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## The Policies of State Succession: Harmonizing Self-Determination and Global Order in the Twenty-First Century Tai-Heng Cheng, State Succession and Commercial Obligations

Robert D. Sloane\*

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# The Policies of State Succession: Harmonizing Self-Determination and Global Order in the Twenty-First Century

## Tai-Heng Cheng, *State Succession and Commercial Obligations*

Robert D. Sloane

### Abstract

I differ with Cheng's appraisal of certain events and think that we need a more sophisticated analysis of the twin policy goals he identifies and embraces—self-determination and global order—before they can offer real policy guidance. But *State Succession and Commercial Obligations* stands out as a rigorously researched, original, and insightful effort to understand this quite confused and opaque body of international law. Cheng's work will both enable and encourage a more candid, reasoned, and constructive debate about the global policies at stake each time “a state fundamentally changes its structures of power and authority, and an authoritative international response is needed to manage disruptions to international arrangements that may result from that change.” Briefly, I find Cheng's analysis of the dynamics of State succession relative to commercial obligations sophisticated, pragmatic, descriptively comprehensive, and, for the most part, normatively compelling. But it may be too ambitious. Defining disruptions to global commerce as the principal indicia of State succession tends to inflect, and at times to bias, the general analysis of the diverse phenomena that fall within the rubric of State succession. This commercial focus can obscure or normatively predispose our understanding and appraisal of equally vital, but non-economic, dimensions of State succession, including the core policy goals—self-determination and global order—that Cheng identifies and recommends. And to a certain extent, this compromises the work's descriptive accuracy and normative appeal.

## BOOK REVIEW

### THE POLICIES OF STATE SUCCESSION: HARMONIZING SELF-DETERMINATION AND GLOBAL ORDER IN THE TWENTY-FIRST CENTURY

#### TAI-HENG CHENG, STATE SUCCESSION AND COMMERCIAL OBLIGATIONS

*Robert D. Sloane\**

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#### INTRODUCTION

The New Haven School, a policy-oriented perspective on and approach to international law pioneered by Myres S. McDougal, Harold D. Lasswell, and their many distinguished colleagues and students,<sup>1</sup> has variously been criticized for collapsing

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\* Associate Professor of Law, Boston University School of Law. I acknowledge with gratitude the research assistance of Benjamin Brockman-Hawe, Boston University School of Law, J.D. 2008, and the helpful suggestions of Anthony J. Colangelo, Kenneth W. Simons, Sepehr Shahshahani, Andrew R. Willard, and W. Michael Reisman.

1. See generally Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968); W. Michael Reisman, *The View From the New Haven School of International Law*, 86 AM. SOC'Y INT'L L. PROC. 118 (1992). Strictly speaking, the New Haven School aspires to offer a general framework for methodically analyzing questions of law and policy in any legal field; its relevance is not limited to international law. See 1 HAROLD D. LASS-

the distinction between policy and law; substituting power for principle; and offering impractical or convoluted guidance to practicing lawyers faced with concrete problems.<sup>2</sup> This last criticism strikes me as particularly misguided. It is a mistake to suppose, as the late Oscar Schachter put it, that the policy-oriented lawyer would relegate every question about lawfulness, regardless of context, to “a highly uncertain and endless quest for shared expectations, value preferences and power relations on a global scale.”<sup>3</sup> From a historical perspective, the impracticability critique is also ironic. The New Haven School’s intellectual antecedents lie in the sociological jurisprudence of Roscoe Pound and the reformist ambitions of the American Legal Realists. Like those antecedents, the New Haven School sought to rescue the enterprise of jurisprudence, which had long been dominated in the late nineteenth and early twentieth centuries by positivism and Langdellian formalism, from its virtual irrelevance to jurists, politicians, and other decision-makers faced with concrete problems in the real world.<sup>4</sup> But the impracticability objection persists: In a symposium on method published by the *American Journal of International Law* at the end of the twentieth century, Bruno Simma and Andreas L. Paulus, echoing fairly common sentiments, chided the New Haven School for “conflating law, political science and politics plain and simple” and for

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WELL & MYRES S. McDOUGAL, *JURISPRUDENCE FOR A FREE SOCIETY* 3-21 (1992). Its greatest influence and elaboration, however, and the focus of most students trained in its methods, has been in international law and relations.

2. For a representative critique mentioning or embracing each of these points, see Oscar Schachter, Remark, *McDougal's Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC'Y INT'L L. PROC. 266, 266-273 (1985); see also, e.g., Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AM. J. INT'L L. 394, 408 (1999) (charging that New Haven theorists tend to “merge law into policy” and to support “legally questionable activities conducted by the most powerful states”); Schachter, *supra*, at 268 (arguing that “[t]he empirical task envisaged [by the New Haven School] is not merely daunting; it is wholly unrealistic as a practical undertaking for lawyers”).

3. Schachter, *supra* note 2, at 268. Schachter’s observations about McDougal as a practitioner—i.e., that “[i]n his writing and surely in his legal briefs, he relies on precedents, treaties and established legal concepts as the basic foundations of his legal arguments,” *id.* at 269—do not, I think, show that McDougal took a different approach in practice than in theory; rather, they evince the contextualized implementation of that theory.

4. See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 200 (1995) (“Certainly the purpose of jurisprudence conceived as policy science seems eminently pragmatic, since it must, according to Lasswell and McDougal, be oriented toward improving the problem-solving and policy-making skills of the would-be lawyer.”).

“fail[ing] to provide the very guidance that real-life decision makers expect from their lawyers.”<sup>5</sup>

In *State Succession and Commercial Obligations*,<sup>6</sup> Tai-Heng Cheng, an Associate Professor at New York Law School trained in the New Haven School, applies its methodology to a particularly vexing and unsettled area of international law: the law governing the commercial rights and duties of States, creditors, and other participants in the often unruly process of State succession. Virtually no positive law of general application, conventional or customary, exists in this area. Two treaties were negotiated under the auspices of the International Law Commission: the Vienna Convention on Succession of States in Respect of Treaties (“1978 Convention”),<sup>7</sup> which entered into force in 1978, and the Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts (“1978 Convention”), which has yet to enter into force.<sup>8</sup> But their limited scope, application, and subscription make them of correspondingly limited utility,<sup>9</sup> particularly in view of dramatic changes in the global political and economic order since the era of decolonization and the Cold War. And in the realm of custom, State practice as to what may broadly be denominated “succession issues” is so diverse as to render efforts to discern customary rules artificial or futile.<sup>10</sup>

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5. Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 305 (1999); see also DUXBURY, *supra* note 4, at 201 (arguing that policy science “is too preoccupied with the development of a methodology and too little concerned with the matter of how that methodology may prove in some way to be useful”); Schachter, *supra* note 2, at 268-69. Simma and Paulus nevertheless concede that “writings following the New Haven approach may have considerable value for both the analysis of actual decision making and the formulation of policy proposals.” Simma & Paulus, *supra*, at 305.

6. TAI-HENG CHENG, *STATE SUCCESSION AND COMMERCIAL OBLIGATIONS* (2006).

7. Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3, 17 I.L.M. 1488 [hereinafter 1978 Convention].

8. Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, Apr. 8, 1983, 22 I.L.M. 306 (1983) [hereinafter 1983 Convention].

9. See, e.g., Paul R. Williams, *The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?*, 23 DENV. J. INT'L L. & POL'Y 1, 8 (1994) (observing that “it is generally considered that the [1978] Convention does not reflect customary international law” and that despite offering “a number of customary legal rules useful for the determination of treaty continuity,” the Convention “does not accurately reflect the divergent practices” relative to the continuity of treaty obligations following State successions).

10. See CHENG, *supra* note 6, at 23 (“In light of the lack of uniform state practice and *opinio juris*, any positivistic rule of state succession is likely to be so broad or vague

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. Rather than work within inherited conceptual and doctrinal frameworks of succession, which have in any event seldom proved either helpful or descriptively accurate in this area, Cheng provides a fresh perspective on the issues. He methodically analyzes and appraises (i) the diverse forms of succession; (ii) the full range of participants, decision trends, policies, and processes implicated by them; and (iii) their impact on commercial obligations, conceived expansively as “all obligations arising out of international trade and financing arrangements that may be affected by state succession.”<sup>11</sup> The resulting analytic framework will surely disappoint anyone expecting a guide to the black-letter law in this area. But given the present state of international law on these issues, such a guide would inevitably be artificial and misleading. Cheng instead offers a comprehensive, clear, and systematic approach to State succession and commercial obligations based on explicit policy goals.

I differ with Cheng’s appraisal of certain events and think that we need a more sophisticated analysis of the twin policy goals he identifies and embraces—self-determination and global order—before they can offer real policy guidance. But *State Succession and Commercial Obligations* stands out as a rigorously researched, original, and insightful effort to understand this quite confused and opaque body of international law.<sup>12</sup> Cheng’s work will both enable and encourage a more candid, reasoned, and constructive debate about the global policies at stake each time “a state fundamentally changes its structures of power and authority, and an authoritative international response is needed

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that it can be easily reinterpreted and manipulated by participants in state succession to advance their interests.”); see also 1 OPPENHEIM’S INTERNATIONAL LAW 236 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM]; accord P.K. MENON, THE SUCCESSION OF STATES IN RESPECT TO TREATIES, STATE PROPERTY, ARCHIVES, AND DEBTS 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, 150-51 (1998) (emphasizing inconsistency in state practice and unclear inferences on *opinio juris* relevant to state successions); Williams, *supra* note 9, at 10-16 (surveying State practice).

11. CHENG, *supra* note 6, at 53-54.

12. See Craven, *supra* note 10, at 143 (“If there is one common theme running through all recent literature on the law of state succession, it is that the subject is largely confused and resistant to simple exposition.”).

to manage disruptions to international arrangements that may result from that change."<sup>13</sup>

At the same time, some readers may well wonder in what sense the phenomena analyzed by Cheng can be deemed law. While he draws incisive conclusions and policy inferences from the case studies he painstakingly analyzes, one might understandably (though not, in my view, accurately) conclude that there is no law on State succession and commercial obligations—only policy issues, power, and politics; and that despite some general trends, each succession is essentially a *sui generis* event.<sup>14</sup> Of course, the truth of this view depends on what we understand by law, and this review is not the place to engage this perpetual jurisprudential debate in any depth. But if we conceive of law in a crude positivist vein, as a “model of rules,”<sup>15</sup> Cheng would undoubtedly agree that no international law, so conceived, exists in this area: “In state succession,” he writes, “attempts to prescribe doctrinal rules that purport to exert authority over the participants to whom the rules are addressed are almost exclusively doomed to failure.”<sup>16</sup>

A cardinal premise of the New Haven School, however, is that law is most profitably conceived and shaped, not from the perspective of the receiver of commands or rules, *pace* Austinian positivism,<sup>17</sup> but rather from that of the decision-maker at every level of social organization: that is, an actor with effective power charged with “making choices that are appropriate for the relevant community.”<sup>18</sup> In this review, I therefore want to appraise Cheng’s policy-oriented perspective on its own terms: *State Succession and Commercial Obligations* is not, and does not purport to provide, a guide to doctrinal rules. Rather, it is an effort, first, to

13. CHENG, *supra* note 6, at 3.

14. This may well be true, as Cheng and others suggest, *see* CHENG, *supra* note 6, at 379; OPPENHEIM, *supra* note 10, at 236, but it does not obviate the possibility of identifying law—where law denotes, in the formulation of the New Haven School, a process of authoritative decision rather than a body of doctrinal rules.

15. *See generally* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

16. CHENG, *supra* note 6, at 22. “There are currently few, if any, crystallized international rules regarding state succession and commercial obligations.” *Id.* at 379.

17. *See generally* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).

18. W. Michael Reisman, *The View From the New Haven School of International Law*, 86 AM. SOC’Y INT’L L. PROC. 118, 119 (1992); Schachter, *supra* note 2, at 267 (“The notion of law as a process of authoritative decision—rather than as rules of constraint—is a basic tenet of the policy-oriented approach.”).

appreciate the complex political, economic, social, and other factors that shape State succession and commercial obligations; and second, to posit, and offer guidance on the implementation of, certain policies and values to assist decision makers confronting future State successions. Cheng argues that a policy-oriented perspective on succession ameliorates the “descriptive inaccuracy” and “normative deficit” of inherited theories.<sup>19</sup> Part I of this review considers the former claim; Part II the latter.

Briefly, I find Cheng’s analysis of the dynamics of State succession relative to commercial obligations sophisticated, pragmatic, descriptively comprehensive, and, for the most part, normatively compelling. But it may be too ambitious. Defining disruptions to global commerce as the principal indicia of State succession tends to inflect, and at times to bias, the general analysis of the diverse phenomena that fall within the rubric of State succession. This commercial focus can obscure or normatively predispose our understanding and appraisal of equally vital, but non-economic, dimensions of State succession, including the core policy goals—self-determination and global order—that Cheng identifies and recommends. And to a certain extent, this compromises the work’s descriptive accuracy and normative appeal.

## I. FRAMING THE INQUIRY: DESCRIPTIVE ACCURACY

### A. Defining “State Succession and Commercial Obligations”

The first problem confronted by scholars attempting to divine doctrinal rules of law on state succession is that international law does not precisely or helpfully define either “State” or “succession,” rendering the subjects of the inquiry themselves unclear. With respect to States, the perennial but largely academic debate between the declaratory and constitutive criteria for statehood, which offers little in the way of practical guidance or clarity,<sup>20</sup> reflects a more basic truth about the contemporary global order: State identity, like personal identity, is not fixed;<sup>21</sup>

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19. See CHENG, *supra* note 6, at 26.

20. For an overview and critique, see generally Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT’L L. REV. 107 (2002) (critiquing the declaratory and constitutive schools of thought on the recognition of States and suggesting that, for analytic and normative reasons, recognition could more profitably be subdivided into its political, legal, and civil components).

21. See, e.g., KONRAD G. BUHLER, STATE SUCCESSION AND MEMBERSHIP IN INTERNA-



it constantly fluctuates and evolves. The Montevideo or other doctrinal criteria for statehood inevitably convey an oversimplified and incomplete understanding of this principal subject of international law.<sup>22</sup> States may acquire new territory; accede to a treaty regime—such as those governing the European Union and the World Trade Organization—requiring fundamental changes to their internal laws, elect a new government, or experience a (welcome or unwelcome) *coup d'état*. Marginal changes to State identity—for example, the acquisition of a disputed piece of territory, consensual border adjustments, or the election of a parliament controlled by a new party—seldom disrupt global economic or other arrangements in a way that requires an authoritative international response.

Cheng thus justifiably dismisses both the territorial and personal views on State succession, which dominated prior scholarship in this area, as unhelpful or misleading.<sup>23</sup> Both presume to identify the essential feature, so to speak, of the State and go on to conclude that if that feature changes in some significant way, there has been a succession: The territorial approach defines statehood mainly in terms of responsibility for territory. Succession, on this view, refers to any process whereby one State displaces another “in the responsibility for the international relations of territory.”<sup>24</sup> The personal approach defines statehood (a bit tautologically) in terms of the State’s “legal personality,” and jurists and commentators offer various proposals as to what that means—none particularly satisfying.<sup>25</sup> Succession then re-

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TIONAL ORGANIZATIONS: LEGAL THEORIES VERSUS PRAGMATISM 18 (2001); W. Michael Reisman, *Private Armies in a Global War System: Prologue to Decision*, 14 VA. J. INT'L L. 1, 4 (1974) (emphasizing that “legitimate statehood is not acquired at some moment, thereafter existing in perpetuity, but is a varying function of the attitudes of all other participants in the world effective power process”); see also DEREK PARFIT, REASONS & PERSONS 199-350 (1984) (deconstructing personal identity).

22. See Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19. On the difficulty of defining statehood, see generally Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403 (1999).

23. See CHENG, *supra* note 6, at 37-50.

24. This is the approach adopted by the Vienna Conventions. See 1978 Convention, *supra* note 7, art. 2(1)(b); 1983 Convention, *supra* note 8, art. 2(1)(a).

25. See CHENG, *supra* note 6, at 46-47; see also Craven, *supra* note 10, at 152-53. For a modern formulation of the personal view, see OPPENHEIM, *supra* note 10, at 208-09. The heart of the problem is that international legal personality, like sovereignty, is really no more than a shorthand for a bundle of competences, which may not always be co-present in a collective entity. Cf. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND

fers to (qualitatively or quantitatively significant?) changes in the international legal personality of the State. Associated with the territorial and personal views on succession, respectively, are two inherited doctrinal distinctions, which Cheng also dismisses: those between (i) partial and total succession; and (ii) State and governmental succession.<sup>26</sup>

The value or accuracy of these inherited approaches and distinctions is questionable because, at least vis-à-vis the main subject of Cheng's study, *viz.*, global commercial obligations, they offer scant descriptive or normative guidance. Whether we characterize the breakup of the former Socialist Federal Republic of Yugoslavia ("SFRY") as the dissolution of that State or a series of secessions, for example, we confront the same questions about the proper distribution of assets and liabilities as between the post-SFRY entities and their obligations to creditors, debtors, and other participants in the process of succession.<sup>27</sup> Furthermore, despite doctrinal classifications presumably intended to provide some legal guidance, few if any identifiable trends in decision have emerged that stabilize expectations about how international law does—or should—respond to different permutations of State succession: dissolution, secession, decolonization,

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VALUES 8-13 (1995). A regional organization, for example, may enjoy international legal personality in the sense that it can enter into certain treaties, but lack the competence to sue in a particular forum such as the International Court of Justice. See Statute of the International Court of Justice art. 34, ¶ 1, June 26, 1945, 59 Stat. 1055, T.S. No. 993.

26. See CHENG, *supra* note 6, at 38-39; see also OPPENHEIM, *supra* note 10, at 209, 234-36.

27. See CHENG, *supra* note 6, at 42; accord Craven, *supra* note 10, at 153. For further analysis, see CHENG, *supra* at 267-341; PETER RADAN, *THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW* (2002); Carsten Stahn, *The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia*, 96 AM. J. INT'L L. 379 (2002); Anna Staniè, *Financial Aspects of State Succession: The Case of Yugoslavia*, 12 EUR. J. INT'L L. 751 (2001). The Badinter Commission, an advisory body established by the European Community, concluded that the SFRY's breakup should be characterized as a dissolution, not a series of secessions, because of the inability of the federal organs of the SFRY either to "meet the criteria of participation and representativeness inherent in a federal state" or "to enforce respect for the . . . ceasefire agreements concluded under the auspices of the European Communities or the United Nations Organization." Opinion No. 1, Conference on the Former Yugoslavia Arbitration Commission, 31 I.L.M. 1488, 1496-97 (1992). But the absence of a government with effective control over the entirety of its State's territory—for example, in Somalia since 1991 or during the U.S. Civil War—does not necessarily imply the dissolution of that State, still less justify the secession of putative breakaway regions purporting to exercise their right to self-determination. See RADAN, *supra*, at 209-11.

partition, merger, annexation, and so forth.<sup>28</sup> The domestic analogy, an oft-abused heuristic in international law reflected in certain prior theories of State succession, would be deeply flawed in this context.<sup>29</sup> States differ from persons in (among other ways) the extent to which they may usefully be conceived as unitary actors with a univocal will.<sup>30</sup> The quantity and nature of assets, liabilities, and other obligations that attach to a predecessor State, and the sheer diversity of circumstances that fall under the rubric of State succession, render it impossible for any fixed set of doctrinal rules, however aspirationally comprehensive, to allocate those commercial obligations equitably.<sup>31</sup>

In short, the lexicon of State succession, despite its veneer of analytic and organizational precision, offers little practical guidance to decision makers. State successions require authoritative and effective international legal responses because of their potential disruption of, *inter alia*, global commercial obligations. Yet to label them as one type of succession rather than another contributes little, if anything, to our understanding of what those responses should be.<sup>32</sup> Indeed, for Cheng, even the intuitive and widely accepted distinction between State and governmental succession does not survive scrutiny: Both, he says, involve fundamental changes to the internal governance structure of a State, which may require relevantly similar legal responses “to manage the adjustments that are triggered by” claims pertaining to preexisting international obligations.<sup>33</sup>

A chief virtue of *State Succession and Commercial Obligations*, then, is that it discards these inherited but largely unhelpful concepts and strives to offer in their stead a functional, inclusive, and comprehensive approach. State succession, Cheng writes, “includes any fundamental internal governance reorganization

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28. See OPPENHEIM, *supra* note 10, at 209 (“Although it is convenient to treat cases of succession as involving several distinct kinds of situation in which states emerge or break up, the various categories are not terms of art carrying with them clearly established legal consequences, nor are they sharply differentiated.”).

29. See CHENG, *supra* note 6, at 13-26.

30. See D.P. O’CONNELL, *THE LAW OF STATE SUCCESSION* 7 (1956).

31. See Paul Williams & Jennifer Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 *HARV. INT’L L.J.* 355, 360-66 (2001).

32. CHENG, *supra* note 6, at 42-45, 49-50.

33. CHENG, *supra* note 6, 49, 53 (“The community policies at stake when successor states present claims that preexisting commercial obligations should be terminated or modified are equally at stake when successor governments press similar claims.”).

that causes, or may potentially cause, disruptions to international commercial arrangements and that requires an authoritative international response.”<sup>34</sup> Similarly, Cheng eschews a narrow concept of commercial obligations in this context—limited to public financial obligations arising under international law—in favor of an inclusive one that subsumes “any obligation owed by a state, or corporation, or national of that state to another party external to that state, regardless of whether the obligation arose under public or private international law or national law.”<sup>35</sup> Finally, again in line with the configurative jurisprudence of the New Haven School, Cheng classifies and describes the full range of participants in State successions: not only (predecessor and successor) States and creditors, but international organizations (*e.g.*, the International Monetary Fund, the World Trade Organization, and the European Union), corporations, banks, national and international tribunals, and individuals.<sup>36</sup>

Within this analytic framework, he argues persuasively that neither (i) the *tabula rasa* approach, whereby a new State begins its existence with a clean slate, wholly free from its predecessor’s obligations,<sup>37</sup> nor (ii) the universal succession theory, a legacy of Roman law picked up and given new rationales by well-known theorists like Grotius, Pufendorf, and Huber,<sup>38</sup> accurately describes State practice in past successions, still less offers anything like binding international law on the subject.<sup>39</sup> Equally, in the modern era in which sovereignty has been deconstructed and

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34. CHENG, *supra* note 6, at 50. This definition subsumes three categories: first, “a territorial relocation of power from one sovereign state to another sovereign state that existed prior to the relocation”; second, “a break in the power and control of the predecessor government over the territory in succession and the establishment of a new seat of power that did not exist prior to the succession”; and third, and most innovatively, “successions in which the structure of the governance [of a State] changes fundamentally but remains in the same territory. CHENG, *supra* note 6, at 50-51.

35. See CHENG, *supra* note 6, at 54.

36. CHENG, *supra* note 6, at 65-76.

37. See, *e.g.*, YILMA MAKONNEN, INTERNATIONAL LAW AND THE NEW STATES OF AFRICA (1983); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 210(3), cmt. (f) (1987) (adopting the clean-slate theory as to treaty obligations).

38. The universal succession theory, in one form or another, remained predominant from roughly the seventeenth to the nineteenth century. See CHENG, *supra* note 6, at 13-16; see also O’CONNELL, *supra* note 30, at 7-8; Erik Castrén, *On State Succession in Practice and Theory*, 24 NORDISK TIDSSKRIFT INT’L RET 57 (1954). In its pure form, the universal succession theory posits that the successor State inherits all the rights and obligations of its predecessor or predecessors.

39. See CHENG, *supra* note 6, at 13-26; accord Craven, *supra* note 10, at 147-52.

demystified,<sup>40</sup> and the complex nature of State consent acknowledged,<sup>41</sup> neither of the two polar academic theories that predominated historically proves particularly compelling as a normative matter. In fact, the quest for a monolithic theory of State succession that can account for and stabilize international expectations as to its diverse manifestations and consequences is, as Cheng argues, conceptually misguided.<sup>42</sup> After establishing his comprehensive analytic framework, Cheng thus attempts to persuade the reader, principally through a careful analysis and appraisal of several well-researched case studies, that application of such a framework would enable decision makers more accurately to predict and shape the substantial commercial aspects of future State successions.<sup>43</sup>

In this regard, I think, Cheng's project succeeds. By appraising trends in decision, he illustrates the role and power of the various participants in the process of State succession. Briefly, he shows that rather than conform to an all-or-none (universal succession or clean slate) approach to the continuing vitality of commercial obligations following a succession, contemporary international law tends—if not immediately then in due course—to manage those obligations pragmatically: Commercial obligations that continue to serve presuccession purposes will be preserved; those that become obsolete will be terminated; and those that no longer serve their original purposes, but cannot be terminated without risking an unacceptably high degree of disruption to the global economy, will be adjusted accordingly.<sup>44</sup> By reviewing Cheng's incisive case studies of recent successions—those of East Timor, Hong Kong, Macau, Czecho-

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40. See, e.g., HENKIN, *supra* note 25, at 8-13.

41. See Fernando R. Tesón, *Interdependence, Consent, and the Basis of International Obligation*, 83 AM. SOC'Y INT'L L. PROCEEDINGS 547, 561-62 (1989); see also, e.g., Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 AM. J. INT'L L. 531, 533-35 (2002).

42. See CHENG, *supra* note 6, at 5-6.

43. See CHENG, *supra* note 6, *passim*.

44. See CHENG, *supra* note 6, at 32, 340-41 (concluding that State practice rejects a "binary choice between terminating or preserving all obligations on succession" in favor of "a more discriminating approach" whereby "channels for commercial cooperation that remain relevant to postsuccession realities will tend to be protected while obsolete channels will tend to be reconfigured to permit meaningful commercial exchanges between participants"). Cheng also discusses "the trend towards continuity" in contradistinction to both the universal succession and clean-slate theories of succession. See CHENG, *supra* note 6, at 386.

slovakia, Yugoslavia, and the Soviet Union—decision-makers will be far better equipped to predict, understand, and potentially influence the network of global commercial obligations affected by future successions than they would be were they to study the Vienna Conventions or immerse themselves in the abstract jurisprudential literature on theories of State succession.

### B. *Defining “State Succession” Simpliciter*

That said, by defining State succession in terms of the presence *vel non* of “disruptions to international commercial arrangements” that require an authoritative international response, Cheng’s view may sacrifice some of its descriptive accuracy and—of equal concern for the policy-oriented lawyer—normative force.<sup>45</sup> I sympathize with and often find helpful the pragmatic approach to issues of definition adopted by Cheng. But he may be too quick to dismiss at least some of the conventional distinctions. For example, to treat governmental succession as a subset of State succession promotes analytic clarity vis-à-vis commercial obligations. A radical change in the internal governance structure of a State often (though not always) raises issues about the continuity of international commercial obligations that do not differ meaningfully from those raised by other, traditionally recognized, forms of succession, *e.g.*, dissolution, cession, partition, or merger. But to focus on commercial obligations as the principal indicia of State succession at times proves under-inclusive or imprecise vis-à-vis other, equally vital, global interests and values. Consider two examples:

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45. CHENG, *supra* note 6, at 50; *see id.* at 3, 26 (arguing that “[a] policy-oriented approach to State succession and commercial obligations overcomes the main weaknesses of earlier succession theories: their narrow scope of inquiry, descriptive inaccuracy, and normative deficit”) In fairness, I acknowledge—as the word “includes” in the end of the definition of State succession at page 50 implies—that Cheng does not really mean to offer an exhaustive definition of State succession suitable for every purpose; only for the particular purpose of appraising the diverse issues of commercial obligation raised by most State successions. *See id.* at 3, 37. Yet his discussion and analysis throughout the book often imply a far more inclusive definition of State succession, *i.e.* one that is not limited in its relevance to commercial obligations. Because Cheng adopts the New Haven School’s configurative jurisprudence and methodology, this is understandable—indeed, inevitable. It would be contrary to that methodology, which strives to appreciate the full constellation of values and interests implicated by particular issues (from the broadest range of perspectives), to examine issues of State succession and commercial obligations in artificial isolation from the many other dimensions of State succession.

In 1949, the People's Republic of China invaded and quickly annexed Tibet, which had enjoyed *de facto*, if not *de jure* independence, at least during the period from 1913 to 1947 and, according to virtually all credible legal and historical scholarship, for centuries before then.<sup>46</sup> The process now known as globalization—the prime mover, as Cheng rightly notes in his opening sentence, behind the modern law of State succession and commercial obligations<sup>47</sup>—had not, at the time, advanced to anywhere near its present stage. And Tibet had foolishly sought to cultivate its natural geographic isolation precisely as a means to ward off foreign domination.<sup>48</sup> Only the United Kingdom, Russia, India, and China (the successor State) had any real relationship, commercial or otherwise, with Tibet before the mid-twentieth century.<sup>49</sup> China's occupation and annexation of Tibet<sup>50</sup> therefore did not trigger disruptions to global commercial arrangements, which, to paraphrase Cheng, required an authoritative international legal response. Nonetheless, it would be not only counterintuitive, but detrimental to a world public order of human dignity, to conclude that China's annexation of Tibet does not qualify as State succession.<sup>51</sup> True, it had only a negligible effect on international commerce. But it had monumental and enduring effects on the region's geopolitical dynamics, particularly during the Cold War;<sup>52</sup> on the Tibetan people's right to self-determination,<sup>53</sup> one of the two values that Cheng says State successions should promote; on fundamental human rights; and increasingly today, on the global environment, for Tibet is the source of Asia's major rivers.

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46. See Sloane, *supra* note 20, at 131 n.85, 135-36 n.94.

47. CHENG, *supra* note 6, at 3.

48. See JOHN F. AVEDON, *IN EXILE FROM THE LAND OF SNOWS* 19 (1979); MICHAEL C. VAN WALT VAN PRAAG, *THE STATUS OF TIBET: HISTORY, RIGHTS AND PROSPECTS IN INTERNATIONAL LAW* 26-46 (1987); TSERING SHAKYA, *DRAGON IN THE LAND OF SNOWS* 5 (1999).

49. See Sloane, *supra* note 20, at 135-36.

50. See The Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet, P.R.C.-Tibet, May 23, 1951, *reprinted in* VAN WALT VAN PRAAG, *supra* note 48, at 337-40.

51. Cheng mentions Tibet as a potential candidate for a future State succession. See CHENG, *supra* note 6, at 7. It is not clear whether he regards its original annexation as succession.

52. See generally JOHN KENNETH KNAUS, *ORPHANS OF THE COLD WAR: AMERICA AND THE TIBETAN STRUGGLE FOR SURVIVAL* (1999) (describing the U.S. Central Intelligence Agency's covert funding of Tibetan guerilla operations against China until 1974).

53. See, e.g., Dawa Norbu, *Selfdetermination in the Post-Soviet Era: A Case Study of Tibet*, 34 J. INT'L L. STUD. 237, 254-263 (1997).

Consider also the 1973 *coup d'état* in Chile orchestrated by General Augusto Pinochet, which toppled the democratically elected government of Salvador Allende. By Cheng's definition of State succession, it is unclear whether the ouster of Allende would qualify. Without question, it brought about radical changes to Chile's internal governance structure. But far from triggering disruptions to the global economy by, for example, leading to the repudiation of treaties or casting doubt on the vitality of previous commercial arrangements, Chile quickly stabilized its economy and reassured foreign investors who had been alarmed by the prospect of its potential movement toward a socialist economy.<sup>54</sup>

In March 1990, Pinochet relinquished power to a left-of-center coalition. At that time, another fundamental change to Chile's internal governance structure took place. The assumption of power by the new regime, however, likewise did not trigger disruptions to global commercial arrangements; to the contrary, the regime "pledged its commitment to the development of a liberal economy and society in Chile during the transition to democracy."<sup>55</sup>

In part, then, Chile's experience supports Cheng's general observation that States undergoing successions in the modern era will increasingly strive to avoid disrupting entrenched commercial obligations entered into by their predecessors.<sup>56</sup> Yet it seems misguided to view the events in Chile as either not genuine State successions (as Cheng's definition might imply), or as State rather than governmental successions—or, as he recommends, to dispense with this latter distinction altogether.<sup>57</sup> According to the definition of State succession stressed by Cheng, because the changes to the internal governance structure of Chile did not precipitate disruptions to the global economic order requiring an authoritative response, they may not qualify as State successions.<sup>58</sup> Conventional wisdom holds that however

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54. See Kyle Steenland, *Chile: Blood On the Peaceful Road*, 1 *LATIN AM. PERSP.* 9, 24-25 (1974). Pinochet reprivatized factories and banks and paid compensation for U.S. property nationalized by Allende. Subsequently, the United States supported Chile's efforts to renegotiate its foreign debt. See *id.*

55. Eduardo Silva, *From Dictatorship to Democracy: The Business-State Nexus in Chile's Economic Transformation, 1975-1994*, 28 *COMP. POL.* 299, 311 (1996).

56. See CHENG, *supra* note 6, at 12-13.

57. See *id.* at 32.

58. See *id.* at 3.



brutal and morally abhorrent Pinochet's iron-fisted regime may have been, from an economic perspective, it did not disrupt but—quite the contrary—helped stabilize global economic arrangements threatened by Allende's avowed intention to introduce radical socialist reforms.<sup>59</sup> Needless to say, this is not to sanction Pinochet's *coup* and certainly not to excuse the chronic human rights abuses of his regime. The point is that stressing disruptions to global commercial arrangements as almost a *sine qua non* of State succession does not always prove descriptively accurate.

Furthermore, 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. Thankfully, international law no longer regards the internal structure of a State's government as a matter solely within that State's domestic jurisdiction.<sup>60</sup> While radical changes to the internal governance structure of Chile did not require an authoritative international response to manage disruptions to global commerce, they may well have called for such a response vis-à-vis other matters regulated by law; for example, diplomacy and international human rights. Equally, in the cases of Pakistan in 1999, or Thailand in 2006, *coups* within those States should surely be considered governmental successions even if they did not trigger radical disruptions to global commerce.<sup>61</sup> In short, the distinction between governmental and State succession may, contrary to Cheng's view, remain analytically helpful. It can facilitate normative judgments relevant

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59. See, e.g., Gary S. Becker, *Latin America Owes a Lot to Its "Chicago Boys,"* Bus. Wk., June 9, 1997. Changes to the Chilean economy in the years immediately following the 1973 *coup* have been described as "relatively moderate." See Patricio Silva, *Technocrats and Politics in Chile: From the Chicago Boys to the CIEPLAN Monks*, 23 J. LATIN AM. STUD. 385, 392 (1991). But see PETER WINN, *VICTIMS OF THE CHILEAN MIRACLE: WORKERS AND NEOLIBERALISM IN THE PINOCHET ERA, 1973-2002 passim* (2004) (positing that high inflation and low exports in the mid-1970s were caused more by the global rise in oil prices than anything internal to Chile's governance structure).

60. See U.N. CHARTER art. 2, ¶ 7; see also W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990).

61. On Pervez Musharraf's *coup d'etat* overthrowing the government of Nawaz Sharif, see, for example, Sean D. Murphy, *Contemporary Practice of the United States*, 94 AM. J. INT'L L. 348, 354-56 (2000); see also OWEN BENNETT JONES, *PAKISTAN: EYE OF THE STORM* 34-55 (2d ed. 2003). On the recent *coup* in Thailand overthrowing Prime Minister Thaksin, see *Old Soldiers, Old Habits*, *ECONOMIST*, Sept. 23, 2006, at 65; Amy Kazmin, *Thaksin Faces Coup as Army Seizes Bangkok*, *FIN. TIMES*, Sept. 19, 2006.

to non-economic responses to changes in the internal governance structures of States. The functional and (aspirationally) inclusive definition of State succession proposed by Cheng offers sound guidance in the commercial context, but it may well prove descriptively inaccurate or normatively misguided in other contexts.

## II. HARMONIZING SELF-DETERMINATION AND GLOBAL ORDER: NORMATIVE DEFICIT

*State Succession and Commercial Obligations* both makes explicit and embraces two global values raised by most, if not all, State successions: self-determination and global order.<sup>62</sup> Values, in the parlance of the New Haven School, refer to “demanded relations among human beings, which stimulate claimants to appeal to processes of decision and invoke the prescription and application of authoritative policy,”<sup>63</sup> or simply, certain “preferred event[s].”<sup>64</sup> These have been classified as power, enlightenment, respect, well-being, wealth, skill, affection, and rectitude.<sup>65</sup> The policy goals of self-determination and global order, which Cheng recommends the law of State succession harmonize,<sup>66</sup> implicate most of these value categories. But by framing the inquiry as State succession and commercial obligations, Cheng may at times unjustifiably prioritize certain values (*e.g.*, wealth) at the expense of others (*e.g.*, respect, rectitude).

Now, having set out to write about the already vast subject of State succession and commercial obligations, it may be unfair to fault the author for linking these two concepts in the way that offers the greatest analytic payoff *vis-à-vis* each other and for correspondingly deemphasizing other aspects of State succession. Yet Cheng’s decision to focus principally on how State successions affect global commercial arrangements, however expansively conceived, tends to give precedence as a matter of policy to economic stability, development, and wealth promotion. Wealth is only one of the values that international law, as a mat-

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62. See CHENG, *supra* note 6, at 27-28.

63. 1 LASSWELL & MCDUGAL, *supra* note 1, at 30.

64. Harold D. Lasswell & Myres S. McDougal, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT’L L. 1, 7 (1959).

65. See *id.* at 7, 12-13.

66. See CHENG, *supra* note 6, at 27.

ter of policy, should promote.<sup>67</sup> Of course, the abstract goals that Cheng tasks the international law of State succession with harmonizing—self-determination and global order—may and should, as Cheng would, I think, agree, be conceived broadly to subsume other values. He cites or alludes to some of these in the course of his case studies. For example, Cheng rightly emphasizes the significance of Russia's recognition as the continuing legal personality of the Soviet Union, not only for commercial reasons, but because it effectively meant that Russia would retain control over its predecessor's arsenal of nuclear and conventional weapons,<sup>68</sup> with profound geostrategic consequences for world public order.

But on the whole, the 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. This is not to say that I disagree with that analysis as far as it goes; to the contrary, he offers thoughtful appraisals that will, as I said earlier, enable more constructive debate on these issues in the future, and he brings greater descriptive accuracy to the legal analysis of State successions vis-à-vis the commercial obligations affected by them. It is to say, however, that despite Herculean efforts to be comprehensive in considering the diverse value dimensions of successions, the framework Cheng supplies may privilege certain values at the expense of others. For this reason, it falls short of his avowed goal of ameliorating the "normative deficit" in the law of State succession.<sup>69</sup> To appreciate why, consider briefly the two values that Cheng tasks the law of State succession with harmonizing: self-determination and global order.

#### *A. Self-Determination in the Twenty-First Century*

Many, though not all, State successions involve a demand by a putative "people" to exercise its alleged right to self-determination, a foundational but poorly understood human right.<sup>70</sup> I

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67. See 1 LASSWELL & MCDUGAL, *supra* note 1, at 30-31.

68. See CHENG, *supra* note 6, at 350-51, 390, 394.

69. See *id.* at 26.

70. See International Covenant on Civil and Political Rights art. 1(1), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR] ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."); International

agree with Cheng that it is a core value that should be supported by the evolving international law of State succession. To effectively and appropriately further the legitimate right of peoples to self-determination, however, we need to appreciate the scope and limits of that right. *State Succession and Commercial Obligations* largely elides such questions. Cheng says that “[s]elf-determination in its broadest sense refers to the right of communities to freely determine, without external interference, their political status and freely pursue their economic, social and cultural development,” and he cites decolonization and the consensual unification of States as “generally proper exercises of the right to self-determination.”<sup>71</sup> That is true but not very helpful. The decolonization era is essentially over. Most modern State successions will require decision makers to appraise the legitimacy of an asserted exercise of the right to self-determination in far more controversial circumstances.

After World War II, largely because Germany and other States abused the concept of self-determination and (related) minority rights regimes as pretexts for war,<sup>72</sup> international law fundamentally reconceptualized self-determination. It came to denote, in the main, a clear international right to be free from colonial domination.<sup>73</sup> In its advisory opinion in *Western Sahara*,<sup>74</sup> the International Court of Justice (“ICJ”) affirmed the right to self-determination in the context of decolonization as *erga omnes*.<sup>75</sup> But outside of that context, the precise contours of self-determination were, and remain, unclear. It has been aptly

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Covenant on Economic, Social and Cultural Rights art. 1(1), Dec. 16, 1966, 9993 U.N.T.S. 3, 6 I.L.M. 368 [hereafter ICESCR] (repeating the ICCPR formulation of the right to self-determination verbatim); see also Vienna Declaration and Programme of Action ¶ 2, June 25, 1993, U.N. Doc. A/CONF.157/24 (Pt. I), 32 I.L.M. 1661, 1665 (declaring the denial of self-determination a human rights violation).

71. CHENG, *supra* note 6, at 28.

72. See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 2 (1997) (noting that “Nazi Germany justified its invasion of Poland and Czechoslovakia on the grounds that these countries were violating the treaty rights of ethnic Germans on their soil”).

73. See Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 *YALE J. INT’L L.* 1, 40-41 (1998); see also Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 *AM. J. INT’L L.* 304, 305, 307-08 (1994).

74. *Western Sahara*, Advisory Opinion, 1975 *I.C.J.* 12 (Oct. 16).

75. See *id.* at 31 (citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), 1971 *I.C.J.* 16, 31 (June 21)); see also *East Timor (Port. v. Austl.)*, 1995 *I.C.J.* 90, 102 (June 30).

described as “a concept increasingly at war with itself.”<sup>76</sup>

Self-determination reemerged as a major issue in the 1990s precisely because of the explosion of post-Cold War State successions: The dissolution of old States (*e.g.*, the former Yugoslavia, Czechoslovakia, and the Soviet Union), the emergence of new ones (*e.g.*, Croatia, Slovenia, Bosnia-Herzegovina, the Czech Republic, the Slovak Republic, Georgia, Eritrea), and the (regrettably often related) brutal ethnic conflicts within nation-States that had been held together in the past by iron-fisted rule or Cold War geopolitical forces. The question therefore arose—or, more accurately, reemerged from its dormancy since the interwar period—whether and, if so, under what conditions, the right to self-determination requires that States offer greater autonomy or even independence to disaffected national, ethnic, or other minorities.<sup>77</sup>

In *Reference re Secession of Quebec*,<sup>78</sup> the Supreme Court of Canada considered whether the right to self-determination under international law would permit Quebec to secede from Canada unilaterally.<sup>79</sup> It concluded, in line with the prevailing view, that the modern right to self-determination must, with few exceptions, be exercised within a framework that respects the territorial integrity of sovereign States.<sup>80</sup> With the clear exception of decolonization, international law now presumes that self-determination will be realized internally, that is, through the political avenues available in liberal democratic States; and, if necessary, by affording special protections to national minorities.<sup>81</sup> The Court referred to this in conventional terms as “internal self-determination—a people’s pursuit of its political, economic, social

76. Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT’L L. 733, 733 (1995) (reviewing YVES BEIGBEDER, *INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY* (1994)).

77. See Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT’L & COMP. L.Q. 241, 243 (1994).

78. 37 I.L.M. 1340 (1998).

79. See *id.* at 1342, ¶ 2.

80. See *id.* at 1370 ¶ 122, 1372 ¶¶ 131, 137; see also, *e.g.*, David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 663 (1995) (noting that contemporary international law does not generally sanction secession by minorities and that “self-determination outside of the decolonization context is increasingly understood as a right of the people of a state as a whole to determine their own political structures”).

81. See, *e.g.*, *Reference re Secession of Quebec*, 37 I.L.M. 1340, 1357, ¶ 48 (1998).

and cultural development within the framework of an existing state.”<sup>82</sup> By contrast, an external right to self-determination—that is, the right of a putative people to choose independence, free association, or integration with another State in accordance with the framework established by the General Assembly over several decades<sup>83</sup>—arises “only in the most extreme cases and, even then, under carefully defined circumstances.”<sup>84</sup> But the Canadian Supreme Court did not explain which cases qualify as extreme or what carefully defined circumstances it had in mind. The debates about the contemporary scope of the right to self-determination, which preceded that decision,<sup>85</sup> continue unabated.<sup>86</sup>

While Cheng thus rightly, in my view, identifies self-determination as one of the values that modern State successions should promote, he does not explain satisfactorily what it means. Nor does he offer guidance on how it should be understood and weighed in modern State successions that arise in contexts other than decolonization—which is to say, virtually all of them.<sup>87</sup> This question cannot be elided. The appropriate weight to be given to self-determination naturally requires understanding what, exactly, it does or should guarantee in the diverse contexts of contemporary successions. Cheng uncontroversially posits, for example, that international law should discourage illegiti-

82. *Id.* at 1371, ¶ 126.

83. See G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960); see also G.A. Res. 3292, U.N. GAOR, 29th Sess., Supp. No. 31, at 103-04, U.N. Doc. A/9631 (1974); G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); G.A. Res. 421, U.N. GAOR, 5th Sess., Supp. No. 20, at 42, U.N. Doc. A/1775 (1950).

84. Reference re Secession of Quebec, 37 I.L.M. 1340, 1371, ¶ 126 (1998).

85. See generally Stephen J. Toope, *International Decisions: Re Reference by Governor in Council Concerning Certain Questions Relating to Secession of Quebec From Canada*, 93 AM. J. INT’L L. 519, 524 (1999) (pointing out that the Court’s decision neglected to address the assertions, and arguable State practice in support of, “a more expansive right to secede than had previously been admitted,” and collecting authorities).

86. For recent contributions to the debate over whether at least some non-colonial “peoples” enjoy a self-determination right to secede, see, for example, JOSHUA CASTELINO, *INTERNATIONAL LAW AND SELF-DETERMINATION* (2000); *MODERN LAW OF SELF-DETERMINATION* (Christian Tomuschat ed. 1993); *NATIONAL SELF-DETERMINATION AND SECESSION* (Margaret Moore ed., 1998); DAVID RAIÈ, *STATEHOOD AND THE LAW OF SELF-DETERMINATION* (2002); *SECESSION AND SELF-DETERMINATION* (Stephen Macedo & Allen Buchanan eds., 2003).

87. See CHENG, *supra* note 6, at 392 (acknowledging that the era of decolonization, with its attendant trend toward discontinuity of commercial arrangements imposed by erstwhile colonial powers, has essentially drawn to a close).

mate successions such as Iraq's invasion of Kuwait in 1990.<sup>88</sup> It may be easy to recognize the illegitimacy of such a clear case of aggression in violation of the U.N. Charter.<sup>89</sup> But more frequently—for example, in the cases of the breakup of the Soviet Union and the former Yugoslavia analyzed by Cheng—legitimacy remains a deeply controversial normative concept that is inextricably bound up with questions about the proper scope and limits of self-determination, as well as the emerging right to democratic governance.<sup>90</sup> Absent a more sophisticated understanding of when and how the right to self-determination may be legitimately exercised—or which peoples (other than formerly colonized ones) qualify for external self-determination—decision-makers will be at a loss to determine the legitimacy of, *inter alia*, secession claims made by disaffected or historically maltreated national, ethnic, or other minorities.

In Iraq, for example, a succession that Cheng rightly regards as still in progress and therefore one that it would be premature to appraise,<sup>91</sup> what does self-determination mean? What normative weight does it merit? Iraq is not in the process of decolonization at this stage in its history; it is emerging from an externally instigated and managed “regime change”<sup>92</sup> that may be conceived, following Cheng, as one form of State succession. Modern international law has clearly rejected a general right of secession outside of the context of decolonization.<sup>93</sup> But should Iraq, to paraphrase the Canadian Supreme Court, be deemed an extreme case because of the past oppression of its Shiite and Kurdish populations by the Sunni minority, which held the reigns of power under Saddam Hussein's Baathist regime? Perhaps Iraq's peoples, defined in ethnic, cultural, or religious terms, merit some form of external self-determination. Or perhaps that would be the least bad solution even if they do not.

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88. *See id.* at 29.

89. U.N. CHARTER art. 2, ¶ 4.

90. *See generally* Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

91. *See* CHENG, *supra* note 6, at 34-35, 405. Cheng explores the issue of “odious debt” relative to Iraq in a forthcoming article. Tai-Heng Cheng, *Renegotiating the Doctrine of Odious Debt*, 70 L. & CONTEMP. PROBS. (forthcoming 2007).

92. *See* W. Michael Reisman, *Why Regime Change is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516 (2004).

93. *See* Fox, *supra* note 77, at 733.

Some suggest, for example, partitioning Iraq into three independent States, or a nominal federation of three autonomous entities, the borders of which would be defined roughly along ethnic and religious lines.<sup>94</sup> A key issue in that event would be how equitably to distribute Iraq's oil revenues, for its major oil fields lie predominantly in Kurdish and Shiite regions. The future governments of these potential federated provinces or States would naturally be loath to surrender any of their oil's economic value to their former oppressors. Should the law of State succession encourage or discourage such an arrangement? Would it be normatively desirable by reference to the overarching policy values of self-determination and global order? How much weight should be given to the economic interests of foreign investors and the need to stabilize global oil prices as against, say, an assertion by the Kurds that they enjoy the right to a State with its capital at Kirkuk? The absence of more than a cursory analysis of self-determination makes it difficult to answer these questions, or to understand how properly to frame them, in a normatively compelling way.

Also, should the invasion of Iraq by the United States and its allies be deemed an illegitimate succession, assuming that it violated international law on the use of force,<sup>95</sup> and in view of its profoundly destabilizing effect on international commercial obligations (among many other facets of global order)? Or should it be viewed as a legitimate succession because Saddam Hussein's brutal regime frustrated the right of the Iraqi people to self-determination? The simple point is that the values of global order and self-determination, while laudable in the abstract, need to be fleshed out. Without defining or expounding them in more concrete and detailed terms, they remain too malleable to offer the normative policy guidance that Cheng seeks to derive from them.

### B. *The Elements of Global Order*

Cheng's work would similarly benefit from a more thorough definition of global order. In the context of his case studies,

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94. See, e.g., Joseph R. Biden, Jr. & Leslie H. Gelb, *Unity Through Autonomy in Iraq*, N.Y. TIMES, May 1, 2006, at A19; Peter W. Galbraith, *How to Get Out of Iraq*, 15 N.Y. REV. BOOKS, May 13, 2004, at 42.

95. See Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607 (2003).



global order, though never explicitly defined, seems to mean a stable international economy conducive to private business arrangements and sustainable development within States. Global order has many other, equally vital, facets, foremost among them, geopolitical stability and the protection of human dignity. Cheng's analysis of these issues tends to be cursory. It occupies three pages in the concluding chapter and elsewhere remains largely limited to a descriptive appraisal of the influence of non-economic factors on the diverse participants in State successions.<sup>96</sup> A noteworthy and laudable exception is Cheng's criticism of the law for its failure to discourage illegitimate successions—for example, in the cases of Indonesia's invasion of East Timor and the Soviet Union's long-term occupation of the Baltics.<sup>97</sup> Cheng observes that international responses to these events "have created an incentive for aggressors to commit unlawful acts of aggression against weaker states"<sup>98</sup> by effectively reassuring them that States and other participants will acquiesce in and adjust to the new geopolitical and economic arrangements rather than deploy, in the parlance of the New Haven School,<sup>99</sup> the economic instrument or other strategies to retaliate against aggressors.

But this, in turn, raises larger questions about the price, value, and meaning of global order. Mussolini, so it has been said (though falsely), at least made the trains run on time.<sup>100</sup> Perhaps States must sometimes ignore or postpone the implementation of contemporary norms of human rights, democracy, and self-determination to avoid potentially catastrophic disruptions to global order and stability. In Pakistan, the United States and the European Union alike initially condemned the *coup d'état* orchestrated by General Pervez Musharraf, which ousted the elected, albeit apparently corrupt, government of Nawaz Sharif.<sup>101</sup> After the attacks of September 11, 2001, however, this policy of discouraging an illegitimate succession fell victim to cal-

96. See CHENG, *supra* note 6, at 392-95.

97. See *id.* at 399-401.

98. *Id.* at 400.

99. See Lasswell & McDougal, *supra* note 64, at 21.

100. See ASHLEY MONTAGU & EDWARD DARLING, *THE PREVALENCE OF NONSENSE* 19-20 (1967).

101. See, e.g., BENNETT JONES, *supra* note 61, at 34-55, 223-49; Steven Lee Meyers, *Congress Expands Choices on Punishing Pakistan*, N.Y. TIMES, Oct. 14, 1999, at A12; Jane Perlez, *U.S. Urges Pakistani Army to Restore Democracy Soon*, N.Y. TIMES, Oct. 13, 1999, at

culations based on the military and geostrategic value of a nuclear Pakistan and the sense that Musharraf, whatever his faults, would be far preferable to the likely alternative: a radical Islamist regime sympathetic to or even allied with al-Qaeda and the Taliban.<sup>102</sup>

But this strategy of embracing expedient alliances with authoritarian leaders perceived as the lesser of two evils can and often does backfire in the long term, as the Iranian Revolution of 1979 made painfully clear.<sup>103</sup> Two years after the nationalization of the Iranian oil industry in 1951 under the popular government of Dr. Mohammed Mossadegh,<sup>104</sup> British and U.S. intelligence services orchestrated a *coup d'état* that restored to power Shah Mohammed Reza Pahlavi.<sup>105</sup> The Shah favored economic modernization.<sup>106</sup> If global order refers in the main to economic stability—to facilitating or protecting the escalating transborder movement of goods, services, and people for the economic benefit of the world community—then arguably the *coup* temporarily furthered global order (although it clearly thwarted self-determination). But the deleterious consequences of U.S. support for the Shah continue to reverberate today. Nearly thirty years after the Revolution, Iran and the United States face off over each other's roles in Iraq and over Iran's pursuit of nuclear status. Had decision makers considered the likely long-term consequences of the *coup* for all the dimensions of global

A12; *Restore Democracy or Lose Aid, Europeans Tell Pakistanis*, N.Y. TIMES, Oct. 17, 1999, at A10.

102. See Anatol Lieven, *The Pressures on Pakistan*, 81 FOREIGN AFF., Jan./Feb. 2002, at 106; see also Jessica Stern, *Pakistan's Jihad Culture*, 79 FOREIGN AFF., Nov./Dec. 2000, at 115 (emphasizing the prevalence of radical Islamism in Pakistan). See generally HASSAN ABBAS, *PAKISTAN'S DRIFT INTO EXTREMISM: ALLAH, THE ARMY, AND AMERICA'S WAR ON TERROR* (2004); HUSSAIN HAQQANI, *PAKISTAN: BETWEEN MOSQUE AND MILITARY* (2005).

103. See generally JAMES A. BILL, *THE EAGLE AND THE LION: THE TRAGEDY OF AMERICAN-IRANIAN RELATIONS* (1988).

104. See generally MUSSADIQ, *IRANIAN NATIONALISM, AND OIL* (James A. Bill & Wm. Roger Lewis eds., 1988); ALAN W. FORD, *THE ANGLO-IRANIAN OIL DISPUTE OF 1951-52* (1954).

105. See, e.g., MOHAMMED MOSADDEQ AND THE 1953 COUP IN IRAN (Mark J. Gasiofowski & Malcolm Byrne, eds., 2004); STEPHEN KINZER, *ALL THE SHAH'S MEN: AN AMERICAN COUP AND THE ROOTS OF MIDDLE EAST TERROR* (2003).

106. See Layla Nouraei, *Reassessing U.S. Policy Toward Iran: Stimulating Reform Through Economic Means*, 25 SUFFOLK TRANSNAT'L L. REV. 535, 537-39 (2002). See generally ERVAND ABRAHAMIAN, *IRAN BETWEEN TWO REVOLUTIONS* (1982); FRED HALLIDAY, *IRAN: DICTATORSHIP AND DEVELOPMENT* (1979); NIKKIE R. KEDDIE, *MODERN IRAN: ROOTS AND RESULTS OF REVOLUTION* (2003).

order, not only the short-term economic benefits, Iran might well be a natural geopolitical ally in the modern era.<sup>107</sup> The long-term negative consequences for global order caused by this “succession” in Iran surely outweigh any short-term gains in economic stability and modernization arguably enabled by the externally instigated regime change that restored the Shah to power. In short, the geostrategic and humanitarian facets of global order, as well as long-term economic interests, were ill-served by a policy of supporting a regime perceived to offer greater economic stability for international investment.

I do not mean to suggest that a fair reading of Cheng’s work would have recommended a policy supporting the *coup*, which would clearly be deemed an illegitimate succession in his estimation; nor, more broadly, to accuse him of equating the general policy or value of global order with no more than one feature or manifestation of that value: a stable, efficient, and productive global economy. But the natural commercial focus of *State Succession and Commercial Obligations* tends to obscure other dimensions of global order, which merit equal if not greater attention during many State successions. By focusing on preserving global economic relationships, we risk blinding ourselves to the long-term consequences of conduct that seems economically beneficial or stabilizing in the near term.

Hence, for example, while I find Cheng’s descriptive analysis of the factors that influenced the ICJ in resolving the East Timor dispute between Portugal and Australia persuasive, I differ with his ultimate appraisal of that case. For Cheng, the Court’s judgment reflected a strategically acute compromise between, on the one hand, (i) ruling in favor of Portugal and, by extension or implication, validating the norm against the acquisition of territory by force and the East Timorese people’s clear right to self-determination—but at the same time risking that its judgment would be ignored and repudiated by powerful actors invested in Indonesia; and on the other, (ii) ruling in favor of Australia and thereby effectively giving its legal blessing to Indonesia’s blatantly unlawful annexation of East Timor and subsequent record of chronic human rights abuses.<sup>108</sup> Instead, Cheng

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107. Cf. Thomas M. Friedman, *Not-So-Strange Bedfellow*, N.Y. TIMES, Jan. 31, 2007, at A19.

108. See CHENG, *supra* note 6, at 185-86.

suggests, the Court adopted an approach redolent of *Marbury v. Madison*.<sup>109</sup> It held that Indonesia's absence from the case divested it of jurisdiction, "leaving the issue of the legality of the actions of Indonesia and Australia unresolved, but effectively leaving the Timor Gap Treaty intact."<sup>110</sup> By this means, so the argument runs, the ICJ balanced self-determination and global order, which in this context, Cheng suggests, required that it prudently decline to disturb the network of global commercial arrangements that had been concluded between Indonesia and other States on the presumption that Indonesia enjoyed lawful sovereignty over East Timor:

A declaration that the Timor Gap Treaty was void could potentially have thrown the legality of these other treaties into question. The resulting uncertainty could have encouraged vexatious litigation and disrupted mutually beneficial treaty arrangements. Renegotiating these arrangements to exclude the territory of East Timor would have incurred opportunity and transaction costs for all affected participants. The policy of promoting minimum order vitiated against such a judgment after a dense web of pragmatic arrangements had been spun around East Timor over two decades of Indonesian occupation.<sup>111</sup>

Cheng appears to equate global order (or "minimum order") here with economic stability and an imperative to preserve the expectations of economic actors. But incurring the costs of renegotiating certain commercial arrangements among "all affected participants"<sup>112</sup>—which, it bears emphasizing, did not include the East Timorese people—would, I think, have been a price well worth paying in view of Indonesia's clear violation of the East Timorese people's right to self-determination, its associated record of chronic human rights abuses, and its violation with impunity of the postwar norm against the use of force to annex territory.<sup>113</sup> It may be correct, as Cheng argues, that dur-

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109. 5 U.S. (1 Cranch) 137 (1803).

110. CHENG, *supra* note 6, at 186.

111. *Id.* at 184-85.

112. *Id.* at 184.

113. See Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1970) (affirming that "[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal"); see also SHARON D. KORMAN, THE

ing the Cold War, “[t]he costs of antagonizing Indonesia were simply too high in comparison with the minimal costs of turning a blind eye to the East Timor situation.”<sup>114</sup> But in 1995, after the Cold War—after South Africa quit Namibia, after the demise of apartheid, and in an era characterized generally by a resurgence of activism in international human rights—the geopolitical circumstances confronting the Court did not, in my view, render the price of a decision vindicating East Timor’s right to self-determination unduly high from the perspective of global order. The ICJ’s decision may nonetheless have been the right one for other reasons. My point is only that from a policy perspective, a balanced appraisal of the full range of factors subsumed by a comprehensive definition of “global order” did not legitimately militate in favor of a decision that evaded condemning Indonesia’s occupation of East Timor and denial of the East Timorese people’s right to self-determination.

Of course, it is true that some courts—and especially the ICJ because consensual jurisdiction is its lifeblood, and it has no police to enforce its decisions—at times prudently decline to say or decide what they believe the law actually is (or should be) because of valid concerns about damage to their long-term institutional capital, authority, or efficacy. Cheng speculates in this regard that “the ICJ may have been conscious that its authority in international law depended on the continued acceptance of its authority by states,” and for that reason it “could not depart too wildly from the general expectations of states concerning East Timor without good justification[.]”<sup>115</sup> But a decision that Indonesia unlawfully annexed East Timor or violated its people’s right to self-determination would hardly have been one that departed wildly from the general expectations of States in 1995. In fact, as Cheng points out in his appraisal of the succession of Czechoslovakia, the ICJ can deploy its legal authority to shape responses to State successions in a manner that furthers the core policy goals of State succession that he identifies. In *Gabčíkovo-Nagymaros*, for example, the ICJ “supported the policy of protecting cooperative arrangements from disruptions in succession in

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RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE 218-34 (1996).

114. CHENG, *supra* note 6, at 178.

115. *Id.* at 186.

order to reap the [economic and environmental] benefits.”<sup>116</sup>

The ingenious tactic taken by Chief Justice Marshall in *Marbury* may well have a legitimate place in the ICJ’s strategic jurisprudence; perhaps, for example, it would have been profitably employed in the notoriously controversial *Nicaragua* case.<sup>117</sup> But if, as Cheng suggests, the Court indeed decided as it did because it feared that Australia might disregard a decision in Portugal’s favor,<sup>118</sup> I think it erred. In the first place, as a democracy with a reasonably good human rights record, Australia would have been under considerable pressure not to ignore a decision validating the East Timorese people’s right to self-determination.<sup>119</sup> Indeed, it is revealing that after the global outrage over the Santa Cruz massacre, Australia quickly “softened its long-standing policy of recognizing Indonesia as the de facto and de jure sovereign over East Timor.”<sup>120</sup> There is no reason to think this could not have happened several years earlier, prompted by an authoritative decision of the ICJ rather than by the global media. Furthermore, by its “ambivalent attitude toward Indonesia’s unlawful incorporation of East Timor,”<sup>121</sup> the ICJ neglected an opportunity to shape international law in precisely the manner Cheng recommends, that is, to discourage illegitimate successions.<sup>122</sup> Finally, even assuming the ICJ’s institutional credibility would have been damaged had Australia repudiated its decision, the Court’s failure to condemn unequivocally two serious violations of international law—the norm against the acquisition of territory by force and the unequivocal right of a formerly colonized people to self-determination—may well have been equally, if not more, damaging to its credibility. And as Cheng’s analysis demonstrates, the costs of renegotiating arrangements surrounding the Timor Gap were not, as it happened, particularly disrupt-

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116. *Id.* at 255 (discussing *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25)).

117. *Military and Paramilitary Activities in and Against Nicaragua* (U.S. v. Nicar.), 1986 I.C.J. 4 (June 27); see Michael J. Glennon, *Protecting the Court’s Institutional Interests: Why Not the Marbury Approach?*, 81 AM. J. INT’L L. 121 (1987).

118. See CHENG, *supra* note 6, at 186-87.

119. See Michael Shane French-Merrill, *The Role of the United Nations and Recognition in Sovereignty Determinations: How Australia Breached Its International Obligations in Ratifying the Timor Gap Treaty*, 8 CARDOZO J. INT’L & COMP. L. 285 (2000).

120. CHENG, *supra* note 6, at 192.

121. *Id.* at 186.

122. *Id.* at 29.

tive to global order conceived in economic terms. The principal participants managed to revise commercial and treaty arrangements pragmatically to the benefit of both East Timor and Australia during and after the former's transition to U.N. administration and then to independence.<sup>123</sup>

Cheng agrees that international law's "pragmatic accommodation of Indonesia ignored the inequities and injustices to East Timor[,] but he sees the trend toward "supporting the international commercial networks that develop through the de facto acquiescence of states and corporations to the annexation should be viewed" as "the next best alternative" from the standpoint of global order.<sup>124</sup> Acknowledging the role of power in law, as Cheng does, is a prerequisite to shaping it. As a general proposition, I do not take issue with Cheng's "next best alternative"<sup>125</sup> view. But because I share the New Haven School's key normative postulate that the paramount goal of world public order should be the promotion of human dignity,<sup>126</sup> I worry that an approach to State succession that focuses in the main on its global commercial dimensions can obscure or minimize other fundamental values at stake. Global order requires much more than a stable international economic environment conducive to wealth and sustainable development—an aspect, in the parlance of the New Haven School, of "optimum world order"; it also means preserving "minimum world order" by reducing the expectation of unauthorized violence and protecting human dignity.<sup>127</sup> The law and policy of State succession should not neglect or marginalize these dimensions of global order in its pursuit of commercial stability.

### CONCLUSION

Despite these reservations, which may in any event speak

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123. *See id.* at 199-200.

124. *Id.* at 204-205.

125. *Id.* at 204.

126. *See* MYRES S. McDUGAL, et al., *The World Constitutive Process of Authoritative Decision*, in *INTERNATIONAL LAW ESSAYS*, 191, 201 (Myres S. McDougal & W. Michael Reisman, eds., 1981).

127. *See* LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE* 85-86 (2000) (defining minimum and optimum world order, in the tradition of the New Haven School, as, respectively, "minimizing unauthorized violence and other coercion" and "the greatest production and widest distribution of all demanded values that can be attained with available resources").

more to the scope of the book than to its substance, *State Succession and Commercial Obligations* is a remarkably erudite study and a laudable achievement. It reconceptualizes an increasingly vital but poorly understood area of contemporary international law; it brings greater analytic clarity to the subject; and it provides a foundation for future study that will both encourage more constructive policy debates and furnish lawyers and other decision makers with a better appreciation of the complex process of State succession. Scholars and practitioners alike will find that its insights enable them more effectively to predict, respond to, and shape future successions. The book's focus on commercial obligations, as I have suggested, may tend to obscure other vital dimensions of State successions. Future work will be needed to explore in greater detail the cardinal values—self-determination and global order—which Cheng tasks the law of State succession with harmonizing. But far from “fail[ing] to provide the very guidance that real-life decision makers expect from their lawyers,”<sup>128</sup> Cheng's policy-oriented analysis strikes me as more helpful to practicing lawyers and decision makers—and other participants in the unruly process of State succession—than anything that has preceded it.<sup>129</sup>

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128. Simma & Paulus, *supra* note 5, at 305.

129. See CHENG, *supra* note 6, at 379-80 (emphasizing that the absence of doctrinal rules on State succession “does not . . . exclude law and lawyers from performing meaningful functions in state successions” and suggesting how examination of past trends in decision would enable lawyers more profitably to approach the task of advising clients on strategies to achieve their goals relative to a future succession).