis under the supervision of Schachter and McDougal).

106. CRAVEN, *supra* note 20, at 214.

107. *Id.* at 215 & n.44.

108. Leong, *supra* note 22, at 357.

109. *Id.* *But see* Perritt, *supra* note 3, at 134 (“[Cheng] appropriately and explicitly encourages lawyers advising corporations and governmental negotiations to engage the opportunity to recommend a careful analysis of geopolitical realities, media attention, and public sympathies, along with the available legal tools in aid of developing effective strategies.”).

110. *Cf.* W. Michael Reisman, *Law From the Policy Perspective*, in INTERNATIONAL LAW ESSAYS 1, 9 (Myres S. McDougal & W. Michael Reisman eds., 1981) (“That, international law notwithstanding, a large state will intervene in the affairs of a smaller state if it deems its own security threatened does not mean that it is right for it to do so. . . . It does mean that people in the smaller and larger state who are trying to develop a realistic set of matter-of-fact expectations . . . will be wise to put this possibility into their reckoning.”).

111. *See* Robert D. Sloane, *More than What Courts Do: Jurisprudence, Decision, and Dignity—In Brief Encounters and Global Affairs*, 34 YALE J. INT’L L. 517, 523–24 (2009) (“Yet the extent to which ‘power trumps’ in many areas of international law must not . . . lead lawyers to lose their sense of indignation at injustice and violations of human dignity.”).

in the process of succession blindly legitimates that power. It does not. It signals to jurists to appraise whether the power is directed toward appropriate policy goals for the world community and to make recommendations to policy makers to constrain abusive behavior. One cannot speak truth to power without first acknowledging it.

Leong's methodological concern that the policy-oriented approach to state succession is not reflective of contemporary practice is not shared by other scholars, including scholars who do not necessarily carry out research using the policy-oriented approach.<sup>112</sup> Nevertheless, given the ambiguities inherent in an interpretative methodology, it is appropriate to question the interpretation of prior successions from which the policy-oriented approach was constructed. Kosovo provides a useful test case. Because it occurred after the policy-oriented approach was proposed, analyzing Kosovo could provide some indication of the predictive value or explanatory power of the approach.

### C. Kosovo

Kosovo's succession is the latest critical case study to further develop the law of state succession and commercial obligations. Although succession is a recurring problem, state successions do not occur with great frequency. Every new succession provides additional important data to examine and appraise. Studying the relationship between Kosovo's declaration of independence and disruptions to international commercial arrangements is also useful because even though there are copious scholarly works on Kosovo,<sup>113</sup> scant attention has been paid to issues concerning its commercial obligations.<sup>114</sup>

Kosovo's succession is unusual in that disruptions to international commercial arrangements have been raised and partially addressed, even though Kosovo's succession remains in dispute at the time of this writing. Although the United States and some sixty states have recognized Kosovo as a state,<sup>115</sup> Serbia and other important states such as Russia have de-

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112. Bowman, *supra* note 3, at 588 ("Professor Cheng's broad, inclusive approach does provide for accurate description of state succession and appears promising as a predictor . . .").

113. See, e.g., Robert J. Delahunty & Antonio F. Perez, *The Kosovo Crisis: A Dostoievskian Dialogue on International Law, Statecraft, and Soulcraft*, 42 VAND. J. TRANSNAT'L L. 15 (2009); Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779 (2009); William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT'L L.J. 115 (2009).

114. See, e.g., Perritt, *supra* note 3, at 134 ("[I]nternational and local decision makers involved with Kosovo [should heed the advice to] organize a constructive approach to working out the complicated succession issues embedded in a decision over the final status for Kosovo.").

115. See U.N. Secretary-General, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, ¶ 2, U.N. Doc. S/2009/300 (June 10, 2009) [hereinafter *Kosovo Interim Administration Report*]; see also Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHL J. INT'L L. 1, 4 (2009) (noting fifty-eight recognitions, including by the United States, as of summer 2009); Who Recognized Kosovo as an Independent State, <http://www.kosovothanksyou.com>

nied that succession occurred and have refused recognition,<sup>116</sup> and many other states have neither recognized nor withheld recognition of Kosovo.<sup>117</sup> At the request of the U.N. General Assembly, roughly two-and-a-half years after Kosovo's declaration of independence on February 17, 2008, the ICJ issued an advisory opinion that Kosovo's declaration of independence was not illegal under international law. The opinion expressly declined to state a view on whether Kosovo had achieved statehood and the legal consequences of Kosovo's declaration.<sup>118</sup> Although a final outcome in its succession may not yet have been reached, which may simply be a matter of time, disputes about its succession's impact on commercial treaty arrangements, international contracts, and Serbia's public debt have already emerged and require international attention. There are other recent successions, such as the dissolution of the SFRY, that also required some years to finally resolve questions of whether and when succession occurred, but questions about the disposition of international commercial arrangements were addressed only when there were no serious questions about whether succession occurred, and certainly not while the legality of a declaration of independence was the subject of ICJ deliberation. It is appropriate to consider whether, under the inverted sequencing of events in Kosovo's succession, the policy-oriented law of state succession and commercial obligations discussed above holds true or whether it requires adjusting.

### 1. *Geopolitical Context*

To understand the ongoing decision-making process in Kosovo regarding state succession and commercial obligations, it is necessary to situate the legal issues in their geopolitical context.<sup>119</sup> The centuries of enmity between Christian Serbs and Muslim Albanians in Kosovo, including the genocide that took place at the end of the last century,<sup>120</sup>

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(last visited Nov. 21, 2010) (noting seventy-two recognitions by U.N. member countries as of Nov. 21, 2010).

116. Press Release, Security Council, Security Council Meets in Emergency Session Following Kosovo's Declaration of Independence, with Members Sharply Divided on Issue: Serbia's President, Russian Federation Say Declaration Illegal; United States, United Kingdom, France, Others Favour Recognition of New State, U.N. Press Release SC/9252 (Feb. 18, 2008).

117. See *id.* (presenting statements from nations that did not outright recognize Kosovo's status as an independent state).

118. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ¶ 51 (July 22, 2010), <http://www.icj-cij.org/docket/files/141/15987.pdf>; U.N. GAOR, 63d Sess., 22d plen. mtg., U.N. Doc. A/63/PV.22 (Oct. 8, 2008).

119. See generally Milena Sterio, *The Kosovar Declaration of Independence: "Botching the Balkans" or Respecting International Law*, 37 GA. J. INT'L & COMP. L. 267 (2009); Vidmar, *supra* note 113; *Kosovo Historical Chronology*, SECURITY COUNCIL REPORT, <http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.2693009/> (last visited Nov. 21, 2010) [hereinafter *Kosovo Historical Chronology*] (listing events over the past thirty years that led to Kosovo's declaration of independence).

120. See U.N. Secretary-General, *Report of the Secretary-General Prepared Pursuant to Resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council*, U.N. Doc. S/1998/1221 (Dec. 24, 1998).

made it normatively unappealing and geopolitically unwise to deny Kosovo independence. The genocide and wars that took place at the end of the last century provide a compelling case for allowing Kosovo to achieve autonomous governance unburdened by debts of the past. Yet, curiously, Kosovo did accept a proportional share of Serbian debt and commercial treaties entered into prior to its independence.<sup>121</sup> This Section of the Article explains why and how these outcomes nevertheless relieved Kosovo of burdens while preserving global commercial order.

The Balkans is a multi-ethnic and multi-religious region. It has been ruled at different times by the Byzantines, Croats, Serbs, Hungarians, and Turks.<sup>122</sup> In the mid-fourteenth century, the Ottoman Empire was expanding, and in 1389, Sultan Murad I advanced his army deeper into Serbia.<sup>123</sup> The Serbian Prince Lazar, together with other noblemen and their troops, met the Ottoman force at Kosovo.<sup>124</sup> The Serbs were heavily outnumbered, and the Ottoman army prevailed, but both sides suffered heavy casualties, including the Prince and Sultan. The Battle of Kosovo became a symbol of Serbian independence, for it temporarily halted the Ottoman's advance.<sup>125</sup> To some Serbs, Kosovo is considered the birthplace of their identity,<sup>126</sup> the cradle of the great Serbian medieval empire, and a symbol of Serbian civilization and culture.<sup>127</sup>

This symbolism does not reflect present-day Kosovo. Serbia is predominantly Serb and Christian. Kosovo is mostly Muslim and Albanian, with a Serbian minority isolated in the northern part of Kosovo. Kosovo is also very poor; “the unemployment rate hovers at more than fifty percent overall, more than seventy percent for youth.”<sup>128</sup> “Additionally, the economy remains the poorest in Europe outside the former Soviet Union; and the average monthly salary does not exceed \$250.”<sup>129</sup> “One in six Albanians lives in poverty.”<sup>130</sup>

During World War II, the Axis forces occupied Yugoslavia.<sup>131</sup> In 1943, the SFRY, firmly under the Soviet sphere of influence, was pro-

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121. See *The World Factbook: Kosovo*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html> (last visited Nov. 21, 2010) (“In June 2009 . . . Kosovo began servicing its share of the former Yugoslavia’s debt.”).

122. CHENG, STATE SUCCESSION, *supra* note 1, at 268.

123. See Larry J. Eisenhauer, *From Nuremberg to Kosovo—Two Iowa Judges Step Outside Their Jurisdiction to Promote International Law*, 55 *DRAKE L. REV.* 311, 331 (2007).

124. See *id.*

125. See Hajredin Kuci, *The Legal and Political Grounds for, and the Influence of the Actual Situation on, the Demand of the Albanians of Kosovo for Independence*, 80 *CHI.-KENT L. REV.* 331, 336 (2005); see also Vidmar, *supra* note 113, at 784.

126. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 *AM. J. INT’L L.* 161, 167–68 (1999); Sterio, *supra* note 119, at 270.

127. Henry H. Perritt, Jr., *Final Status for Kosovo*, 80 *CHI.-KENT L. REV.* 3, 6 (2005).

128. Sterio, *supra* note 119, at 274.

129. *Id.* at 274.

130. *Id.* at 274.

131. See Vidmar, *supra* note 113, at 785.

claimed.<sup>132</sup> It comprised six republics: Bosnia-Herzegovina, Croatia, Slovenia, Montenegro, Macedonia, and Serbia, which included the autonomous region of Kosovo.<sup>133</sup> Except for Bosnia, each of the republics roughly represented a distinct ethnic group.<sup>134</sup> Today, each of the republics of the former Yugoslavia uses its own language, but they are all Slavic languages similar to Serbo-Croatian.<sup>135</sup>

By the end of the 1980s, Communism waned. Milošević came to power in 1989 during the rise of Serbian nationalism that followed the fall of the Berlin Wall and Soviet communism.<sup>136</sup> He became a hero in Serbia when he went to Kosovo to calm the fears of local Serbs amid a strike by Kosovar Albanian miners that was paralyzing the province. In 1989, Milošević was firmly in control of the Serbian republic and embarked on a campaign to consolidate his power throughout Yugoslavia.<sup>137</sup> On the 600th anniversary of the Battle of Kosovo, Milošević presided over a massive rally that was attended by more than one million Serbs at Kosovo Polje, the location of the historic battle.<sup>138</sup> One of his first acts following this historic event was to rescind the autonomy enjoyed by Kosovo and institute draconian martial law in the province.<sup>139</sup> Kosovar Albanians were fired from their jobs, their schools were closed, they were denied access to state-run health care, and they lost administrative control of the province.<sup>140</sup>

As Milošević pushed for more power over Yugoslavia, the other republics began to break away.<sup>141</sup> In 1991, Slovenia, Croatia, and Macedonia issued declarations of independence.<sup>142</sup> Efforts by Slovenia and Croatia to secede led Serbia to invade them.<sup>143</sup> Eventually, however, Slovenia and Croatia achieved succession.<sup>144</sup> Bosnia-Herzegovina followed suit.<sup>145</sup> More civil wars followed until the Dayton Peace Agreement in 1995.<sup>146</sup>

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132. See ECON. INTELLIGENCE UNIT, COUNTRY PROFILE: BOSNIA AND HERZEGOVINA 1998–1999, at 4–5 (1998).

133. See *id.*; see also Sterio, *supra* note 119, at 270.

134. See generally ROBERT D. GREENBERG, LANGUAGE AND IDENTITY IN THE BALKANS: SERBO-CROATIAN AND ITS DISINTEGRATION (2004).

135. See *id.*

136. Perritt, *supra* note 127, at 7–8.

137. Robert F. Carolan, *An Examination of the Role of Hybrid International Tribunals in Prosecuting War Crimes and Developing Independent Domestic Court Systems: The Kosovo Experiment*, 17 *TRANSNAT'L L. & CONTEMP. PROBS.* 9, 12 (2008).

138. See *id.* at 13.

139. See *id.*

140. See Borgen, *supra* note 115, at 3; Sterio, *supra* note 119, at 271; Michael T. Kaufman, *Two Distinct Peoples with Two Divergent Memories Battle Over One Land*, N.Y. TIMES, Apr. 4, 1999, at 10.

141. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 9, ¶ 232.

142. *Id.* ¶ 88, 232.

143. See CHENG, STATE SUCCESSION, *supra* note 1, at 268.

144. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 9, ¶ 88.

145. *Id.*

146. See CHENG, STATE SUCCESSION, *supra* note 1, at 269.

The SFRY had broken up into the FRY, Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia.<sup>147</sup>

Kosovo, too, began to agitate against Milošević's oppression. In 1998 fighting broke out between Serbian forces and Kosovar Albanian forces resulting in mass murders of Kosovars by Milošević's regime.<sup>148</sup> Under international pressure, the violence waned in late 1998 and the North Atlantic Treaty Organization (NATO) called off planned airstrikes. Violence flared up again in 1999, resulting from provocations on both sides and the use of excessive force by the Serbs.<sup>149</sup> Milošević used brutal tactics of oppression—including genocide—in response to more ethnic upheavals in Kosovo staged by the Kosovo Liberation Army (KLA), a separatist movement.<sup>150</sup> Eventually, NATO countries launched a series of airstrikes on Serbian territory, which ultimately forced Milošević into a peace agreement in Rambouillet, France, in June of 1999.<sup>151</sup> Under the terms of the Rambouillet Peace Agreement and subsequent U.N. Security Council Resolution 1244, the U.N. Mission in Kosovo (UNMIK), a U.N. provisional authority, was to administer Kosovo.<sup>152</sup>

Resolution 1244 struck a careful balance between self-determination and sovereignty. It reaffirmed both with references to “the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region,” as well as “substantial autonomy and meaningful self-administration for Kosovo.”<sup>153</sup> It also set in motion a process for Kosovo's self-governance. It established an international civil presence, which would be responsible for “[p]romoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo . . . .”<sup>154</sup>

On September 28, 2000, Vojislav Kostunica was elected president of the FRY.<sup>155</sup> With the removal of Milošević, Belgrade's outlook turned favorable. Beginning in 2003, the FRY existed as the State Union of Serbia and Montenegro.<sup>156</sup> This union proved short lived. With European Union (EU) involvement, Montenegro voted to secede by referen-

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147. *See id.*

148. *See id.* at 270; *Kosovo Focus on Human Rights: Kosovo War Crimes Chronology*, HUMAN RIGHTS WATCH, <http://www.hrw.org/campaigns/kosovo98/timeline.shtml> (last visited Nov. 21, 2010).

149. *Kosovo Focus on Human Rights*, *supra* note 148.

150. *See id.*; *see also* Sterio, *supra* note 119, at 271.

151. U.N. Security Council, *Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo*, U.N. DOC. S/1999/648, Annex (June 7, 1999).

152. S.C. Res. 1244, ¶ 10, U.N. DOC. S/RES/1244 (June 10, 1999); *Rambouillet Accords*, *supra* note 151.

153. S.C. Res. 1244, *supra* note 152, at pmb1.

154. *Id.* ¶11(a).

155. *See* Vidmar, *supra* note 113, at 817 n.251; *Kosovo Historical Chronology*, *supra* note 119.

156. *See* Vidmar, *supra* note 113, at 795 n.125.

dum and became an independent republic, and the Republic of Serbia remained as the continuing legal entity.<sup>157</sup>

Kosovo did not transition to independence as smoothly as Montenegro, and negotiations over Kosovo's status remained inconclusive for years. The parties involved, including the Serbian leadership, Kosovar representatives, and U.N. and EU representatives, tried negotiating repeatedly.<sup>158</sup> Due to strong differences of opinion concerning the future of Kosovo, they were never able to reach a consensus.<sup>159</sup> While pragmatically recognizing the need to accommodate Western demands, Serbia "maintained its position that Kosovo remain a territorial part of Serbia with strong regional autonomy"; Kosovo insisted on independence.<sup>160</sup> The United States strongly favored Kosovo's independence to promote stability in the Balkans,<sup>161</sup> whereas Russia favored the Serbs.

In 2005, the former Finnish President Martti Ahtisaari was appointed Special Envoy for the Future Status Process for Kosovo.<sup>162</sup> Although initial negotiations only made limited headway, on March 26, 2007, Ahtisaari produced the Report of the Special Envoy of the Secretary-General on Kosovo's Future Status (Ahtisaari Plan), which U.N. Secretary-General Ban Ki-moon transmitted to the Security Council.<sup>163</sup> The Ahtisaari Plan proposed independence for Kosovo, supervised by the international community.<sup>164</sup> The U.N. Security Council did not endorse the Ahtisaari Plan, however, because Russia made clear it would veto any resolution expressing support for Ahtisaari's proposal to grant Kosovo independence.

In August 2007, in a further effort at a diplomatic solution, the U.N. Secretary-General requested a troika comprising the EU, the United States, and Russia to broker further talks for 120 days.<sup>165</sup> After more futile talks, the United States and the EU expressed their willingness to

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157. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 9, ¶ 67.

158. See Perritt, *supra* note 127, at 8–9; Sterio, *supra* note 119, at 272.

159. See Sterio, *supra* note 119, at 272.

160. See *id.* at 272–73.

161. Press Release, Sec'y Condoleezza Rice, U.S. Dep't of State, U.S. Recognizes Kosovo as Independent State (Feb. 18, 2008) ("In light of the conflicts of the 1990s, independence is the only viable option to promote stability in the region."), available at <http://2001-2009.state.gov/secretary/rm/2008/02/100973.htm>.

162. Press Release, Secretary-General, Secretary-General Appoints Former President Martti Ahtisaari of Finland as Special Envoy for Future Status Process for Kosovo, U.N. Press Release SG/A/955, BIO/3714 (Nov. 15, 2005), available at <http://www.un.org/News/Press/docs/2005/sga955.doc.htm>.

163. Special Envoy of the Secretary General, *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, U.N. Doc. S/2007/168 (Mar. 26, 2007) (by Martti Ahtisaari) [hereinafter Ahtisaari Plan].

164. *Id.* ¶ 13.

165. Press Release, Secretary-General, Secretary General Welcomes Agreement on New Kosovo Initiative, U.N. Press Release SG/SM/11111 (Aug. 1, 2007); *Kosovo Historical Chronology*, *supra* note 119.

recognize Kosovo as an independent state.<sup>166</sup> The EU also created the European Union Rule of Law Mission (EULEX) to assist Kosovo in building its legal institutions without supplanting UNMIK's peacekeeping role.<sup>167</sup> It was no secret that with the support of the United States and the EU, Kosovo planned to declare its independence.<sup>168</sup>

On February 17, 2008, the Kosovo Assembly declared independence and adopted a constitution.<sup>169</sup> Article 143 of the Kosovo Constitution expressly gave overriding legal effect to the Ahtisaari Plan as a matter of Kosovo constitutional law.<sup>170</sup> The United States, along with France, Germany, the United Kingdom, and several other countries, promptly recognized the existence of the new state.<sup>171</sup> On February 18, 2008, U.S. President Bush issued a letter granting Kosovo recognition. It stated:

On behalf of the American people, I hereby recognize Kosovo as an independent and sovereign state. I congratulate you and Kosovo's citizens for having taken this important step in your democratic and national development. . . .

. . . .

. . . I am pleased to accept your request that our two countries establish diplomatic relations. The United States would welcome the establishment by Kosovo of diplomatic representation in the United States and plans to do likewise in Kosovo.<sup>172</sup>

Following U.S. recognition of Kosovo, the existing U.S. office in Pristina was designated as an embassy in April 2008.<sup>173</sup>

Kosovo's succession was disputed by other countries, however, including China, Greece, Russia, and Spain.<sup>174</sup> On October 8, 2008, Serbia

166. See Vidmar, *supra* note 113, at 804; Press Release, Int'l Civilian Office: Kosovo, Troika Press Statement on Kosovo (Nov. 20, 2007); see also Press Release, Sec'y Condoleezza Rice, *supra* note 161; *supra* note 115 and accompanying text.

167. *Kosovo Historical Chronology*, *supra* note 119.

168. See Vidmar, *supra* note 113, at 804.

169. See Dan Bilefsky, *In a Showdown, Kosovo Declares Its Independence*, N.Y. TIMES, Feb. 18, 2008, at A1; *Kosovo MPs Proclaim Independence*, BBC NEWS (Feb. 17, 2008, 22:45 GMT), <http://news.bbc.co.uk/2/hi/7249034.stm>; see also Dan Bilefsky, *Kosovo's New Constitution Takes Effect*, N.Y. TIMES, June 16, 2008, at A8; *Kosovo Adopts a New Constitution*, BBC NEWS (Apr. 9, 2008, 16:25 GMT), <http://news.bbc.co.uk/2/hi/europe/7339239.stm>; Brian Whitmore, RADIO FREE EUROPE, *Kosovo: Constitution Born Amid Fears of Turmoil* (June 13, 2008), <http://www.unhcr.org/refworld/docid/4864eab5c.html>.

170. CONST. OF THE REPUBLIC OF KOSOVO art. 143.

171. See Letter from President George W. Bush, to President Fatmir Sejdiu of Kosovo, Recognizing Kosovo as an Independent and Sovereign State (Feb. 18, 2008), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=76735&st=kosovo&st1> [hereinafter Letter to President Sejdiu]; see also Vidmar, *supra* note 113, at 782 n.11 (citing Letter to President Sejdiu, *supra*).

172. Letter to President Sejdiu, *supra* note 171.

173. See *Kosovo: U.S. "Office" Becomes U.S. Embassy Pristina*, MONTHLY NEWSL. (U.S. Office Pristina, Kosovo), Apr. 2008, [http://pristina.usembassy.gov/uploads/cc/6c/cc6cbfa70e5e3ec9285d2c66151a2550/April08\\_Newsletter.pdf](http://pristina.usembassy.gov/uploads/cc/6c/cc6cbfa70e5e3ec9285d2c66151a2550/April08_Newsletter.pdf).

174. See Vidmar, *supra* note 113, at 782 & n.9, 834-35 & n.378; *Background Note: Greece*, U.S. DEPARTMENT OF STATE (Apr. 28, 2010), <http://www.state.gov/r/pa/ei/bgn/3395.htm>; *Papandreou*:

brought a draft resolution to the Sixty-Third Session of the U.N. General Assembly, proposing that the General Assembly request an advisory opinion on the legality of Kosovo's declaration of independence.<sup>175</sup> The question Serbia proposed was carefully worded: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"<sup>176</sup> Posing this question to the ICJ for an advisory opinion avoided explicitly addressing whether Kosovo had succeeded. It also avoided bringing a contentious dispute against Kosovo, because that would entail at least implicitly recognizing that Kosovo had statehood, as only states can be sued before the ICJ.<sup>177</sup> Nonetheless, this strategy was intended to have a chilling effect on other states that may have been considering recognizing Kosovo. *Ceterus paribus*, few states wish to be perceived as supporting an illegal act. The General Assembly voted in favor of the resolution with seventy-seven states in favor, six states against—including the United States—and seventy-four abstentions—including the United Kingdom.<sup>178</sup>

At the time of this writing, Kosovo functions in many ways as a state. More than sixty states have recognized Kosovo.<sup>179</sup> Over one dozen countries have established embassies in Pristina.<sup>180</sup> Kosovo's internal governance also resembles a state. According to a UNMIK report dated June 10, 2009:

Although many Kosovo Serbs reject the authority of Kosovo institutions derived from the "Constitution of the Republic of Kosovo[.]" as does the Government in Belgrade, increasing numbers continue to apply for Kosovo identity cards, driver's licenses and other Kosovo documentation, and sign contracts with the Kosovo Energy Corporation in order to facilitate their daily lives in Kosovo.<sup>181</sup>

At the same time, however, Serbia, Russia, and other states continue to oppose Kosovo's independence and have not recognized it as a state.<sup>182</sup> The ICJ issued an advisory opinion in July 2010 stating that the Kosovo "declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Consti-

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*Greece Will Not Change Its Opposition to Kosovo's Secession*, KOSOVOCOMPROMISE (Jan. 4, 2010), <http://www.kosovocompromise.com/cms/item/topic/en.html?view=story&id=2407&sectionId=1>.

175. U.N. GAOR, 63d Sess., 22d plen. mtg. at 1, U.N. Doc. A/63/PV.22 (Oct. 8, 2008).

176. *Id.* at 6.

177. U.N. Charter art. 34(1).

178. G.A. Res. 63/3, ¶ 6, U.N. Doc. A/RES/63/3 (Oct. 8, 2008); see Press Release, General Assembly, Backing Request by Serbia, General Assembly Decides to Seek International Court of Justice Ruling on Legality of Kosovo's Independence, U.N. Press Release GA/10764 (Oct. 8, 2008).

179. *Kosovo Interim Administration Report*, *supra* note 115, ¶ 1.

180. See *Foreign Missions in Kosovo*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF KOSOVO, <http://www.mfa-ks.net/?page=2,50#box355> (last visited Nov. 21, 2010).

181. *Kosovo Interim Administration Report*, *supra* note 115, ¶ 7.

182. See T.J., *Independence Day*, Posting to *Eastern Approaches*, THE ECONOMIST (July 22, 2010, 4:14 PM), [http://www.economist.com/blogs/easternapproaches/2010/07/icj\\_ruling\\_kosovo](http://www.economist.com/blogs/easternapproaches/2010/07/icj_ruling_kosovo).

tutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.”<sup>183</sup>

## 2. *External Public Debts*

Although questions remain surrounding Kosovo’s succession, its declaration of independence almost immediately triggered claims about whether international public debts owed by Serbia, but for the benefit of Kosovo, remained with Serbia or passed to Kosovo. These claims are still in the process of being fully resolved, but preliminary indicators suggest that the five factors influencing the disposition of commercial obligations, discussed above in Part II.A, provide an adequate framework to understand, and are confirmed by, the Kosovo succession.

In 2001, when the FRY became a member of the World Bank, it signed a loan agreement to restructure its portion of outstanding SFRY debt owed to the World Bank.<sup>184</sup> A portion of this debt, known as “Consolidation Loan C,” had been taken out by the SFRY for activities in Kosovo.<sup>185</sup> Through this restructuring, the FRY became the lender of record for Consolidation Loan C. As recently as November 13, 2007, the World Bank continued to take the view that Serbia, as the continuing legal personality of the FRY, “has legal responsibility to ensure continued service of this loan, as well as similar Paris and London Club obligations.”<sup>186</sup> As of 2009, Consolidation Loan C amounted to some €320 million.<sup>187</sup>

Normally, when a territory achieves independence, its predecessor state has an economic interest in passing off as much of its external debt as possible. This economic interest was particularly strong in the case of Serbia because it was a transitional economy faced with high debts as a proportion of gross domestic product (GDP). From 2002 to 2007, Serbia’s GDP increased from US\$15.8 billion to an estimated US\$40.8 billion. Its external debt as a percentage of GDP, however, is estimated to have only fallen from 70.9% to 59.6%.<sup>188</sup>

The succession of Kosovo was not the normal case, however. A national priority for Serbia was to retain Kosovo as a province and to oppose its secession. When Kosovo declared independence in 2008, had Serbia claimed that Kosovo became responsible for Consolidation Loan C, that may have implied acceptance that Kosovo had achieved statehood. Without succession, there could be no other reason for Kosovo assuming the localized debt that Serbia had hitherto been responsible for

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183. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, *supra* note 118, ¶ 122.

184. World Bank, International Bank for Reconstruction and Development, International Finance Corporation, Multilateral Investment Guarantee Agency: Country Partnership Strategy for the Republic of Serbia for the Period FY08-FY11, ¶¶ 3, 101, Report No. 41310-YF (Nov. 13, 2007).

185. *Id.* ¶ 101.

186. *Id.*

187. *See id.* ¶ 95.

188. *Id.* ¶ 11 tbl.1.

under the 2001 World Bank debt rescheduling. Belgrade calculated that the political cost of such a claim was too high, and instead opted to incur the economic costs of Consolidation Loan C to bolster its objections to Kosovo's succession. On June 9, 2008, the National Bank of Serbia issued a statement stating that it planned to repay Kosovo debt, and that the Serbian government had set aside the budget to do so.<sup>189</sup>

For its part, Kosovo's priority was establishing statehood. Membership in international organizations such as the IMF and World Bank would provide further evidence of its succession. As a practical matter, it would also connect Kosovo with the international financial system and help provide access to much needed loans for development. As for becoming responsible for Consolidation Loan C, it could avoid an excessive drag on its economy if patron states, such as the United States, would provide financial assistance and diplomatic support in obtaining debt cancellation or rescheduling.

On July 10, 2008, Kosovo applied for IMF and World Bank membership.<sup>190</sup> The IMF issued a press release stating that it "determined that Kosovo has seceded from Serbia as a new independent state and that Serbia is the continuing state. Accordingly, Serbia continues its membership in the International Monetary Fund (IMF) and retains . . . all assets in, and liabilities to, the IMF."<sup>191</sup>

By the end of May 2009, it became apparent that Kosovo would be granted membership to the World Bank and IMF.<sup>192</sup> With limited mileage left in continuing to service Kosovo's debt, and the world economic crisis affecting Serbia's economy, passing Kosovo's debt became a priority. Serbia's deputy prime minister, Mladjan Dinkić, issued a statement insisting that Kosovo assume the portion of Serbian debt to the World Bank allocated to Kosovo upon Kosovo's accession to the IMF and World Bank.<sup>193</sup> He argued this was fair because Kosovo had not paid taxes to Serbia for one decade.<sup>194</sup>

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189. See Ivana Sekularac, *Serbia to Keep Servicing Kosovo Debt, Minister Says*, REUTERS (Feb. 28, 2008, 12:27 PM), <http://www.reuters.com/article/idUSL2892621620080228>.

190. Press Release, International Monetary Fund, Statement on Membership of the Republic of Kosovo in the IMF, IMF Press Release No. 08/179 (July 15, 2008), available at <http://www.imf.org/external/np/sec/pr/2008/pr08179.htm>.

191. *Id.*

192. Press Release, International Monetary Fund, IMF Offers Membership to Republic of Kosovo, IMF Press Release No. 09/158 (May 8, 2009), available at <https://www.imf.org/external/np/sec/pr/2009/pr09158.htm>; Press Release, World Bank, Kosovo Joins World Bank Group Institutions, Press Release No. 2009/448/ECA (June 29, 2009), available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22230081~menuPK:34463~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

193. *Kosovo to Pay Off 1bn Dollar Debt if It Joins IMF, World Bank - Serbian Minister*, BBC MONITORING EUROPE, May 8, 2009.

194. *Id.*

One month later, on June 29, 2009, Kosovo became a member of the IMF and World Bank.<sup>195</sup> Although Kosovo's accession to the World Bank was not formally conditioned on an agreement regarding assumption of Consolidation Loan C, the two issues were closely linked. Without Kosovo's agreement to assume repayment obligations, it is doubtful that it would have gained membership to the IMF and World Bank. Immediately after signing the membership agreement with the World Bank, representatives of Kosovo gathered at the Treaties Room of the U.S. State Department to sign a loan assumption agreement in the presence of U.S. Deputy Secretary of State James Steinberg.<sup>196</sup> Under the agreement, Kosovo became responsible for repaying Consolidation Loan C, and Serbia was correspondingly released from those repayment obligations.<sup>197</sup> In September 2009, Kosovo repaid its first installment of €9.2 million and is expected to pay roughly €26 million annually.<sup>198</sup>

This decision-making process did not result in Kosovo becoming responsible for any portion of Serbia's general debt.<sup>199</sup> An argument could have been made, based on state practice, that upon succession a proportional share of general debt, as opposed to localized debt for the benefit of the seceding territory, should also pass to the successor state. Yet, it does not appear as of this writing that any portion of Serbia's general debt has passed to Kosovo.<sup>200</sup> This data indicates that a positivistic approach that prescribes the transmission of general debt may lack controlling authority and predictive utility.

An analysis of the decision-making process involving Kosovo's succession to debts would be incomplete without accounting for international efforts to assist Kosovo in repaying its debts. At Kosovo's signing of the loan agreement with the World Bank, U.S. Deputy Secretary of State Steinberg announced that the United States would pay \$150 million of Kosovo's debt.<sup>201</sup> The World Bank has also sought further donors to

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195. Press Release, International Monetary Fund, Kosovo Becomes the International Monetary Fund's 186th Member, Press Release, No. 09/240 (June 29, 2009), available at <http://www.imf.org/external/np/sec/pr/2009/pr09240.htm>; Press Release, World Bank, *supra* note 192.

196. James B. Steinberg, Deputy Sec'y, *U.S. Hosts Republic of Kosovo's Signing Ceremony of the Articles of Agreement of the International Monetary Fund and the International Bank for Reconstruction and Development*, U.S. DEPARTMENT OF STATE (June 29, 2009), <http://www.state.gov/s/d/2009/125480.htm>.

197. See World Bank, *Project Paper for the Assumption of Responsibilities for Consolidation Loan C by the Republic of Kosovo*, No. 49182 (June 29, 2009).

198. See *Kosovo Begins Paying 381 Mln Euro World Bank Debt*, WORLD BULLETIN (Sept. 11, 2009, 12:16 PM), [http://www.worldbulletin.net/news\\_detail.php?id=47085](http://www.worldbulletin.net/news_detail.php?id=47085) [hereinafter *Kosovo Begins Paying*] (quoting Muharrem Shahini, Kosovo Ministry of Economy and Finance).

199. See World Bank, *supra* note 197 (explaining that only loans taken for the benefit of Kosovo will be transferred).

200. See *id.*

201. Steinberg, *supra* note 196.

assist Kosovo in its debt repayment, and the European Commission has pledged assistance.<sup>202</sup>

### 3. *Commercial Treaties*

After Kosovo came under international administration pursuant to U.N. Security Council Resolution 1244, UNMIK concluded a range of international commercial treaties on behalf of Kosovo. These include free trade agreements with Albania (2003), Macedonia (2005), Croatia (2006), and Bosnia and Herzegovina (2006).<sup>203</sup> On December 19, 2006, Kosovo became a member of the Central European Free Trade Agreement (CEFTA), a multilateral free trade agreement between non-EU countries in Southern and Central Europe.<sup>204</sup>

Issues concerning the continuity or disruption of these treaties have not generally arisen since Kosovo declared independence. This is unsurprising. UNMIK had concluded the commercial treaties on behalf of Kosovo. At the time the treaties were signed, both Kosovo and UNMIK lacked a state's international legal personality. Yet Kosovo exercised economic functions autonomously. Practically speaking, the international agreements memorialized and consolidated expectations among Kosovo and its treaty partners as to their respective international trade regulations. Kosovo's declaration of independence may have changed its international legal personality, or not. But any change in legal personality should not, in these circumstances, render the agreements obsolete or raise questions about whether the newly-formed Kosovo government or state would not wish to be bound by the agreements.

There might also appear to be a formalistic reason for the absence of any disruptions. UNMIK is an international mission created through the U.N. Security Council's Chapter VII powers and it reflects the position of the Security Council on Kosovo.<sup>205</sup> Because Russia and the United States cannot agree on Kosovo's status, UNMIK accordingly remains status neutral on Kosovo.<sup>206</sup> If Kosovo has not achieved independence,

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202. Press Release, European Commission Liaison Office to Kosovo, European Commission and Government Seal 103m Assistance Deal for Kosovo (Sept. 25, 2009), available at <http://www.delprn.ec.europa.eu/?cid=2,103,586>.

203. *Free Trade Agreements*, KOSOVA CUSTOMS, <http://www.dogana-ks.org/?cid=2,43> (last visited Nov. 21, 2010).

204. See Press Release, UNMIK, Kosovo Joins Enlarged Central European Free Trade Agreement, UNMIK/PR/1623 (Dec. 19, 2006), [http://www.unmikonline.org/dpi/pressrelease.nsf/0/A183E431CBE30FB7C12572490056F188/\\$FILE/pr1623.pdf](http://www.unmikonline.org/dpi/pressrelease.nsf/0/A183E431CBE30FB7C12572490056F188/$FILE/pr1623.pdf); see also *Kosovo to Begin CEFTA Negotiations*, ECONOMIC INITIATIVE FOR KOSOVO (June 29, 2006, 11:08 AM), [http://www.eciks.org/english/lajme.php?action=total\\_news&main\\_id=417](http://www.eciks.org/english/lajme.php?action=total_news&main_id=417).

205. See U.N. Charter art. 39–51; see also *About UNMIK*, UNMIK ONLINE, <http://www.unmikonline.org/intro.htm> (last visited Nov. 21, 2010).

206. Press Release, Security Council, Kosovo Remains Stable, but Slow Progress on Reconciliation Could Lead to Volatility, Special Representative Tells Security Council, U.N. Press Release SC/9928 (May 17, 2010), available at <http://www.un.org/News/Press/docs/2010/sc9928.doc.htm>.

then the question of whether CEFTA and other commercial treaties have been disrupted as a result of succession does not arise.

This logic is ultimately flawed. Although UNMIK facially seems status neutral, to presume that there has been no disruption could imply that there has not been succession. If UNMIK were truly status neutral, it would regard the status of Kosovo as undetermined, and the question of whether disruptions to free trade agreements had arisen would be correspondingly indeterminate.

The functional explanation for the lack of disruptions provides a solution. When succession may have, but not necessarily, occurred, if the continuity or termination of commercial treaties is determined by whether the treaties continue to serve their purposes regardless of the legal personality of the treaty parties, then the status of Kosovo is immaterial. In such a case, UNMIK would be free to remain status neutral without necessarily confronting the question of whether disruptions to commercial treaties had arisen.

#### 4. *Appraisal*

The unfolding succession of Kosovo and its impact on international commercial arrangements comports with the five relevant factors under a policy-oriented approach to state succession and commercial obligations. The Kosovo incident confirms that the international decision-making process resulting from the five factors will tend to leave the successor bound by preexisting commercial obligations, but will also provide the successor state with assistance to discharge those obligations, thereby providing some support for the self-determining aspirations of the territorial community. The Kosovo incident thus confirms the predictive utility and normative appeal of the policy-oriented approach.

As to the density of relationships, the interconnectedness of the global economy has rendered it impractical to completely disrupt international debts and commercial arrangements through the process of succession. Although there were initially questions about whether Kosovo or Serbia should be responsible for Consolidation Loan C owed to the World Bank, there was never any doubt that one of them would be responsible and the World Bank would not be left holding debt without a debtor. Even though lawyers may debate the technicalities of whether free trade agreements remain in force when Kosovo's succession claims have yet to be fully resolved, the necessity of continuing to trade internationally and regionally dictates that all parties to the agreements treat them as remaining in force. The alternative of incurring transaction costs to renegotiate useful commercial treaties when there are many other priorities for nation building in Central Europe is simply impractical.

The importance of human rights and self-determination is underscored in other ways as well. The demands of freeing Kosovo from Serbian oppression is aligned with global interest in stability in the Balkans

and avoiding yet another failed state. Consequently, even though Kosovo assumed SFRY debt localized to the territory of Kosovo, the United States and the EU have taken it upon themselves to subsidize Kosovo's loan repayments,<sup>207</sup> providing Kosovo with a fighting chance at economic development without an unsustainable debt overhang. Although it would be difficult to precisely state the extent to which this outcome was a result of the compelling human rights reasons borne out of Kosovo's genocide, as opposed to the interests of the United States and the EU in a stable Balkans, it seems reasonable to conclude that both considerations played a part in causing them to provide assistance to Kosovo.

As to distortions caused by supervening geopolitical considerations, this factor is clearly demonstrated by Serbia's initial insistence on servicing Kosovo's debt in order to bolster its claim that Kosovo remained a Serbian province. Yet, the immense economic pressure of additional debt on Serbia's transitional economy, particularly in a time of global recession, eventually contributed to Serbia's capitulation to the more normal pattern of passing debt localized in the breakaway province to its independent government.

The last two factors, the relative power and authority of decision makers, and collective decision making, can be addressed together. In the succession of Kosovo, there were opposing blocs of states. Kosovo was supported by the United States and the EU. Serbia was supported by Russia and other states. Because Russia and the United States are both permanent members of the U.N. Security Council with veto powers, the Security Council could not take a position on Kosovo's independence<sup>208</sup> and UNMIK remains status neutral.<sup>209</sup> Backed by the substantial power of the United States and the EU, however, Kosovo's government was able to declare independence. With financial support, infrastructure, and manpower offered by the United States and the EU, directly as well as through the International Civilian Office and EULEX, Kosovo has been able to function increasingly like a state in its internal and external affairs. The question of Kosovo's legal status, even when it was pending before the ICJ, did not stop Kosovo, the United States, and the EU from finding workarounds to continue to transition Kosovo toward sustainable independence, including membership to the IMF and World Bank, as well as responsibility for its portion of SFRY debt coupled with debt assistance from donor states.

In some ways, the Kosovo incident is not a perfect case study, although it is the only recent one that we have. It is imperfect because it lacks explicit outcomes on some important issues. The Kosovo incident provides data on the transmission of debts localized to the territory of Kosovo, but this issue presents an easier case than whether any portion

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207. See *Kosovo Begins Paying*, *supra* note 198; see *supra* notes 201–02 and accompanying text.

208. See Press Release, Security Council, *supra* note 116.

209. See Press Release, Security Council, *supra* note 206.

of general debts incurred by Serbia should pass onto Kosovo. At the time of this writing, this latter issue has not been resolved.

The policy-oriented approach provides some guidance on how to anticipate a possible outcome. From the policy-oriented perspective, barring an unanticipated shift in geopolitics (always a risk in global affairs), Serbia is likely to remain responsible for the entirety of its general debt, although some of that debt may be rescheduled if Serbia is unable to service it in order to avoid the disruptive effects of default. Kosovo may not assume any portion of that debt. It has no interest in taking on that burden because it has already achieved the goal of demonstrating that it is a successor state capable of taking on preexisting debt through its acceptance of Consolidation Loan C and its membership to the IMF. There is also limited geopolitical interest in passing Serbia's debt to Kosovo, as it is difficult to see a clear advantage of such an outcome to the United States or the EU.

The policy-oriented approach also provides normative guidance to appraise the outcome anticipated above. The configuration of debt arrangements ought to be normatively acceptable. So long as Serbia remains responsible for the entirety of its general debt, there will not be disruptions to the global commercial order in this regard. Although passing the debt to Kosovo would also avoid disruptions, the history of Kosovar genocide and repression exerts some normative pressure against passing general debt. Thus, if the outcome is that the general debt remains with Serbia, the alignment of normative goals and geopolitical interests may promote an appropriate solution that achieves some balance between the policies of global order and human rights.

The foregoing analysis of Kosovo suggests that the five factors in the policy-oriented approach to state succession and commercial obligations offers decision makers a useful lens to anticipate and appraise the actions of other actors and outcomes in future successions. The five factors do not claim to enable decision makers to achieve the predictive accuracy and certainty of legal rules that are followed and enforced. In the absence of international laws governing state succession and commercial obligations, however, the five factors provide a useful guide to decision making.<sup>210</sup>

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210. See Bowman, *supra* note 3, at 592 (“While one might wish for more specific or particularized conclusions than the generalized observations and conditioning factors . . . such abstraction is unavoidable—and in a way it is a virtue, since his approach recognizes the breadth and nuance of globalization’s multifaceted impact on state successions.”); Perritt, *supra* note 3, at 132 (“Cheng’s factors are more useful than purported rules of the international law of succession.”); Sloane, *supra* note 3, at 1291 (“The virtual absence of positive rules, however, is precisely what may make the neglected topic of State succession and commercial obligations an ideal candidate for the New Haven School methodology.”). Even Leong, with his reservations about the policy-oriented approach proposed here, states that “it serves as a useful guide to the study of state succession and commercial obligations for both scholars and practitioners alike.” Leong, *supra* note 22, at 357.

## III. AN ARISTOTELIAN MOMENT

Addressing the problem of state succession and commercial obligations from its foundations potentially yields useful guidance unconstrained by formalistic taxonomies, which often do not correspond closely to the dynamics of decision making in succession and do not fully address the global policies at stake.<sup>211</sup> One troubling taxonomy is the formal law that claims state succession is different from government succession. State succession occurs when the territory or international legal personality of the state changes.<sup>212</sup> In contrast, government succession occurs when only the government changes, even if the change is radical, such as through revolution.<sup>213</sup> In such a situation, the international legal personality of the state remains intact, state succession has not occurred, and the state remains responsible for the obligations entered into by the predecessor government on behalf of the state.<sup>214</sup>

So the theory goes.

Distinguishing government succession from state succession, and then claiming that commercial obligations are unaffected by government succession, ignores the reality that some debt and commercial obligations may be disrupted in government succession if preexisting commercial arrangements are obsolete or if they would debilitate the successor entity. Formalistic reasoning may also fail to achieve the correct context-specific balance between global order, which is generally preserved by continuity of obligations, and the human rights of the people of the territory in question, which may be promoted by the termination of oppressive prior obligations.

In order to include in the scope of inquiry all incidents in which deep changes in international governance may potentially disrupt international commercial arrangements, state and government successions should be considered as the same type of international problem, and state succession should be defined to include government succession. The author previously proposed:

“[S]tate succession” includes any fundamental internal governance reorganization that causes, or may potentially cause, disruptions to international commercial arrangements and that requires an au-

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211. See Sloane, *supra* note 3, at 1296 (“[T]he lexicon of State succession, despite its veneer of analytic and organizational precision, offers little practical guidance to decision makers.”); see also Benjamin E. Brockman-Hawe, A Comment on *State Succession to International Responsibility*, 10 (2008) (unpublished manuscript), available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=benbh>, at 10 (noting that Patrick Dumberry’s 2007 monograph, *State Succession to International Responsibility*, maintained the distinction between state and government succession, “result[ing] in a work that comes off at times as somewhat strained”).

212. Cheng, *Odious Debt*, *supra* note 1, at 10.

213. *Id.*

214. Buchheit et al., *supra* note 16, at 1206 (“Public international law is particularly strict in requiring successor governments to shoulder the debt obligations of their predecessors.”); Cheng, *Odious Debt*, *supra* note 1, at 7, 10–11.

thoritative international response. Internal governance reorganizations are changes in power and authority over the people of the territory in succession.<sup>215</sup>

This definition would include in its ambit revolution and regime change, but it excludes nonfundamental changes, such as a different political party being elected to power in a democracy.<sup>216</sup>

When this proposal was presented, orthodox publicists regarded the proposals as heresy.<sup>217</sup> The proposal entails at least a partial rejection of entrenched Westphalian ideas that states have an identity in international law distinct from their territorial communities and governments, and that it is states that are the basic legal units in the world order.<sup>218</sup>

Yet the idea of viewing states and governments as coextensive, at least with regard to a territorial community's international obligations, has a venerable pedigree. Aristotle took the view that "since the state is a community of citizens united by sharing in one form of government, when the form of government changes and becomes different, then it may be supposed that the state is no longer the same."<sup>219</sup> With perspicuity, he explained: "it is evident that the sameness of the state consists chiefly in the sameness of the constitution, and it may be called or not called by the same name, whether the inhabitants are the same or entirely different."<sup>220</sup> Indeed, the idea that governments should not be distinguished from states kept its currency over the millennia, until the middle of the nineteenth century.<sup>221</sup>

Contemporary jurists are once again rejecting the artificiality of distinguishing between state and government succession. They are instead addressing the problem of succession in a similar fashion in both state and government successions.<sup>222</sup> This movement seems to be gathering

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215. CHENG, *STATE SUCCESSION*, *supra* note 1, at 50.

216. Sloane argues that this definition of state succession fails to account for successions that do not cause disruptions to international commercial arrangements. He argues further that the definition here may obscure the need for an international response to such successions on other issues, such as human rights. See Sloane, *supra* note 3, at 1299–1303. These comments are made out of context. The policy-oriented proposals address only commercial obligations and do not purport to provide a general definition of state succession for all contexts. See generally CHENG, *STATE SUCCESSION*, *supra* note 1, ch. 1.

217. An early reviewer of the *State Succession and Commercial Obligations* manuscript stated that the author had made a basic mistake of international law in conflating state and government succession. Manuscript reviews solicited by publishers are anonymous.

218. See CRAVEN, *supra* note 20, at 32–35 (threading the idea of a separate state personality through Grotius, Hegel, Westlake, and Huber up until the 20th century); DUMBERRY, *supra* note 33, at 13–15 & n.48–50 (sharply distinguishing between state and government succession and surveying contemporary literature in support of this distinction).

219. ARISTOTLE'S *POLITICS* 105 (Benjamin Jowett trans., 1920).

220. *Id.*

221. See 1 O'CONNELL, *supra* note 28, at 5 ("Until the middle of the nineteenth century both [state and government succession] were assimilated, and the problems they raised were uniformly solved.").

222. See, e.g., RODA MUSHKAT, *ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG 1* (1997); Bowman, *supra* note 3, at 584–85; Johannes Chan, *State Succession to Human Rights Treaties: Hong Kong and the International Covenant on Civil and Political*

momentum. Scholars have preferred this approach for its stronger explanatory power. For example, Perritt supports conceptualizing state succession as any fundamental internal reorganization because it “recognizes that commercial and political relations in the international community can be disrupted by a continuum of changes in individual states.”<sup>223</sup>

There is also normative appeal to adjusting commercial obligations in both state and government successions. Robert Howse has expressed support for a similar approach, not simply because it is descriptively more accurate of the disruptions that accompany fundamental political changes within a state, but also because it is normatively appealing.<sup>224</sup> By collapsing state and government succession, the rule prescribing continuity in government succession could be dispensed with, and international decision makers could consider in each geopolitical context whether it was just to burden the transitional state with the predecessor’s obligations.<sup>225</sup>

A recent court decision indicates judicial support for not distinguishing between state and government succession when deciding if an entity is responsible for prior international obligations. In *Mortimer Off Shore Services Ltd. v. Federal Republic of Germany*, a Cypriot hedge fund, Mortimer, brought claims in the U.S. District Court for the Southern District of New York against Germany to enforce payment of Prussian bonds with interest.<sup>226</sup> Judge Lynch dismissed these claims, and rejected on a motion for reconsideration the argument that the German government was “a successor government and not a successor state” to Prussia, which could have entailed finding Germany responsible for Prussian bonds.<sup>227</sup> The court explained its holding by quoting verbatim the 2006 proposal: “State succession is not limited to changes in the international legal personality of the state, but includes any fundamental

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*Rights*, 45 INT’L & COMP. L.Q. 928, 929 (1996); Cheng, *Odious Debt*, *supra* note 1, at 10–12; Robert J. Delahunty & John Yoo, *Statehood and the Third Geneva Convention*, 46 VA. J. INT’L L. 131, 160–63 (2005); Ochoa, *supra* note 22, at 125–26 (adopting the view that distinction between government and state succession is obsolete and conceiving of state and government succession interchangeably); Brockman-Hawe, *supra* note 211, at 10 (favoring broader definition of state succession that includes government succession). *But cf.* Sloane, *supra* note 3, at 1302 (“[A] distinction between State and governmental succession may at times offer normative guidance on how participants should respond to geopolitical changes in the territorial or personal character of a State.”).

223. Perritt, *supra* note 3, at 129; *see also* Bowman, *supra* note 3, at 585 (“[T]raditional doctrine, when viewed against the backdrop of actual state practice, embodies a distinction without much ultimate difference.”).

224. Robert Howse, *The Concept of Odious Debt in Public International Law*, UNCTAD DISCUSSION PAPERS, July 2007, at 16–17, UNCTAD/OSG/DP/2007/4.

225. *Id.* at 16 (“Although state succession and regime change raise different issues from the perspective of international legal personality, these differences nevertheless do not lessen the extent to which there are common normative challenges of transitional justice.” (*citing* RUTI TEITEL, TRANSITIONAL JUSTICE (2000))).

226. *Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Ger.*, No. 05 Civ. 10669(GEL), 2007 WL 2822214, at \*1 (S.D.N.Y. Sept. 27, 2007), *aff’d*, 615 F.3d 97 (2d Cir. 2010).

227. *Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Ger.*, No. 05 Civ. 10669(GEL), slip op. at 2 (S.D.N.Y. Apr. 9, 2008) (order denying motion to amend judgment), *aff’d*, 615 F.3d 97 (2d Cir. 2010).

reorganization of a state that triggers international claims concerning preexisting commercial obligations and requires an international response.<sup>228</sup> This jurisprudence marks a shift from the prior position of U.S. courts that state and government successions were different and that changes in a state's government and internal constitution do not bring about a change in its legal personality or international obligations.<sup>229</sup> *Mortimer* is also significant because the court appears to acknowledge, at least implicitly, its role in providing an international response to a claim concerning whether a successor state is responsible for its predecessor's commercial obligations.

Regime change in Iraq provides a useful test case of the policy-oriented approach<sup>230</sup> and goes some way to answer Drumbl's urging that the policy-oriented approach address how to "treat those obligations incurred by criminal States which have transitioned to law-abiding regimes."<sup>231</sup> In 2003, the United States invaded Iraq, claiming that Iraq had violated U.N. Security Council Chapter VII Resolution 1441 and providing the Saddam government with a final opportunity to comply with its disarmament obligations.<sup>232</sup>

The U.S. invasion of Iraq in 2003 and replacement of Saddam's regime with a new government would, under traditional legal taxonomies, be considered government and not state succession. Yet, such a classification, with its attendant claim that government successions do not disrupt preexisting international obligations, fails to account for, explain, and appraise the process that took place after regime change occurred in Iraq. The United States called for debt cancellation on the basis that the debts incurred by Saddam were not for the benefit of the Iraqis.<sup>233</sup> In the

228. *Id.* (quoting CHENG, STATE SUCCESSION, *supra* note 1, at 37).

229. *See, e.g.*, *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 731 F. Supp. 619, 623 (S.D.N.Y. 1990) (holding that Sudan's change in government and constitution did not change its legal personality or obligations).

230. The discussion of Iraq in this article is comparatively shorter than the discussion of Kosovo because much ink has already been spilt on the closely-related question of whether Saddam's debts were odious and did not pass to the successor government. *See, e.g.*, Buchheit et al., *supra* note 16, at 1203; Cheng, *Odious Debt*, *supra* note 1, at 26–30; Bradley N. Lewis, *Reconstructing the Odious Debt Exception*, 25 B.U. INT'L L.J. 297, 329 (2007); Ochoa, *supra* note 22, at 119; *see also* Jeff A. King, *Odious Debt: The Terms of the Debate*, 32 N.C. J. INT'L L. & COM. REG. 605 (2007) (adding to the prior scholarship by reframing the issue as one of state succession more broadly, rather than a narrower question on odious debt).

231. Drumbl, *supra* note 2, at 255.

232. For a lengthy discussion of the geopolitical history leading to the invasion of Iraq, see generally Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576, 576–77 (2003) (supporting the invasion). *But cf.* Iraq: Note of Telephone Conversation Between the Foreign Secretary and the Attorney General 3 (Nov. 12, 2002) (declassified) (“[Under Resolution 1441] it [was] for the Security Council to decide whether Iraq were in fact in material breach” and “whether all necessary means were authorized.”) (copy on file with author).

233. Iraqi Freedom from Debt Act, H.R. 2482, 108th Cong. § 2–3 (1st Sess. 2003); *see also* Soren Ambrose, *Social Movements and the Politics of Debt Cancellation*, 6 CHI. J. INT'L L. 267, 278–79 (2005) (“[T]he US government argued for cancellation of the external debt of Iraq in terms very similar to those of the odious debt doctrine.” (citing U.S. Secretary of the Treasury John Snow)).

end, however, there was a negotiated settlement rather than an outcome *ipso jure*. Iraq paid its arrears to the IMF amounting to 55.3 million Special Drawing Rights, the currency of the IMF.<sup>234</sup> Iraq's debt to the Paris Club of states creditors and non-Paris Club creditors were not cancelled either. Instead, claim settlements were reached at ten to twenty percent of the original debts.<sup>235</sup>

The Iraq case study reveals that defining state succession broadly to include fundamental changes of governance has predictive advantages. Characterizing government succession as a subspecies of state succession allows a jurist to subject a government succession to analysis under the same trends and five conditioning factors, which provide guidance on how commercial obligations are likely to be affected by the government succession. By comparison, insisting that government successions are different from state successions because the legal personality of the state remains intact and, therefore, the commercial obligations of the state are unaffected does not help decision makers anticipate and respond to disruptions in international commercial obligations that may, and in fact often do, occur when government succession occurs.

The experience with Iraq also illustrates a normative advantage in rejecting technical distinctions between state and government succession in favor of broader trend analysis. Few jurists and policy makers would quarrel with the idea that it would be a cruel turn of fate, if not unjust, for peoples oppressed by a governing regime to be made to discharge debts incurred by that regime when the oppressor is finally removed either by revolution or external force.<sup>236</sup> Making the oppressed pay for the costs of their oppression simply offends fairness.<sup>237</sup> It may also stymie the transitional communities' efforts at stabilizing their economy.<sup>238</sup>

Scholars have struggled to accommodate these normative concerns within the positivist idea that government succession does not affect a state's international obligations. One innovation that gained some momentum following the regime change in Iraq was a revival of the odious debt doctrine, which provides for the cancellation of debts that are odious in the manner described here.<sup>239</sup> Yet this purported doctrine lacks sufficient state practice and *opinio juris* to exist as a customary law, and it

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234. For the detailed figures of Iraq's debt structuring, see Cheng, *Odious Debt*, *supra* note 1, at 26–28.

235. Iraq Debt Settlement Documents, *supra* note 77; Terms of Settlement, *supra* note 77 (discussing terms); Trust Indenture, *supra* note 78 (providing terms). For a lengthier discussion of the settlement terms, see Cheng, *Odious Debt*, *supra* note 1, at 27–29.

236. See Howse, *supra* note 224, at 21; Buchheit et al., *supra* note 16, at 1201; see also Wedgwood, *supra* note 232. But see Albert H. Choi & Eric A. Posner, *A Critique of the Odious Debt Doctrine*, *LAW & CONTEMP. PROBS.*, Summer 2007, at 33.

237. See Howse, *supra* note 224, at 4.

238. See *id.* at 4–9; Buchheit et al., *supra* note 16; Ochoa, *supra* note 22.

239. For a wide ranging span of contemporary scholarship on odious debt, see Cheng, *Odious Debt*, *supra* note 1.

has never been accepted in a treaty.<sup>240</sup> It is doubtful this idea ever gained sufficient traction with private lenders and states,<sup>241</sup> and the final debt settlement documents do not mention odious debt.<sup>242</sup> International organizations remain sharply divided on the doctrine of odious debt. The World Bank published a paper by Vikram Nehru and Mark Thomas criticizing the doctrine,<sup>243</sup> and the U.N. Conference on Trade and Development prepared a discussion paper by Howse in favor of it.<sup>244</sup>

Given the failed attempts at adjusting the rigid tenets of government succession with an inchoate doctrine of odious debt, a more practical solution to account for the underlying normative impulses is to apply the policy-oriented approach described in this Article to all forms of radical shifts in governance within a state. This approach explicitly requires decision makers to balance the policies of world order and self-determination, especially when they conflict with each other. In future successions, just as in the succession in Iraq, the policy-oriented approach provides guiding principles for the restructuring of debt and other commercial obligations to minimize disruptions to global order, while modifying and reducing obligations to enable the successor state to discharge those limited obligations over time.

Whereas the suggestion to view succession as any fundamental reorganization of a state was a minority view when it was first made five years ago, it has now gained currency. In part, support for the proposal was precipitated by the regime change in Iraq. This international incident drew to the attention of policy makers the injustice of saddling Iraqis with the debts of its oppressor, and brought to the forefront of the minds of scholars the difficulty in accommodating pragmatic adjustments of Saddam-era debts under the positivistic distinction between state and government succession. With a real problem to test theoretical approaches, it appears that the policy-oriented approach found favor because of its utility.

Yet, in spite of the momentum among decision makers and scholars to treat state and government succession in a similar policy-oriented fashion, and the strong normative and predictive advantages of doing so, it would be premature, at this stage, to completely consign away the positivistic distinction between state and government succession. At the present time, both views have their supporters and detractors, the application of either view to a future succession will turn in part on the persuasiveness of decision makers who adopt either view, and their relative authority and control over the decision-making process.

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240. See Vikram Nehru & Mark Thomas, *The Concept of Odious Debt: Some Considerations*, WORLD BANK ECON. POL'Y & DEBT DEPARTMENT DISCUSSION PAPER, May 21, 2008, at 14.

241. Howse, *supra* note 224, at 19–20.

242. Iraq Debt Settlement Documents, *supra* note 77.

243. Nehru & Thomas, *supra* note 240.

244. Howse, *supra* note 224.

## IV. NORMATIVE APPRAISAL AND RECOMMENDATIONS

So far this Article has taken stock of the explanatory power and predictive value of the policy-oriented approach to state succession and commercial obligations. It has revalidated and refined the descriptive aspects of the approach by appraising scholarly responses, testing it against Kosovo and Iraq, and studying the attitude of courts in recent cases. There has also been some discussion about the broad normative appeal of the policy-oriented approach to state succession, but a more particularized discussion is warranted.

Few scholars would quarrel with the selection of self-determination and global order as relevant policy goals.<sup>245</sup> A further question could be asked as to whether the policy-oriented approach properly balances these goals when they conflict in state succession. Sloane expresses a concern that the policy-oriented approach proposed here might excessively preference minimum global order over self-determination and other values important for maximum well-being.<sup>246</sup> Howse supports the policy-oriented approach to the extent that it accounts for politics as well as extant legal rules, but would argue more strongly in favor of adjusting debts that were incurred by a previous oppressive regime without benefit to the territorial community.<sup>247</sup>

In the final assessment, it is highly doubtful that there is a definitive answer to whether the laws of state succession and commercial obliga-

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245. See Ochoa, *supra* note 22, at 130 (“From a normative perspective, this article is in agreement with the position that in addition to the validly desirable policies of predictability and stability, ‘international law should manage state successions to . . . facilitate . . . and support the legitimate aspirations of territories that undergo succession.’” (alteration in original) (quoting CHENG, STATE SUCCESSION, *supra* note 1, at 13)); Sloane, *supra* note 3, at 1303 (stating that self-determination and global order are “raised by most, if not all, State successions”). *But see* Leong, *supra* note 22, at 357 (“Critical legal scholars may even doubt the soundness of Dr. Cheng’s fundamental proposition that international law in this area should aim to balance the two policies of global order and the maintenance of the right to self-determination.”). Leong does not explain further what concerns about these two policies might be.

246. Sloane, *supra* note 3, at 1304 (“[T]he construction and relative weight given to the twin policy goals of State succession identified by Cheng tends to be inflected, and perhaps even biased at times, by the commercial concerns that lie at the core of his analysis.”); *see also id.* at 1303–16. Sloane contends that applying the policy-oriented approach to certain historical successions would have resulted in outcomes that failed to maximize well-being for the territorial communities that underwent succession. The author does not agree that the outcomes Sloane assigns to those successions are necessarily mandated by the policy-oriented approach.

247. Howse, *supra* note 224, at 7–9. Howse mischaracterizes the author’s earlier construction of the policy-oriented approach in two ways. First, he suggests that the author would require a binary choice between accepting all debt or none at all when succession occurs. *Id.* at 8. This is exactly opposite to the policy-oriented approach, which favors adjusting obligations according to those which remain relevant. See CHENG, STATE SUCCESSION, *supra* note 1, at 31; Cheng, *Odious Debt*, *supra* note 1, at 21–22. Second, Howse criticizes the policy-oriented approach for failing to account for the benefits that a territorial community may draw from a debt incurred by a prior oppressive regime as one factor in deciding if the debt should bind the successor entity. Howse, *supra* note 224, at 9 n.8. The policy-oriented approach explicitly requires this factor to be accounted for in a calculus about how to adjust debt. See CHENG, STATE SUCCESSION, *supra* note 1, at 26–27; Cheng, *Odious Debt*, *supra* note 1, at 22.

tions should place greater emphasis on human rights than it currently does. The views of Sloane and Howse reflect a different policy emphasis than the author. They appear to favor self-determination over global order to a greater extent than the author. They also appear to place a greater emphasis than the author on the interests of the people in a transitional state over the interests of workers in creditor states and investors in creditors corporations. It may not be possible to address differences in normative orientations without extended philosophical debate beyond the scope of this Article. If Jonathan Zasloff and Richard Steinberg are correct that law ultimately is less of a science and more of “a disciplined craft requiring practical wisdom and sophisticated judgment,”<sup>248</sup> then scholars may reasonably judge the importance of global policies differently. They may also assign different relative weights to the concerns of people that undergo succession and the shareholders and workers of creditor corporations and states.

In any event, the application of the twin policies of self-determination and global order should always be determined in the specific geopolitical context of each succession, as called for in the policy-oriented proposals and their specific reference to geopolitical considerations as a conditioning factor. Jurists and policy makers can debate, and even decide, what the right balance is in each succession. But it is probably a futile exercise to attempt to sharply draw the balance between the two policies in abstract, just as it has been in the past a futile exercise to make claims about laws on the transmission of obligations when succession occurs.

A context-specific analysis of Kosovo reveals that succession might turn out to pose challenges for the well-being of Kosovars. When the dust has settled on the Kosovo experience, it may be apparent that the human rights dimensions are unlikely to ever be fully addressed through adjustments to international commercial arrangements alone. Even if Kosovo’s succession is eventually universally recognized, there are questions about whether Kosovo could be independently sustainable without perennial financial support and manpower from the United States and the EU.<sup>249</sup> The economic and social difficulties that the East Timorese have continued to face after they achieved independence in 2003,<sup>250</sup> even with its energy resources in the Timor Gap, also underscores the perils of secession.

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248. Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT’L L. 64, 87 (2006).

249. See *Why Kosovo Wasn’t Worth It*, NEWSWEEK, Aug. 30, 2008, available at <http://www.newsweek.com/2008/08/29/why-kosovo-wasn-t-worth-it.html>.

250. Int’l Monetary Fund, *Democratic Republic of Timor-Leste: 2009 Article IV Consultation—Staff Report; Public Information Notice on the Executive Board Discussion; and Statement by the Executive Director for the Democratic Republic of Timor-Leste*, IMF Country Report No. 09/219 (July 8, 2009), <http://www.imf.org/external/pubs/ft/scr/2009/cr09219.pdf>.

Although saddling Kosovo with Serbia's debt might exacerbate Kosovo's problems, it is only one of many challenges Pristina faces in promoting the well-being of Kosovars. These challenges do not necessarily suggest that there is any grave normative deficit in the policy-oriented approach to state succession and commercial obligations. More likely, they indicate problems in the content and application of the principle of self-determination.<sup>251</sup> What is needed is a broad review of self-determination in the contemporary context, as well as an investigation into potentially better ways to accommodate legitimate self-determination claims without excessively disrupting world order. A full investigation of self-determination is beyond the scope and subject matter of this Article, and the results of the investigation will be instead presented in a forthcoming book monograph, *When International Law Works: Realistic Idealism After 9/11 and the Global Recession*.<sup>252</sup> As a digestif, this Article presents in abbreviated form proposals for accommodating self-determination within world order, and discusses how these proposals fit into the policy-oriented approach to state succession and commercial obligations.

In the author's view, many apparent conflicts between self-determination and global order can be minimized by unpacking the concept of self-determination. In situations where all the values contained within self-determination cannot be accommodated within the demands of global order, it may be possible to nonetheless promote some of the values. The international community should guide the territorial unit in exercising its choice as to which values it wishes to promote, recognizing that other values may have to fall by the wayside in the current geopolitical order.

The term "self-determination" is ritualistically invoked in positive sources of law, but its content is rarely fully understood.<sup>253</sup> The U.N. Charter contains repeated references to the principle of equal rights and self-determination of peoples.<sup>254</sup> This principle was transmuted into a right in the U.N. Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights (collectively, U.N. Covenants).<sup>255</sup> In 1960, the U.N. General Assembly proclaimed the right to

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251. See Drumbl, *supra* note 2, at 255 ("How should the law of State succession deal with regimes that emerge from the tumult of conflict, State failure or systemic human rights abuses?"); Sloane, *supra* note 3, at 1316-17 (concluding that his reservations "speak more to the scope of the book than to its substance").

252. CHENG, *supra* note 105.

253. See generally N. Atlantic Treaty Org., *Final Report: The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention*, at 8-22 (June 16, 2001) (by Dajena Kumbaro) (surveying positivist sources of self-determination and discussing disagreements in their drafting).

254. E.g., U.N. Charter art. 1, 2, 13, 55, 76.

255. International Covenant on Civil and Political Rights art. 1, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 1, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3; see also Martti Koskenniemi, *National Self-Determination Today: Problems of*

self-determination in the context of decolonization in Resolution 1514.<sup>256</sup> The ICJ has confirmed the right in contentious and advisory cases relating to former colonies.<sup>257</sup> Some human rights activists have attempted to broaden the right beyond situations of decolonization to secessionist movements. They point to, among other sources, Principle VIII of the Helsinki Final Act of 1975 that does not confine self-determination to decolonization.<sup>258</sup> Notably, however, the U.N. Millennium Declaration, adopted by the U.N. General Assembly in 2000 as Resolution 55/2, once again refers only to “the right to self-determination of peoples which remain under colonial domination and foreign occupation,” and not to self-determination of all minorities within states.<sup>259</sup>

Even if one assumes that self-determination potentially applies to all minorities and secessionist movements, and not just to colonies and territories under occupation (no doubt some secessionist movements might legitimately characterize their subjugation within a larger territorial unit as occupation), there remains a question as to what self-determination means. The U.N. Covenants explain that self-determination entails several rights. These are, in the main, the right of a people to “freely determine their political status” and “freely pursue their economic, social and cultural development.”<sup>260</sup> The bifurcation of self-determination into the autonomous selection of political status and the pursuit of economic development is repeated in General Assembly Resolution 1514.<sup>261</sup>

Secessionist movements may believe that statehood is the best vehicle to promote self-determination. There is some basis for their belief. As a matter of formal international law, statehood transforms the movement into a legal personality with standing and rights in international law. The Montevideo Convention, so often invoked by scholars as the codification of the customary criteria of statehood, provides that a state is any defined territory with a government, permanent population,

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*Legal Theory and Practice*, 43 INT'L & COMP. L.Q. 241, 242 (1994) (tracing evolution of self-determination into positive law).

256. G.A. Res. 1514, U.N. Doc/A/RES/1514 (Dec. 14, 1960).

257. See, e.g., *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. 90, ¶ 29 (June 30) (“The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the court; it is one of the essential principles of contemporary international law.” (citations omitted)); *Western Sahara, Advisory Opinion*, 1975, I.C.J. 12, ¶ 55 (Oct. 16); *Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 52 (June 21) (“[T]he subsequent development of international law in regard to non-self-governing territories . . . made the principle of self-determination applicable to all of them.”).

258. Conference on Security and Co-Operation in Europe, Final Act, princ. VIII, Aug. 1, 1975, 14 I.L.M. 1292 (never entered into force).

259. G.A. Res. 55/2, ¶ 4, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

260. International Covenant on Civil and Political Rights, *supra* note 255, art. 1; International Covenant on Economic, Social and Cultural Rights, *supra* note 255, art. 1.

261. G.A. Res. 1514, *supra* note 256, pmbll., para. 2.

and capacity to enter into relations.<sup>262</sup> According to the ritual myth,<sup>263</sup> whenever a secessionist movement with a permanent population in a defined territory and a putative government declares independence, and if other states recognize it as a state (either supplying proof of its statehood or the final constitutive element of statehood), then, *mirabile dictu*, it is a state!<sup>264</sup> Under this myth, because states are sovereign, the territory is now immunized from external interference and its people may exercise political autonomy in pursuit of economic, social, and cultural development.<sup>265</sup>

This calculus is simplistic and misleading, however. In reality, statehood and self-determination often do not map so cleanly onto each other. The plethora of failed states and the real concerns about the sustainability of Kosovo and East Timor indicate that statehood might provide formal political autonomy, but the state may remain beholden to powerful states, pacific arrangements, or international organizations. Political autonomy may come at the cost of economic, social, and cultural development when the newly formed state finds itself without laws, housing, resources, technology, capital, military forces, and administrators. Without economic stability, political autonomy could eventually be undermined as well through internal unrest. Being the master of one's own destiny can lead to becoming the maker of one's own demise.

Conversely, territorial communities within a state may give up total political autonomy in exchange for a greater likelihood of economic and social development. This cost-benefit analysis is particularly compelling when the territorial sub-state unit retains an ability to participate in national politics on an equal footing with other members of the state. This is the case, for example, with Quebec.<sup>266</sup> In some instances, the territorial unit may not have explicitly exercised a choice to remain within a state, as is the case of Hong Kong, which was transferred from the United

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262. Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) (defining "state" the same); Alexander H. Berlin, *Recognition as Sanction: Using International Recognition of New States to Deter, Punish, and Contain Bad Actors*, 31 U. PA. J. INT'L L. 531, 548-49 (2009) (discussing criteria for statehood).

263. Ritual myths combine rites and narratives to provide a shared explanation for myth believers of their socially constructed reality. *See* Stéphane Beaulac, *The Westphalian Model in Defining International Law: Challenging the Myth*, 8 AUSTL. J. LEGAL HIST. 181, 186-88 (2004). *See generally* E. Thomas Lawson, *The Explanation of Myth and Myth as Explanation*, 46 J. AM. ACAD. RELIGION 507 (1978).

264. *But see* Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373, 376 (2003) (providing numerous examples of states without permanent populations, effective governments, or defined territories).

265. *But see id.* at 376-77 (providing examples of states that "can be deemed quasi-sovereign" because they have ceded autonomy to international organizations).

266. *See In re Succession of Quebec*, [1998] 2 S.C.R. 217, 282 (Can.) (characterizing domestic political participation or "internal self-determination" as distinct from secession, which would be an exercise of "external self-determination").

Kingdom to China in 1997.<sup>267</sup> Yet, even absent that choice and in the face of continuing political control by China, Hong Kong participates in its governance, and has maintained an impressive level of economic and social development.<sup>268</sup>

A territorial unit may also exercise some international prerogatives wrongly assumed to inure exclusively to states. Though not a state, Hong Kong exercises some of the international attributes of statehood, such as entering into international commercial agreements with other states and joining international organizations like the WTO.<sup>269</sup> Similarly, Taiwan cannot seriously countenance widespread formal recognition as a state given China's opposition to its independence, yet it functions in many ways as a state. It has substantive international and diplomatic relations with many states, including the United States.<sup>270</sup> It has also provided its people with high levels of economic, cultural, and social well-being.<sup>271</sup>

This brings us to the author's proposal. A secessionist movement should unpack the values bundled into self-determination, and it should unpack the corpus of rights and obligations associated with statehood. It should then construct a realistic matrix of values and map that matrix onto the variant of statehood or territorial autonomy that may best attain the matrix of values. The bottom line is that aspiring simply for self-determination and statehood often obscures what is possible or optimal. The territorial community should instead consider the full range of choices of values to promote and how best to do so.

Often the calculus facing a secessionist movement is the following: secession may provide greater political freedom, but due to limitations in resources, population, or land, the territorial community's economic aspirations may be severely curtailed if it were to organize itself as an independent state. East Timor is a paradigmatic case. The secessionist movement must decide whether remaining with the parent state would provide the greatest aggregate values, including political, economic, and social freedoms.

Should remaining with the parent state be truly unacceptable to either the parent state or the secessionist movement, then it may explore the possibility of independence. If the territory has sufficient resources to succeed as a state, then it can expect to attain many of the aspirations contained with the idea of self-determination. This proved to be the case

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267. See *Background Note: Hong Kong*, U.S. DEPARTMENT OF STATE (Aug. 3, 2010), <http://www.state.gov/r/pa/ei/bgn/2747.htm>.

268. See *id.*

269. See *id.*

270. See Taiwan Relations Act, 22 U.S.C § 3301 (2006).

271. *Background Note: Taiwan*, U.S. DEPARTMENT OF STATE (Apr. 30, 2010), <http://www.state.gov/r/pa/ei/bgn/35855.htm>.

with Singapore.<sup>272</sup> Somaliland, which has not yet achieved full statehood at the time of this writing,<sup>273</sup> might prove to fall into this category if it succeeds from Somalia. Somaliland appears to have an effective government, a fledgling economy, and some diplomatic relations, such as visa offices in the United Kingdom and Eritrea.<sup>274</sup>

If the territory has insufficient resources to succeed as an independent state, however, then it will face another difficult decision. It cannot assume that the international community will forever support it economically and militarily. International relations are not built exclusively on charity. The putative government may elect to court a patron state, such as the United States, or an international organization, such as the EU. It may secure some economic and military support, but it must expect to cede some independent decision-making authority to its patron. Its foreign policies may have to be aligned with the geopolitical interests of its protector, it may have to open its markets, or it may have to allow the protector entity to designate geographical areas as military launching pads. All of these concessions are costly and quite possibly unpalatable. But they may be necessary for the putative state to transition into a stable sovereign state.

If a mutually satisfactory arrangement can be reached between the territorial community and its putative international patrons, succession may proceed. At this point, the policy-oriented approach to state succession and commercial obligations comes together with the foregoing analysis of statehood and self-determination. When the successor state claims to have undergone succession, it should expect to assume responsibility for preexisting commercial arrangements, because the international community will not tolerate the negative externalities resulting from global disorder if international commercial arrangements are disrupted. Patron states and organizations, however, will go some distance in minimizing the burdens of preexisting obligations by either adjusting them or by providing fresh loans. This is the case with Kosovo.

A similar analysis applies to forcible regime change. Although the successor government did not necessarily consent to invasion by a foreign power (how could it, if the successor government did not exist), once the new government is installed, it can expect to become responsible for some significant portion of the predecessor's obligations. The invading power may provide assistance. This may be in part due to a sense of ethical duty, or more precisely, out of a sense of ethical duty by the constituencies of the invading power that elect its government and there-

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272. Singapore's success was not however assured when the Federation of Malaya expelled it, causing it to become a state against the will of its government. See LEE KUAN YEW, *THE SINGAPORE STORY* 13–24 (1998).

273. See *Regions and Territories: Somaliland*, BBC NEWS (July 28, 2010, 12:19 UK), [http://news.bbc.co.uk/2/hi/africa/country\\_profiles/3794847.stm](http://news.bbc.co.uk/2/hi/africa/country_profiles/3794847.stm).

274. See *The World Factbook: Somalia*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (last visited Nov. 21, 2010).

by exert pressure on foreign policy. It may also in part reflect the invading power's interests in stabilizing a region, or continuing to wield influence over the successor government. The succession in Iraq supports this analysis.

An advantage of the informal patron arrangements described above is that the successor state may recover its autonomy viz-a-viz its patron as the successor's economy and government stabilizes. As it needs less assistance, it may also exercise greater discretion in its foreign and domestic policies, because the patron's leverage will diminish.

In some instances, however, loose patronage arrangements may not render sufficient assistance to the seceding entity. The entity may have to explore deeper associative arrangements with patron states that involve greater and more permanent loss of political autonomy in exchange for greater economic and military support.<sup>275</sup> The territory may associate itself with a state, as is the case between Puerto Rico and the United States.<sup>276</sup> Here the range of options multiplies. Political subordination to and corresponding economic support by the principal state can be carefully calibrated according to the needs and interests of the principal and associate state in each succession. Andora became a member of the United Nations in 1993, but relies on France and Spain, who control its security affairs and retain the right to appoint half of its Constitutional Tribunal.<sup>277</sup> The freely associated states of Micronesia, the Marshall Islands, and Palau likewise have U.N. membership but the United States controls their national security policy.<sup>278</sup> Projecting into the near future, Abkhazia and South Ossetia may be suitable candidates for associative statehood with Russia, given their dependence on Russia to fend off Georgia and Russia's geopolitical interest in the two putative associative states.<sup>279</sup>

Further into the future, newly independent states may seek, as an alternative or supplement to a patron state, a patron regional grouping. At the present time, the EU provides the most immediate and choate model. A small state may cede control over foreign trade and monetary policies in exchange for access to markets and collective defense. It might be more attractive to derogate sovereignty to an international organization with institutional checks and a balance of interests rather than

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275. See W. MICHAEL REISMAN, *PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION* 10 (1975) ("[Associated statehood is] characterized by recognition of the significant subordination of and delegations of competence by one of the parties (the associate) to the other (the principal) but maintenance of the continuing international status of statehood of each component.").

276. See Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1132-40 (2009) (discussing Puerto Rico's associated statehood as a means to promoting self-determination).

277. Scharf, *supra* note 264, at 376.

278. *Id.*

279. See Borgen, *supra* note 115, at 5-6 (describing secessionist movements in South Ossetia and Abkhazia).

a single patron state whose interests must be assumed to favor the patron over the associate state.

The preceding excursus responds to the normative concern that the policy-oriented approach to state succession and commercial obligations fails to adequately protect the human rights and self-determination claims of successor states. It illustrates that the distribution of commercial obligations in the process of succession is only one component of assistance to transitional states. The maintenance of global order is important, and the general continuity of preexisting international commercial arrangements supports that key policy goal. When continuity poses a threat to the human rights of the peoples of a successor entity, or when greater adjustments to prior burdens would be unacceptably disruptive to world economic order, other strategies may be available to promote self-determination. These strategies are revealed by deconstructing the principle of self-determination into its component values, and stripping the myth of sovereignty down to its constitutive rights and obligations. International decision makers, including the successor entity, can then determine the optimal mix of values that may be achieved in the circumstances, and temporarily or permanently allocate some sovereign rights and obligations of the successor entity to other decision makers in order to achieve those values.

## V. CONCLUSION

The refinements to the policy-oriented approach to state succession and commercial obligations proposed in this Article may still be unsatisfactory to various quarters of the invisible college of jurists. Positivists and their sympathizers may bemoan the lack of predictability and certainty in the policy-oriented approach. For example, how should J.P. Morgan be expected to price loans to unstable regimes without clear rules governing the transmission of debts on succession? How indeed. Absent rules, the policy-oriented approach provides some authoritative guidance, and it may be the best alternative. The succession in Kosovo has validated the approach. It has also clarified that the decision-making process may be triggered not on succession (whenever that mythic point is designated), but when claims of succession are pressed and corresponding questions about preexisting commercial arrangements are raised. The succession in Iraq has confirmed that the approach applies equally to state and government succession, contrary to orthodox distinctions between the two. Human rights scholars may find that the elaboration of the policy-oriented approach in the broader context of succession alternatives inadequately addresses perceived normative deficiencies with the approach. They may feel that the configurative jurisprudence proposed here still insufficiently preferences the human rights and self-determination claims of transitional communities. The author does not disagree with their idealized aspirations of the international human rights

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program. But until the current global arrangements of power and authority are radically transformed, the realistic normativity of the policy-oriented approach to state succession and commercial obligations may be all that is achievable.

