UNIVERSITY OF PENNSYLVANIA
JOURNAL OF INTERNATIONAL ECONOMIC LAW

Volume 17 Fall 1996 Number 3

ARTICLES

THE ENDURING POLITICAL NATURE OF QUESTIONS OF STATE SUCCESSION AND SECESSION AND THE QUEST FOR OBJECTIVE STANDARDS

CARSTEN THOMAS EBENROTH*
AND
MATTHEW JAMES KEMNER**

* Director of the Center for International Economics and Professor of Law, Universität Konstanz, Federal Republic of Germany; Referendar (J.D.) (1967); M.B.A. (1968); Doktor der Wirtschaftswissenschaften (Dr. rer. pol., Doctor of Economics) (1969); Doktor der Rechte (S.J.D., Doctor of Laws) (1971); Privatdozent (1974) (The Free University of Berlin, School of Law).

** Senior Research Fellow, Universität Konstanz; Member of the State Bars of Texas (1991) and California (1994); Doktor der Rechtswissenschaft ("Doktor Jur"), Universität Konstanz, Konstanz, Federal Republic of Germany (1996); J.D., University of Missouri, Columbia, Missouri (1991); B.A., Southern Methodist University, Dallas, Texas (1988). Dr. Kemner has completed his work at the Center for International Economics and has begun working as in-house legal counsel at ABB Daimler-Benz Transportation GmbH in Berlin.

All translations have been verified by the authors and not by the *University of Pennsylvania Journal of International Economic Law.*

> Any people anywhere, being inclined and having the power, have the *right* to rise up, and shake off the existing government, and form a new one that suits them better. This is a most valuable, a most sacred right — a right, which we hope and believe, is to liberate the world. Nor is this right confined to cases in which the whole people of an existing government, may choose to exercise it. Any portion of such people that *can*, *may* revolutionize, and make their *own*, of so much of the territory as they inhabit. More than this, *a majority* of any portion of such people may revolutionize, putting down *a minority*, intermingled with, or near about them, who may oppose their movement.[1]
>
> — Abraham Lincoln

> According to what is probably still the predominant view in the literature of international law, recognition of States is not a matter governed by law but a question of policy.[2]
>
> — Hersh Lauterpacht

The first quote is from a mid-nineteenth century politician who would later resist an attempt to form a new government in part of a country that he struggled to keep united. The second statement is from a mid-twentieth century scholar who wrote brilliantly on the recognition of emerging states. Both quotes suggest that questions surrounding emerging states have been in the past political rather than juridical in nature, and that the politics involved can change dramatically with the political interests of affected nations.

The goal of the world community at the close of the twentieth

---

[1] Speech by Representative Abraham Lincoln in the House of Representatives, Replying to President James K. Polk on Mexico (Jan. 12, 1848), *quoted in* THE GREAT THOUGHTS 244 (George Seldes ed. 1985).

[2] HERSH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 1 (1947).

century should be to move away from the purely political state of affairs perceptively noted by Mr. Lauterpacht and the "power" element critical to Mr. Lincoln's statement. In furtherance of this objective, the international community should endeavor to follow more objective standards whereby succession and secession questions can be analyzed consistently under principles of international law.

1. INTRODUCTION

One of the most dramatic and visible results of the end of the Cold War has been the emergence of new states in the international community. Not since the dismantling of the colonial world after the Second World War have so many new states emerged as players in the international arena. After the breakdown of the Soviet Union, some of the former "republics" of the USSR and Eastern Bloc countries sought independence, international recognition, and investment from the West — especially financing from international lending institutions such as the International Monetary Fund ("IMF") and the International Bank for Reconstruction and Development ("World Bank"). The goal of these new states was first to establish *de facto* existence, and then to gain international recognition. The emergence of these new states also raised questions regarding the specific rights and duties of successor states. The new states faced the *quid pro quo* nature of achieving recognition following occurrences of state succession and the need for acceptance into the international community generally, as well as into the international financial community dominated by the United States, the European Union, and Japan.

This Article examines the issues generated by state succession and new states' attempts to gain international recognition. In Section 2, this Article sets forth a definition of "state succession." In Sections 3 and 4, it examines the Continental European and U.S. perspectives on state succession. In Section 5, this Article describes the role of the IMF and the World Bank in state succession and their significance to successor states. Finally, in Section 6, this Article suggests new international legal standards for succession in order to provide a more objective and peaceful approach.

2. STATE SUCCESSION AND SECESSION DEFINED

"State succession" is an amorphous term. Generally, a state succession takes place when a former state becomes extinct, in whole or in part, and a new state replaces it. State succession is to be distinguished from the simple continuation of a state that experiences a relatively insignificant change in legal order, government, territory, or population, in which the "the state in its new form is not considered a new state but [merely] a continuation of the old."[3]

2.1. State Succession Distinguished From a Change in Government

International law distinguishes between a mere change in government and the more rare occurrence of state succession. In practice, however, the distinction is often blurred. State succession involves a complete discontinuity of statehood. A simple change in government leaves statehood unaffected. "It is generally accepted that a change in *government*, *regime* or *ideology* has no effect on that state's international rights and obligations because the state continues to exist despite the change."[4] The changes in government structure can be radical and yet not amount to the creation of a new state.[5]

There are several dramatic examples of significant shifts in governments which did not amount to state succession. In *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, the plaintiff sued the Republic of Sudan for breach of contract.[6] The contract in dispute was effective from October 1984 through September

---

[3] Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829, 855 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982).

[4] Trans-Orient Marine Corp. v. Star Trading & Marine, Inc., 731 F. Supp. 619, 621 (S.D.N.Y. 1990) (emphasis added) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 cmt. a (1987))

[5] *See* Lehigh Valley R. Co. v. State of Russia, 21 F.2d 396, 401 (2d Cir. 1927), *cert. denied*, 275 U.S. 571 (1927) (stating that a "monarchy may be transformed into a republic, or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired").

[6] *See Trans-Orient*, 731 F. Supp. at 619.

1989.[7] During that five-year period, dramatic changes occurred in the Sudanese government. In April 1985, a military coup deposed the head of state, suspended the constitution, and declared a state of emergency.[8] After a twelve-month rule, the military regime was replaced by a civilian government, which changed the country's name from "Sudan" to the "Republic of Sudan."[9] In June 1989, another military regime overthrew the civilian government and suspended the constitution.[10] The new Sudanese government claimed that it was not liable for the contractual obligations of its predecessor.[11]

The court found that the "only changes in the Sudan . . . have been in the government . . . . But there has been only one state."[12] Therefore, the successor government was held liable on the contract entered into by the predecessor government.[13] The court relied on the unanimously recognized precedent that changes in government do not change the identity of a state and thus do not amount to state succession.[14]

> There is also another old and fully recognized principal of general international law under which the identity of a state in international law is not effected by unconstitutional changes in government, whether brought about by revolution or coup d'etat. This rule is so unanimously recognized by writers since Grotius and Bynkershoek, by the practice of states, as illustrated by the well-known London Protocol of February 19, 1831, and by national and international court decisions, that it is superfluous to give quotations. It is irrelevant how far-reaching the revolutionary changes may be; as is also the change of the name of the state.
> If the territory in question remains, in its entirety, territo-

---

[7] *See id.* at 620.
[8] *See id.*
[9] *See id.*
[10] *See id.*
[11] *See id.*
[12] *Id.* at 622-23.
[13] *See id.* at 623.
[14] *See id.*

> ry of one state, and if the continuity of the existence of the state under international law is not interrupted, it is not possible to assume that one state had ceased to exist and another state has come into existence on the same territory.[15]

The changes in the Sudanese government were numerous and dramatic, but they did not amount to state succession in the eyes of the court.

The same principal was applied over a century ago in a case in which the U.S. Supreme Court refused to abate a lawsuit initiated by Napoleon III after he was deposed.[16] The Court held that despite Napoleon's deposition, "the sovereignty does not change, but merely the person or persons in whom [the sovereignty] resides."[17] Consequently, the court did not extinguish the cause of action, which remained the cause of action of France.[18]

Other radical changes in government likewise have failed to constitute state succession. In one example, U.S. courts found that the Bolshevik Revolution of 1917 and the subsequent creation of the Soviet Union did not amount to state succession, and held the new government liable for Russia's debts.[19] In the other major communist revolution of the twentieth century, the People's Republic of China was held liable for the debts of the Imperial Chinese Government after its fall from power.[20] The court viewed the communists as a successor government, but said that "the nation" of China remained.[21] These dramatic governmental changes that were not considered state succession demonstrate the narrow scope of events that can constitute state succession.

---

[15] *Id.* at 622 (emphasis omitted) (quoting 2 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 759, 764 (1963)).

[16] *See* The Sapphire, 78 U.S. (11 Wall.) 164 (1870).

[17] *Id.* at 168.

[18] *See id.* at 168-69.

[19] *See* United States v. National City Bank of New York, 90 F. Supp. 448, 452 (S.D.N.Y. 1950).

[20] *See* Jackson v. People's Republic of China, 550 F. Supp. 869, 872 (N.D. Ala. 1982), *dismissed on other grounds*, 596 F. Supp. 386 (N.D. Ala. 1984).

[21] *Id.*

2.2. *Types of State Succession*

Under international law, state succession occurs when one state replaces another state in the responsibility for international relations.[22] The U.S. perspective on state succession is summarized in the *Restatement (Third) of the Foreign Relations Law of the United States* ("*Restatement*"),[23] which defines a successor state as "a state that wholly absorbs another state, that takes over part of the territory of another state, that becomes independent of another state of which it had formed a part, or that arises because of the dismemberment of the state of which it had been a part."[24]

Although the *Restatement* properly includes a secessionist state as a subset of successor states, international law in recent years has accorded succession and secession similar treatment because both result in the creation of a new state.[25] This Article considers succession and secession from the latter perspective.

3. THE CONTINENTAL EUROPEAN PERSPECTIVE ON STATE SUCCESSION

The United States follows the constitutive theory of statehood, which holds that the rights and duties of statehood derive from recognition alone, while Continental Europe reflects the declarative theory of statehood, which holds that statehood is a legal status independent of recognition.

In Continental Europe, state succession is analyzed somewhat differently under public and private international law. In public international law, state succession is defined according to the Vienna Convention of 1978 on Succession of States in Respect of Treaties[26] and in the 1983 Vienna Convention on Succession in

---

[22] *See* Vienna Convention on Succession of States in Respect of Treaties, 1978 U.N. Jurid. Y.B. 106, 107, U.N. Doc. ST/LEG/SER.C/16. The treaty remains unadopted.

[23] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT].

[24] *Id.* § 208, cmt. b.

[25] *See* David O. Lloyd, *Succession, Secession, and State Membership in the United Nations*, 26 N.Y.U. J. INT'L L. & POL. 761, 793-94 (1994).

[26] Vienna Convention on Succession of States in Respect of Treaties, *supra* note 22.

Respect of State Property, Archives and Debts[27] as "the replacement of one state by another in the responsibility for the international relations of a territory." Private international law defines state succession as the substitution of one state for another with regard to the legal system applicable in a certain territory.[28]

In both public and private international law, state succession involves a "territory."[29] A change in the population of a state is of as little importance to the definition of the concept of state succession as is a change of government. For this reason, it can be very difficult to determine whether a state should be regarded as a successor or predecessor state when a change of government coincides with the alteration of state boundaries.[30]

It is possible to regard as state succession those changes of government which are linked to fundamental changes of a revolutionary nature. Unlike traditional cases of state succession, however, in those cases the successor state is bound to inherit, without exception, all the rights and duties of the predecessor.[31] Territory is not to be understood as referring to the legal title empowering a state to exercise sovereignty. Instead, it refers to a geographical area subject to the jurisdiction of a state independent of the existence of a legal title.[32]

In both public and private international law, state succession concerns "states." However, each area of law has a different definition of a "state." In public international law, a "state" refers to every subject of international law which is in the position to exercise jurisdiction over a geographical territory.[33] Recognition, therefore, is not a necessary requirement. In exceptional circumstances, an international organization can be party to a state succession when the organization is able to exercise jurisdiction over a geographic territory. On the other hand, an organization which is not subject to international law can be neither a

---

[27] Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, Apr. 7, 1983, 22 I.L.M. 306 (1983).

[28] *See* Carsten Thomas Ebenroth, *Staatensukzession und Internationales Privatrecht, in* BERICHTE DER DEUTSCHEN GESSELSCHAFT FÜR VÖLKERRECHT, Band 35, Karlsruhe 1996, Einleitung, 2 (forthcoming Dec. 1996).

[29] *See id.* at Teil A.I.1.a., Teil A.I.2.a.

[30] *See id.* at Teil A.I.1.a.

[31] *See id.*

[32] *See id.*

[33] *See id.* at Teil A.I.1.b.

successor nor a predecessor state in a succession, even when the organization exercises effective and independent authority over a geographical territory.[34]

In private international law, on the other hand, the term "state" is used to define any organization with an effective legal system in a geographical territory, whether or not this organization is a subject of international law. According to this definition, a "state" can refer to not only a state in the international law sense, but also, for example, an international organization or independence movement.[35]

In both public and private international law, state succession requires a "connection" between the states involved with the succession and the geographical territory concerned.[36] In public international law, this connection arises through the fact that the predecessor and successor powers in the territory must have exercised sovereignty and, therefore, have had effective and independent authority in the geographical area concerned. In private international law, this connection arises through the fact that the predecessor and successor powers must have implemented their legal systems in the area concerned. The public and private international law definitions of "successor state" converge in that both consider the implementation of a legal system in a geographical area as nothing more than the consequence of exercising sovereignty in this territory.

In both public and private international law, state succession takes place through the substitution of the predecessor with the successor power. This occurs by either the substitution of the predecessor's sovereignty in the successor's territory, or the substitution of the successor's legal system with that of the predecessor in that territory.

In public and private international law, international recognition of a change in sovereignty is not a prerequisite for state succession.[37] In international public law, the act of recognition does not have the effect of conferring rights, but it is merely declarative in character.[38] International private law considers the

---

[34] *See id.*

[35] *See id.* at Teil A.I.2.b.

[36] *See id.* at Teil A.I.1.a., Teil A.I.2.a.

[37] *See id.* at Teil A.II.1.a., Teil A.II.1.b.

[38] *See id.* at Teil A.II.1.a.

effective application of a legal system on the territory involved to be a factual question.[39] Nevertheless, international recognition of the change in sovereignty can have some influence on the juridical analysis of the applicable prerequisites for state succession in both public and private international law.

International recognition of a change in sovereignty constitutes a rebuttable presumption in favor of the existence of such a change in sovereignty, under both public and private international law.[40] This presumption in favor of international recognition can be criticized. International recognition is, as practiced by the international community of states, a political measure that is essentially governed by diplomatic reasons, not by juridical ones.[41] In neither public nor private international law is international lawfulness of a change in sovereignty a prerequisite for state succession.[42] Nonetheless, the lawfulness of the change is of growing importance. State succession in public international law is concerned with the determination of the legal consequences of a change in sovereignty of a territory, especially the determination of the obligations of the successor state, without regard to the lawfulness of the change.

Public international law generally does not prohibit the existence of an illegitimate legal system.[43] It accepts the private international law premise that, in the interests of the private parties involved, only the *de facto* legal system existing in a given geographical territory is considered. Nevertheless, public international law recognizes sanctions for an unlawful change in sovereignty. This especially concerns secession, which violates the principle of the territorial integrity of states, and annexation. Both annexation and secession can result in either responsibility for the guilty state to the victim or sanctions under the U.N. Charter.[44]

Because state succession leads to the substitution of one legal system for another in a particular geographical territory, it produces a conflict where the legal systems involved coincide in

---

[39] *See id.* at Teil A.II.1.b.

[40] *See id.* at Teil A.II.1.a.

[41] *See id.*

[42] *See id.* at Teil A.II.2.a.bb., Teil A.II.2.b.

[43] *See id.* at Teil A.II.2.b.

[44] *See id.* at Teil A.II.2.a.bb.

time and place. This conflict could be described as an "inter-succession conflict of laws."[45] The controversy in private international law focuses on the qualification of this conflict rather than on its results. While some see this conflict as either "intrastate (i.e., domestic) intertemporal," or "international-intertemporal" in nature, others understand it as a conflict between jurisdictions in the nature of a change in governing law. Only the former opinion should be accepted.[46]

Modern private international law acknowledges a foreign legal system only when it exists *de facto* in a given geographical territory. A legal system is ignored if at the decisive point in time it is no longer in place or in practical use in the area concerned.[47] Where a foreign legal system is no longer in place or no longer effective, and therefore officially ignored, the successor state may nonetheless adopt it as its own and thereby incorporate the private law of its predecessor.[48] Such an incorporation can relate not only to the past, but also to the future. In the latter case, it causes an interterritorial conflict of laws as it leads to the coexistence of two different legal systems in the "new" area of the successor state. If this incorporation relates only to the past, then from the point of view of the successor state the conflict is "intrastate intertemporal." From the point of view of the rest of the international community, the conflict is "international intertemporal."

To the successor state, the result is two conflicting domestic laws in the area affected by the change in sovereignty: the retroactively adopted predecessor's law, and the newly adopted law.[49] If the successor state is not a new state, it is obliged to choose territorially the applicable law for all cases which were concluded before the change in sovereignty in order to determine whether and to what extent they are affected by the transitional provisions for the change in sovereignty.[50] The intersuccessional conflict of laws then causes an interterritorial conflict concurrently with the intertemporal conflict.

---

[45] *See id.* at Introduction to 1.
[46] *See id.* at Teil B.I.1.2.
[47] *See id.*
[48] *See id.* at Teil B.I.1.b.
[49] *See id.*
[50] *See id.*

From the point of view of all other states, the result is two conflicting laws passed by the same legislature. Such is the case for any amendment to the law by the foreign legislature. The solution to this conflict lies in the substantive law of the foreign state. The only exception to this rule is when this law would injure the *ordre public* of the controlling jurisdiction. In such a case, the foreign law is inapplicable.[51]

The solutions examined appear to have been used substantially by the German legislature in the reunification.[52] Chapter 6 of the EGBGB (*Einführungsgesetz zum Bürgerlichen Gesetzbuch* or Introduction Code of the German Civil Code) rests on the principle of the material incorporation of the private law legislation of the German Democratic Republic ("GDR") insofar as the past is concerned. From the time reunification took effect, the federal law previously applicable only in the Federal Republic of Germany ("FRG") also took effect in the former GDR.

A prerequisite for the application of these transitional regulations is the territorial choice of law decision of cases concluded before the reunification. Only thereby is it possible to filter out those cases subject to the substantive law or the private international law of the GDR as adopted by the Federal Republic.[53] To determine the territorial application of the substantive law of the former East Germany, the Federal Supreme Court would refer back to German *interlokal* law, those conflict of law provisions regulating the relationship between the states of the formerly divided Germany.[54]

The German Federal Supreme Court has yet to express its view regarding the determination of the territorial application of the East German private international law provisions. The creation of new rules for interterritorial conflict of laws is inevitable, however, because the application of German *interlokal* law, in this case East German private international law, does not solve all problems of territorial choice of law concluded before the reunification.[55]

Where state succession occurs, public international law

---

[51] *See id.*

[52] *See id.* at Teil B.I.2.a.

[53] *See id.* at Teil B.I.2.b.aa., Teil B.I.2.b.bb.

[54] *See id.* at Teil B.I.2.b.aa.

[55] *See id.* at Teil B.I.2.b.bb.

provides special protection to foreign citizens who had rights based on the legal system of the predecessor state. The necessity of such protection was formerly questioned by both the socialist states and the former colonies. In the latter case, these objections have since been discarded in favor of demands for special regulations.[56] The special protection arises for the benefit of foreign citizens, all persons who are not citizens of the successor state and have not acquired citizenship following the change of sovereignty. The legal basis does not rest in a "public international law principle of protection of vested rights." Instead, it rests in the mutual respect that the principle of sovereign equality requires when citizens of one state have particular interests localized in the territory of another state and are therefore subject to the legislation of the latter.[57] This special protection can only benefit the state's own citizens if one agrees that protection of aliens in public international law is grounded in international human rights, whether in the context of state succession or in the law relating to aliens.[58] This position may be desirable, but it does not reflect the present state of public international law.

The protection of aliens in the context of state succession in public international law does not encompass all rights which aliens may obtain under the legal system of the predecessor power. Only private, and to a certain extent mixed rights, are protected. Public rights, which question the sovereignty of the successor powers, are excluded from this protection.[59] The interpretation that this legal protection should be restricted to those private or mixed rights with an economic value is too restrictive. This approach is based on a misinterpretation of the previous international decisions in the context of the public international law protection of vested interests, which did not address the issue of rights with no economic value.

As far as mixed rights and concessions granted by the predecessor state are concerned, the successor state can choose between two solutions. It can either adopt them in their entirety, or it can terminate them.[60] In the latter case, the state is liable

---

[56] *See id.* at Teil B.II.1.a.bb.

[57] *See id.*

[58] *See id.*

[59] *See id.* at Teil B.II.2.a.aa., Teil B.II.2.a.bb.

[60] *See id.* at Teil B.II.2.a.bb.

to compensate the holders of those rights to the extent that they contain private rights. The protection of mixed rights under the public international law of state succession is only effective insofar as the corresponding duties are transferred from predecessor to successor state. This protection is therefore to be understood in the context of the theory of state succession in state property, archives, and public debts, of which it is necessarily the counterpart.

The protection of public international law in state succession prohibits the successor state from providing unequal rights to aliens as compared to the rights provided by the predecessor state before the succession.[61] Public international law is silent regarding how these rights should be guaranteed. The successor state is free to choose any of the following options, so long as the rights of aliens are not prejudiced. First, the successor state can apply the law of the predecessor state without formally adopting it. Next, the successor state has the right to incorporate and adopt as its own the private law of the predecessor state in the affected territory. Finally, the successor state has the right to retroactively apply its own law to the affected territory.[62] This requirement only concerns the moment in time of the change in sovereignty, not the time afterwards. After the change in sovereignty, under public international law, the aliens would only be protected by customary international law relating to aliens.[63]

Because the public international law of state succession protects only those rights which have been acquired before the change in sovereignty and recognized by the predecessor state, it includes rules for both interterritorial and intertemporal conflicts of laws. Regarding interterritorial conflict of laws, public international law protects not only those rights acquired from the substantive law of the predecessor, but also rights acquired from the substantive law of other states, if that law can be applied under conflict of law rules.[64] Public international law looks to the conflict of law rules of the predecessor state regarding this issue.[65]

---

[61] *See id.*
[62] *See id.*
[63] *See id.* at Teil B.II.2.b.bb.
[64] *See id.* at Teil B.II.3.
[65] *See id.*

The conflict of law rules discussed above are a part of public international law, not private international law, and their meaning is limited to that application. Thus, under the Continental European view, objective factors primarily control questions of state succession.

4. THE U.S. PERSPECTIVE ON STATE SUCCESSION AND THE IMPORTANCE OF RECOGNITION

4.1. The Political Nature of the Recognition Decision

The United States primarily follows the constitutive theory of statehood whereby the rights and duties of statehood follow recognition alone. The determination of whether the U.S. government will recognize a newly emerged state which has succeeded another is a purely political issue within the power of the Executive Branch, and completely outside the power of the courts. The decision to grant or deny recognition affects the potential new sovereign's access as a litigant to both state and federal courts in the United States, as well as its right to the property of the predecessor state under the control of the U.S. government.

In *Can v. United States*,[66] the U.S. Court of Appeals for the Second Circuit refused to address the merits of a case involving the determination of rights to property of the then-defunct Republic of Vietnam, after finding that the "threshold determination of title to the blocked assets would require resolution of issues related to state succession."[67] The court held that such a determination was a nonjusticiable political question.[68]

When the Republic of Vietnam fell to the North Vietnamese in 1975, the U.S. government froze the Republic's assets pursuant to the United States Trading with the Enemy Act of 1917[69] and Foreign Asset Control Regulations.[70] Nearly two decades later, citizens of the former Republic brought suit in U.S. federal court to recover those assets.[71] They claimed that the government of

---

[66] Can v. United States, 14 F.3d 160 (2d Cir. 1994).

[67] *Id.* at 162.

[68] *See id.*

[69] *See* Trading with the Enemy Act of 1917, 50 U.S.C. app. §§ 1-44 (1994).

[70] *See* 31 C.F.R. §§ 500.101-.901 (1995).

[71] *See Can*, 14 F.3d at 162.

the Republic of Vietnam was merely a representative of the people, and that when it ceased to exist its assets should pass to the people.[72] The Second Circuit never addressed the merits of the case after invoking the political question doctrine.[73] The court did, however, make clear that the political question doctrine should be used with caution because the fact that a case deals with foreign affairs does not alone imply that it is a nonjusticiable political question.[74]

Can reflects the long standing precedent that the U.S. Judiciary will refuse to rule on what it views as an exclusively political issue. Therefore, the determination of whether a state has reached a legal status — a crucial element under the declarative theory — is not to be decided in the courts of the United States.

The U.S. federal courts' avoidance of state succession questions is rooted in the U.S. Constitution. Sections Two and Three of Article II, respectively, grant the Executive Branch the authority to appoint ambassadors to foreign nations and to receive ambassadors and public ministers from foreign nations.[75] The U.S. Supreme Court has interpreted these clauses as granting exclusive authority to the President of the United States to recognize a foreign state or government, and to establish or refuse to establish diplomatic relations with foreign states.[76] This interpretation takes such decisions of official recognition "outside the competence" of the Judicial Branch of the U.S. government.[77]

The federal courts have recognized the Executive Branch's wide discretion in using this power of recognition to achieve what it independently believes to be in the interests of the United States. The courts, furthermore, will refuse to comment on the wisdom of such executive decisions. In *Can*, for example, the court noted that a judicial determination of title to the assets "would interfere with the President's use of the foreign assets as a bargaining chip in negotiations with the current Hanoi re-

---

[72] *See id.*

[73] *See id.* at 165.

[74] *See id.* at 163 (citing Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev., 838 F.2d 649, 655 (2d Cir. 1988)).

[75] *See* U.S. CONST. art. II, §§ 2-3.

[76] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410-11 (1964).

[77] National City Bank of New York v. P.R.C., 348 U.S. 356, 358 (1955).

gime."[78]

The U.S. Supreme Court has implied that the use of foreign assets by the President as a bargaining chip is constitutional.[79] So established is this practice that the U.S. Supreme Court has held that questions of state succession "are to be addressed to [the political department of the government] and not to the courts"[80] because courts lack judicial standards with which to judge a claim of succession to a foreign sovereign.[81] Therefore, while the *Restatement* outlines the criteria for state succession in the United States,[82] meeting those standards is somewhat meaningless to the emerging state without recognition.

4.2. The Effects of Recognition

The President of the United States, in exercising his executive powers, can use the promise of recognition as a negotiating tool, the effectiveness of which is limited only by the needs of the party seeking recognition. Recognition will affect a country's access to U.S. courts, its rights to property under U.S. control, and its leaders' rights to assert privileges normally accorded to heads of state.

4.2.1. Recognition as a Prerequisite for Access to U.S. Courts

Under U.S. law, it is generally accepted that a suit on behalf of a sovereign state may be maintained in U.S. courts "only by that government which has been recognized by the political department of [the U.S.] government as the authorized government of the foreign state."[83] The U.S. Supreme Court has also held that "[i]n order to take advantage of diversity jurisdiction [in U.S. federal courts], a foreign state and the government represent-

---

[78] *Can*, 14 F.3d at 163.

[79] *See* Dames & Moore v. Regan, 453 U.S. 654, 683 (1981) (recognizing the executive's power to settle claims between the United States and foreign governments, especially when incident to recognition); *Can*, 14 F.3d. at 164.

[80] Guaranty Trust Co. v. United States, 304 U.S. 126, 137-38 (1938).

[81] *See Can*, 14 F.3d at 162-63.

[82] *See generally* RESTATEMENT, *supra* note 23, §§ 208-10.

[83] *Guaranty Trust Co.*, 304 U.S. at 137; *see also* National Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 805 (D. Del. 1990).

ing it must be 'recognized' by the United States."[84] This bar applies to state courts as well.[85]

The decision whether or not to recognize a state has a significant legal effect in the United States — it signifies the United States' willingness or unwillingness to acknowledge that the government in question speaks for the territory it purports to control.[86] Thus, it is logical that U.S. courts would refuse to hear cases involving unrecognized governments because, in deciding such cases, they would attempt to settle disputes over rights that the Executive Branch of the U.S. government believes the litigant does not possess.

4.2.2. Recognition Distinguished From Relations

In addition to having authority to recognize governments and successor states, the U.S. President also controls diplomatic relations. The distinction between these two powers is significant. While the lack of recognition of either a new government or a new state will deny a government access to U.S. courts, the mere nonexistence of diplomatic relations alone may not. The landmark decision on this issue is *Banco Nacional de Cuba v. Sabbatino*.[87]

Sabbatino arose out of the Cuban revolution.[88] The defendant, an American sugar broker, contracted to buy sugar from a Cuban sugar company.[89] In retaliation to President Eisenhower's lowering of the Cuban sugar import quota, the Cuban government passed a law giving itself the power to nationalize property in which American nationals had an interest.[90] The Cuban sugar company with which Sabbatino had contracted was

---

[84] National Petrochemical Co. of Iran v. M/T Stolt Sheaf, 860 F.2d 551, 553 (2d Cir. 1988) (citing Pfizer Inc. v. India, 434 U.S. 308, 319-320 (1978)).

[85] *See* Republic of Vietnam v. Pfizer, Inc., 556 F.2d 892, 894 (8th Cir. 1977) (citing Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938)).

[86] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964).

[87] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). The *Sabbatino* case covered many issues. In addition to its importance to state succession law, it is also influential regarding the act-of-state doctrine. *See* CARSTEN THOMAS EBENROTH, BANKING ON THE ACT OF STATE 19-22 (1985).

[88] *See Sabbatino*, 376 U.S. at 408.

[89] *See id.* at 401.

[90] *See id.*

such a company nationalized by the Cuban government.[91] Having nationalized the company, the Cuban government assigned the sugar contract.[92] The assignee brought suit on the contract.[93]

The case dealt with the issue of whether a government had standing to sue in U.S. courts when the United States had recognized the government, but had severed diplomatic relations, imposed a commercial embargo, and frozen Cuban assets in the United States.[94] The defendant contended that these overtly hostile and unfriendly acts manifested an intent on the part of the Executive Branch to bar Cuba from U.S. courts.[95] Nevertheless, the Supreme Court held that it was "constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to U.S. courts."[96] Despite manifestations of a terrible relationship, the presence of diplomatic relations was enough to let an instrumentality of the Cuban government maintain the action.[97]

4.2.3. Exceptions to the Rule of Recognition as a Prerequisite for Access to U.S. Courts

One exception to the rule that no unrecognized government should be allowed access to U.S. courts was set out in *National Petrochemical Co. v. M/T Stolt Sheaf*.[98] Even as an exception, however, *Stolt Sheaf* confirms the spirit of the rule.

In *Stolt Sheaf*, a corporation wholly owned by the government of Iran brought suit in U.S. federal court at a time when the United States did not recognize the government of Iran under the Ayatollah Khomeini.[99] Application of the general rule would

---

[91] *See id.* at 403.

[92] *See id.* at 405.

[93] *See id.* at 406.

[94] *See id.* at 408-12.

[95] *See id.* at 410.

[96] *Id.* The Court also noted that they "would hardly be competent to undertake assessments of varying degrees of friendliness or its absence . . . ." *Id.* Therefore, they stated that they willingly deferred such determinations to the Executive Branch. *See id.*

[97] *See id.* at 410-11.

[98] *See* National Petrochemical Co. of Iran v. M.T. Stolt Sheaf, 860 F.2d 551 (2d Cir. 1988).

[99] *See id.* at 552-53.

have resulted in dismissal of the case. The U.S. Court of Appeals for the Second Circuit, however, chose to apply a special test in considering the issue of court access for unrecognized governments. The court considered "whether the Executive Branch — despite its withholding of formal recognition — has evinced a willingness to permit Iran to litigate its claims in the U.S. forum."[100] The court's "consideration" was not a difficult exercise. The facts before it included the Executive Branch entering into treaties with Iran and establishing a claims tribunal to adjudicate disputes between the United States and Iran, and the Department of Justice entering the case as an amicus and expressly requesting that Iran be given access to the court.[101] The court permitted the government-owned corporation to bring the suit.[102]

The holding of *Stolt Sheaf*, like the rule to which it was an exception, confirmed the power of the Executive Branch to control foreign policy matters by controlling access to U.S. courts.[103] The court's objective seems to have been to leave the President with the power to execute foreign policy strategy and decisions.

Other exceptions to the general rule exist. One exception arises where diplomatic recognition of a state is effective when a case is filed, but is subsequently withdrawn. Some jurisdictions have held that the courts have discretion to hear a case under these circumstances.[104] Another exception has been recognized where a litigant is a separate juridical entity from the unrecognized government in whose territory it is organized, and the

---

[100] *Id.* at 555.

[101] *See id.* at 556.

[102] *See id.*

[103] *See id.* at 554-56. The court noted that:

> the power to deal with foreign nations *outside the bounds of formal recognition* is essential to a president's implied power to maintain international relations. . . . [T]he Executive Branch must have the latitude to permit a foreign nation access to U.S. courts, even if that nation is not formally recognized by the U.S. government.

Id. at 554-555 (emphasis added) (citations omitted); *see also* National Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800 (D. Del. 1990) (addressing a case in which the executive branch gave the plaintiff, a wholly owned subsidiary of the government of Libya, license to initiate proceedings).

[104] *See* Republic of Vietnam v. Pfizer, Inc., 556 F.2d 892, 894 (8th Cir. 1977).

entity is not an alter ego of the parent government. These entities would be allowed access to the courts even though their parent governments would be denied such access.[105]

4.3. Validity of the Laws of an Unrecognized Regime

What effect U.S. courts will give to the laws of an unrecognized state is a question separate from whether a country may litigate in a U.S. court. The laws of unrecognized regimes are not necessarily without effect in U.S. courts. The *Restatement* reflects the practice in U.S. courts of distinguishing between laws affecting only the territory controlled by the unrecognized regime and those which have an extraterritorial effect.[106] For example, in *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*,[107] the District Court of the United States for the Southern District of New York refused to give effect to the East German government's legislation concerning the Zeiss Foundation in West Germany because the East German government was unrecognized and the law in question had extraterritorial effect.[108]

Where the laws affect only the territory of the unrecognized regime, U.S. courts have given them effect in some surprising instances. For example, U.S. courts were willing to give effect to laws of the former USSR which only had effect in Lithuania and Estonia, although the United States never accepted Soviet

---

[105] *See* Transportes Aereos de Angola v. Ronair, Inc., 544 F. Supp. 858, 863 (D. Del. 1982) (citing Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934)).

[106] *See* RESTATEMENT, *supra* note 23, § 205(3).

> [The] courts in the United States ordinarily give effect to acts of a regime representing an entity not recognized as a state, or of a regime not recognized as the government of a state, if those acts apply to territory under the control of that regime and relate to domestic matters only.

Id.

[107] *See* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892 (S.D.N.Y. 1968), *modified*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971).

[108] *See id.*; *see also* Federal Republic of Germany v. Elicofon, 358 F. Supp. 747, 756 (E.D.N.Y. 1972), *aff'd*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974) (stating that "acts of an unrecognized power are normally given effect where it pertains to rights within its own borders. We are not obliged to give effect to acts of non-recognized powers that grant rights here in derogation of the authority of the President of the United States in foreign affairs").

annexation of those countries and therefore never recognized the Soviet Union as the rightful sovereign in those areas.[109] Nevertheless, the USSR controlled the territories where the law in question applied, and thus the law was given effect. Likewise, the highest state court in New York recognized Soviet nationalization decrees in the aftermath of the Soviet Revolution with regard to property located in Soviet territory at the time of nationalization, though subsequently brought to the United States.[110]

Another court in the United States, however, refused to recognize Soviet nationalization decrees which applied to property purportedly nationalized outside the territory of the Soviet Union.[111] The property involved in *Latvian State Cargo & Passenger S.S. Line v. Clark* was Estonian and Latvian ships that were docked in U.S. ports shortly after the Soviet annexation of those two countries.[112] As *Latvian State Cargo* demonstrates, with respect to foreign nationalization decrees, the court's deference to the Executive Branch's recognition decisions is more limited.

This well-settled distinction was recently modified in a case involving the island of Cyprus. In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*,[113] the U.S. Court of Appeals for the Seventh Circuit examined a nationalization decree by Turkish forces on property located on Cyprus.[114] The property was located on a portion of the island that Turkey had been occupying since its invasion of northern Cyprus in 1974.[115] The property in question was four sixth-century Christian mosaics that centuries earlier had been affixed to the interior walls of the Church of Panagia Kanakaria in

---

[109] *See* Daniunas v. Simutis, 481 F. Supp. 132, 134 (S.D.N.Y. 1978), *rev'd* 729 F.2d 1443 (2d Cir. 1983), *cert. denied*, 464 U.S. 822 (1983); *In re* Estate of Bielinis, 284 N.Y.S.2d 819 (N.Y. Sup. Ct. 1967), *aff'd*, 292 N.Y.S.2d 363 (N.Y. App. Div. 1968); *In re* Luberg's Estate, 243 N.Y.S.2d 747 (N.Y. App. Div. 1963).

[110] *See* M. Salimoff & Co. v. Standard Oil Co., 186 N.E. 679 (N.Y. 1933).

[111] *See* Latvian State Cargo & Passenger S.S. Line v. Clark, 80 F. Supp. 683, 684-85 (D.D.C. 1948), *aff'd*, 188 F.2d 1000 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 816 (1951).

[112] *See Latvian State Cargo*, 188 F.2d at 1001-02.

[113] *See* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990).

[114] *See id.* at 291-93.

[115] *See id.* at 280-81, 291.

Lythrankomi, Cyprus.[116]

The U.S. government never recognized Turkey as the legitimate sovereign of the northern section of Cyprus, despite Turkey's formation of the Turkish Federated State of Cyprus ("TFSC") in 1975.[117] Immediately after the invasion, the TFSC issued confiscatory decrees which attempted to divest the church of title to the mosaics.[118] In 1979, the mosaics were physically removed from the walls to which they had been affixed for over 1400 years.[119] Eventually, the mosaics were purchased by the defendant in the case.[120] The government of Cyprus, which had been searching for the mosaics since their removal, learned that the defendant possessed them.[121] The plaintiffs initiated suit to try to recover the mosaics.[122]

The defendant asked the court to honor the relevant confiscatory decrees of the TFSC under the principles reflected in Section 205(3) of the *Restatement*,[123] contending that the decrees were laws of an unrecognized regime which affected only local matters of the territory under their control.[124] Although citing distinguishing factors, the court was unwilling to rule for the defendant,[125] refusing to apply the recognized exception to the rule regarding acts of unrecognized governments.[126]

First, the *Autocephalous* court repeated the general principle that recognition of the validity of the Turkish administration was

---

[116] *See id.* at 279.

[117] *See id.* at 280.

[118] *See id.* at 291.

[119] *See id.* at 280.

[120] *See id.* at 281-83.

[121] *See id.* at 283.

[122] *See id.* at 284.

[123] *See* RESTATEMENT, *supra* note 23, § 205(3).

> [C]ourts in the United States ordinarily give effect to acts of a regime representing an entity not recognized as a state, or of a regime not recognized as the government of a state, if those acts apply to territory under the control of that regime and relate to domestic matters only.

Id.

[124] *See Autocephalous*, 917 F.2d at 291.

[125] *See id.* at 293. The most important difference was that, to the court, the struggle for the territory involved, though static for some fifteen years, was as yet undecided. *See id.*

[126] *See id.* at 292-293.

a political question, and not a judicial question, under U.S. law.[127] As such, the decision properly rested with the Executive Branch.[128] Next, the court attempted to distinguish the case from the Soviet cases based on the fact that the defendant could not show valid title based on its assertions, but rather could only show that the plaintiff's title was invalid.[129] The court also placed importance on its view that the Turkish invasion and fifteen-year occupation still had not proved successful, unlike the half-century Soviet occupation of the Baltics.[130] Ultimately, the court relied on the United States' nonrecognition of the TFSC,[131] effectively refusing to recognize the intraterritorial acts exception.

The *Autocephalous* court distinguished its conclusion from *M. Salimoff & Co. v. Standard Oil Co.*,[132] which gave effect to the nationalization decrees of the then unrecognized Soviet Republics.[133] There, the U.S. government recognized that the Soviet government "has functioned as a de facto or quasi government . . . ruling within its borders."[134] No such informal recognition, though minimal, existed for the TFSC.

4.4. Effect of State Succession on Property Rights

Under the U.S. view, once it becomes clear that a genuine issue of state succession exists and a new government is not simply replacing an old one, the U.S. Executive Branch weighs many factors before recognizing the potential new state. The United States utilizes diplomatic tools such as granting recognition,

---

[127] *See id.* at 292.

[128] *See id.* (citing United States v. Belmont, 301 U.S. 324, 328 (1937)).

[129] *See id.*

[130] *See id.* at 293.

[131] *See id.* In reaching its conclusion, the court noted that:

> no valid distinction can be drawn between the political or diplomatic act of nonrecognition of a sovereign and nonrecognition of the decrees or acts of that sovereign. . . . Nonrecognition of a foreign sovereign and nonrecognition of its decrees are to be deemed to be as essential a part of the power confided by the Constitution to the Executive for the conduct of foreign affairs as recognition.

Id. (quoting The Maret, 145 F.2d 431, 442 (3d Cir. 1944)).

[132] *See id.* at 292-93.

[133] *See* M. Salimoff & Co. v. Standard Oil Co., 186 N.E. 679 (N.Y. 1933).

[134] *Id.* at 682.

granting favorable trading status, and lending support for membership in the United Nations, World Bank, and IMF, to further its goals and interests.

One important issue that all new states confront is the right to succeed to the public assets and liabilities of the predecessor state. A country's decision whether to accept responsibility for its predecessor's foreign debt may affect its chances of recognition by the United States and the world community. The decision may also affect the state's access to capital, without which the states' newfound existence is rendered precarious. Finally, in cases of egregious non-economic misdeeds, the United States and the world community may use economic pressures to effectuate political changes in emerging states. These pressures can make membership in the IMF and the World Bank as important as formal U.S. recognition to the emerging state.

4.4.1. Private Property

4.4.1.1. The General Rule — The Doctrine of Acquired Rights

Under U.S. law, the transfer of sovereignty via state succession normally has no effect on private property rights. The seminal case reflecting the U.S. position on the fundamental importance of maintaining private property rights is *United States v. Percheman*.[135] In that case, the Supreme Court stated that:

> it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed.[136]

---

[135] *See* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

[136] *Id.* at 86.

At least one scholar believes that the U.S. precedent was critical to the establishment of this doctrine internationally.[137] Also known as *droits aquis*, the "doctrine of acquired rights is perhaps one of the few principles firmly established in the law of State succession, and the one which admits of least dispute."[138]

In what was known as the *German Settlers* case, the Permanent Court of International Justice confirmed this long-standing principle[139] in a case addressing Poland's eviction of German settlers from the territory Poland received after the First World War:

> Private rights acquired under existing law do not cease on change of sovereignty. No one denies that the German Civil Law, both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be maintained that, although the law survives, private rights acquired under it have perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice.[140]

Theoretically, one may think of extreme examples in the decolonization context where citizens of the colonial power owned such a high percentage of national wealth that strict enforcement of the rule was impractical. Legal scholars in newly decolonized countries did in fact make such an attack on the *droits aquis* principle in the decolonization context, although the attack was generally not accepted by the international legal community.[141]

---

[137] *See* 1 D.P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 248-51 (1967).

[138] *Id.* at 267.

[139] *See id.* at 248. O'Connell lists a nearly unbroken line of cases since the nineteenth century, as well as roughly 30 texts and treatises that support the doctrine. *See id.* at 239-44. He saw that the principle of respecting private rights "underlies the whole problem of State succession." *Id.* at 239.

[140] Advisory Opinion No. 6, Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland, 1923 P.C.I.J. (ser. B) No. 6, at 36 (Sept. 10).

[141] *See, e.g., Succession of States and Governments: Succession in Respect of Matters Other Than Treaties*, [1969] 1 Y.B. Int'l L. Comm'n 78-81, U.N. Doc.

In cases where it has replaced a sovereign in a given territory, the United States has consistently followed the practice of preserving private property rights. The annexation of California and the Treaty of Guadelupe Hidalgo following the Mexican-American War are early examples of the implementation of this policy.

Even before the Treaty of Guadelupe Hidalgo became effective in 1848, the United States recognized previously existing private property rights in California.[142] The practice was made official in Article 8 of the treaty, which declared that the private property rights of Mexicans living in the territory must be "inviolably respected."[143] Nonetheless, this policy was not unconditional. Under the Mexican Claims Act of 1851, the U.S. Congress established a Board of Land Commissioners to pass upon the validity of claims to land.[144] Mexicans who wished their rights to remain "inviolably respected" had to follow the affirmative duty of filing a claim.[145] Those who failed to make such claims stood to lose any rights they had previously enjoyed.[146]

The Mexican Claims Act of 1851 and the Treaty of Guadelupe Hidalgo are strong examples of a new state exercising sovereignty while preserving the existing private property rights recognized under the former sovereign. While the new sovereign must respect private property rights, the property owners must comply

---

A/CN.4/SER.A/1969 (statements of Mohammed Bedjaoui) (arguing that the concept of acquired rights is unclear, ambiguous, and ineffective); Mohammed Bedjaoui, *Problémes Rècents de Succession d'Etats Dans les Etats Nouveaux*, *in* 130 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 455 (Académie de Droit International, 1970).

In the state successions involving the former states of Yugoslavia and Czechoslovakia, for example, the decolonization concerns are not germane. Therefore, under well-settled principles of international law, private property rights already established in the predecessor states should not be affected.

[142] *See* United States v. O'Donnell, 303 U.S. 501, 504 (1938) ("Upon the military occupation of California during the Mexican War the United States military commander had proclaimed officially that Mexican land titles would receive due recognition by the United States.").

[143] *See id.*

[144] *See id.* at 504-05.

[145] *See* United States *ex rel.* Chunie v. Ringrose, 788 F.2d 638, 641 (9th Cir. 1986).

[146] *See, e.g., id.* at 646 (ruling that successors-in-interest to Native Americans lost any potential claim to disputed California islands acquired under the Treaty of Guadelupe Hidalgo due to the failure of the Native Americans to present claims pursuant to the 1851 Act).

with the relevant law of the new sovereign.

4.4.1.2. Exceptions

Exceptions to *droits aquis* exist, most involving attempts to thwart the change in sovereignty. For example, one of the most basic rights of a sovereign is the right to take lands through condemnation by exercising the right of eminent domain.[147] One exception to *droits aquis* might arise where one sovereign attempts to transfer real property to private parties in contemplation of an impending change of sovereignty, where such transfers would "defeat the object and purpose of" the agreement transferring sovereignty.[148] In such instances, the transferred rights need not always be respected by the new sovereign.

Cases such as *Trinh v. Citibank, N.A.*[149] illustrate the limits on obligations that an exiting sovereign may normally impose on its successor. In *Trinh*, the government of the Republic of Vietnam, as it faced imminent demise, attempted to accept the responsibilities of the evacuated U.S. branch banks and thereby bind its communist successor to those obligations under the principle that "a promise of a former state is generally binding on the successor state."[150] The court did not recognize the validity of this last-minute act of the Republic of Vietnam undertaken in contemplation of a change in sovereignty, thereby failing to protect the private rights of the banks.[151]

Transfers of property and acceptance of obligations, if executed shortly before a change in sovereignty, are both exceptions to the general rule that a change in sovereignty has no effect on private property rights. These exceptions, however, involve acts undertaken in contemplation of the change in sovereignty.

---

[147] Under U.S. law, a taking requires just compensation under the Fifth Amendment to the U.S. Constitution. *See* U.S. CONST. amend. V; RESTATEMENT, *supra* note 23, § 712 cmt. c.

[148] *See* RESTATEMENT, *supra* note 23, § 312 cmt. i (noting that a state-party to an international agreement is obligated to refrain from acts that would violate the agreement's purpose).

[149] Trinh v. Citibank, N.A., 850 F.2d 1164 (6th Cir. 1988).

[150] *Id.* at 1171 (citing Vilas v. City of Manila, 220 U.S. 345, 357 (1911)).

[151] *See id.* at 1165, 1171.

4.4.1.3. Municipalities Examined

As government subdivisions, municipalities exercise by delegation sovereign powers of the state. They also represent communities in a private capacity as they administer affairs beyond the public purposes of government.[152] Because municipalities exercise powers both public and private in nature, they are worthy of analysis in the context of private property rights in state succession.

In *Vilas v. City of Manila*, the U.S. Supreme Court addressed the issue of whether a Philippine municipality, Manila, was liable for the debts it incurred under Spanish rule, notwithstanding the cession of the Philippine Islands to the United States that was followed by a reincorporation of the municipality.[153] The Court ruled in favor of continuity, finding that the municipality of Manila succeeded to "all of the property rights of the old city and to the right to enforce all of its causes of action."[154] Moreover, the Court stated:

> [t]he juristic identity of the corporation has been in no wise affected, and, in law, the present city is in every legal sense the successor of the old. As such it is entitled to the property and property rights of the predecessor [municipal] corporation, and is, in law, subject to all of its liabilities.[155]

The municipality in its role as a legal entity maintained its rights and obligations notwithstanding the occurrence of state succession.

The Court also considered the role of the municipality as a delegate of sovereign authority. The "municipal laws . . . which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign."[156] The only laws that would change automatically would be those in conflict with the "political character, institutions and

---

[152] *See* Vilas v. City of Manila, 220 U.S. 345, 356 (1911).

[153] *See id.* at 352.

[154] *Id.*

[155] *Id.* at 361 (citations omitted).

[156] *Id.* at 357.

constitution of the new government."[157]

Vilas was not a case of first impression for U.S. courts. Similar holdings are found in cases involving the transfer of sovereignty of California pueblos, which existed as municipalities before the cession of California to the United States.[158] In the California cases, private property rights survived the transition, as did the applicability of municipal laws not in conflict with the preexisting laws of the new sovereign.[159] Additionally, during the American Civil War, the occupation of the City of New Orleans by the Union military did not result in the dissolution of the municipality or its laws.[160]

Vilas and the other municipality cases illustrate the U.S. view of state succession: with relatively few exceptions, the new sovereign steps into the shoes of the former sovereign and begins exercising power to the extent of the former sovereign, leaving intact most preexisting laws, rights, and duties.

4.4.2. Public Property — Assets and Liabilities

In most instances of state succession in the post-Communist era, the questions of the successor state's rights to the public property of the predecessor state and the corresponding responsibility for its public debt play an important role in negotiations regarding state succession. A prospective state's willingness to follow the U.N. Charter and to have the characteristics of a state is fundamental,[161] but the issue of sovereign debt may be next in importance.

While the objective goal of fairness purports to be the aim in state succession situations, the subjective political will of powerful creditor countries plays a significant role in succession negotiations. Preservation of creditor rights is the primary goal of the United States and other creditor countries when addressing public debt issues in state succession.

---

[157] *Id.* The court cited as an example of this type of conflicting law a statute in support of an established religion that would violate the separation of church and state principle of the U.S. Constitution. *See id.* at 357-58.

[158] *See, e.g.*, Townsend v. Greely 72 U.S. (5 Wall.) 326, 334-35, 337 (1866).

[159] *See id.*

[160] *See* New Orleans v. Steamship Co., 87 U.S. (20 Wall.) 387, 391 (1874).

[161] *See infra* Section 6.

4.4.2.1. The General Rule

The most restrictive view on the rights and responsibilities of a successor state regarding the capacities, rights, and duties of the predecessor state is that the successor state begins *tabula rasa*, succeeding to no rights or obligations of the predecessor state. The least restrictive view, on the other hand, holds that the successor state succeeds to all such rights and obligations.

The U.S. view on the rights and responsibilities of a successor state regarding the rights and duties of the predecessor state is summarized in the *Restatement*.[162] The *Restatement* adopts a view that succession has varying effects on states' duties depending on individual circumstances.[163] The *Restatement* primarily follows the Vienna Convention on the Law of Treaties,[164] although that treaty itself was never adopted by the United States or the world community.[165]

Rights and obligations of states regarding property and contracts are addressed in Section 209 of the *Restatement*, which addresses state property but is silent as to private property rights.[166] Section 209 applies both to public debt owed to

---

[162] *See* RESTATEMENT, *supra* note 23, §§ 208-210, § 208 ("When a state succeeds another state with respect to particular territory, the capacities, rights, and duties of the predecessor state with respect to that territory terminate and are assumed by the successor state, as provided in §§ 209-10.").

[163] *See id.*

[164] *See id.* § 208 n.4.

[165] *See* Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, *supra* note 27, at 323-24.

[166] *See* RESTATEMENT, *supra* note 23, § 209.

> § 209. State Succession: State Property and Contracts
> (1) Subject to agreement between predecessor and successor states, title to state property passes as follows:
>
> (a) where part of the territory of a state becomes territory of another state, property of the predecessor state located in that territory passes to the successor state;
> (b) where a state is absorbed by another state, property of the absorbed state, wherever located, passes to the absorbing state;
> (c) where part of a state becomes a separate state, property of the predecessor state located in the territory of the new state passes to the new state.
>
> (2) Subject to agreement between predecessor and successor states, responsibility for the public debt of the predecessor, and rights and obligations under its contracts, remain with the predecessor state,

official creditors, creditor countries, and international lending organizations such as the World Bank and the IMF, and to state debt owed to private foreign creditors.[167] Where one state completely absorbs another, the successor is presumed to absorb the public debt of the predecessor.[168] Otherwise, the successor state would be unjustly enriched by enjoying benefits of the predecessor state's assets without the corresponding liabilities.[169]

The analysis is slightly different for local public debt, which includes debts incurred by a subdivision of a state and debts incurred by a state specifically for a particular subdivision. Under Section 209(2)(a), a state which acquires assets of another territory normally would also acquire corresponding local public debt.[170] Nevertheless, a state that absorbs a subdivision of another state will not assume the liabilities incurred independently by that subdivision unless the laws of the absorbing state relieve the absorbed subdivision from liability by agreeing to assume the debt in question.[171] In other words, if subdivisions within the absorbing state would themselves be liable for the type of local debt in question, then the newly absorbed subdivision will also remain independently liable. If the absorbing state would be liable for the type of local debt incurred by its subdivisions, however, then the absorbing state will likewise be liable for the new local debt.[172]

The absorbing state will not be liable for any of the general

---

except as follows:

> (a) where part of the territory of a state becomes territory of another state, local public debt, and the rights and obligations of the predecessor state under contracts relating to that territory, are transferred to the successor state;
> (b) where a state is absorbed by another state, the public debt, and rights and obligations under contracts of the absorbed state, pass to the absorbing state;
> (c) where part of a state becomes a separate state, local public debt, and rights and obligations of the predecessor state under contracts relating to the territory of the new state, pass to the new state.

Id.

[167] *See id.* § 209 cmt. b.
[168] *See id.* § 209 cmt. c.
[169] *See id.*
[170] *See id.* § 209(2)(a).
[171] *See id.* § 209 cmt. d.
[172] *See id.*

public debt of the predecessor where the predecessor state continues to exist.[173] In that case, the predecessor generally will remain fully liable. If the state incurring the debt has lost so much territory that it would be unfair to make it pay the full debt, then the successor state must negotiate in good faith with the predecessor to assume a reasonable portion of the debt.[174] In these instances, equity rather than law will be the guiding factor.

The allocation of responsibility for state contracts is similar to that of local public debt. Where a party fully performs under a contract entered into with the state and the only remaining responsibility is the payment owed to the party by the state, the fully performed contract will be considered simply a debt.[175] With regard to executory contracts, however, the rule of *rebus sic stantibus*[176] may relieve the parties of promises for performance.[177] The occurrence of state succession alone, however, will not constitute frustration of purpose.[178]

4.4.2.2. The Search for Equity

Where a state has lost so much territory that full payment of public debt by the state would be unfair, the question arises regarding how the public debt should be divided between the successor and predecessor states. Given that questions of state succession are almost always resolved through the political process, rather than the judicial process, responsibility for the application of guidelines governing public debt in the United States has fallen almost exclusively on the Executive Branch. Political negotiations usually resolve the issue.

There is one exception to the general rule that the U.S. Judiciary is not involved in the resolution of the public debt apportionment question. Because of the "quasi-international"

---

[173] *See id.* § 209(2)(a)-(c).

[174] *See id.* § 209 cmt. e.

[175] *See id.* § 209 cmt. f.

[176] *Rebus sic stantibus* means: "[a]t this point of affairs; in these circumstances. A name given to a tacit condition, said to attach to all treaties, that they shall cease to be obligatory so soon as the state of facts and conditions upon which they were founded has substantially changed." BLACK'S LAW DICTIONARY 1267 (6th ed. 1990).

[177] *See* RESTATEMENT, *supra* note 23, § 209 cmt. f.

[178] *See id.*

flavor of the divisions of public debt following the American Civil War, U.S. courts were able to rule on the question of how to divide public debt.[179] One case, *Virginia v. West Virginia*,[180] provides some insight into the U.S. Judiciary's opinion of what constitutes an equitable division of public debt following the division of a "state." That case helped shape world opinion on issues such as succession to the rights and responsibilities of successor states.

In *Virginia*, a case that the U.S. Supreme Court called a "quasi-international" controversy, the former state of Virginia experienced something very much like traditional state succession.[181] Prior to the American Civil War, the Commonwealth of Virginia was comprised of the territory that later became both Virginia and West Virginia.[182] On April 17, 1861, Virginia passed an ordinance of secession,[183] shortly thereafter joining the Civil War already in progress.[184] Many Virginians in the western portion of the Commonwealth, however, did not share the secessionist sentiments of the eastern portion of Virginia and began an attempt to form a new state which would remain loyal to the federal government.[185] Although such a maneuver was legally suspect under U.S. law,[186] the federal administration blessed the attempt based on the political considerations of the day.[187] The efforts of the West Virginians were successful. On June 20, 1863, West

---

[179] *See, e.g.*, Virginia v. West Virginia, 220 U.S. 1 (1911).

[180] *Id.* at 1.

[181] *Id.* at 36.

[182] *See id.* at 15.

[183] *See id.*

[184] *See id.*

[185] *See id.* at 15-16.

[186] The United States Constitution would seem to forbid such a severance:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

U.S. CONST. art. IV, § 3. While this provision applies only to intra-state and intra-United States secessions, the idea of requiring the consent of all parties involved — past, present, and future sovereigns, as well a majority of the citizens affected — will also be critical to proper resolutions of international secession issues. *See infra* Section 6.

[187] *See Virginia*, 220 U.S. at 25-26.

Virginia was recognized as an independent state of the United States.[188]

Fifty years later, the case before the U.S. Supreme Court contemplated the proper apportionment between Virginia and West Virginia of the public debt of the Commonwealth of Virginia, as it existed in 1861.[189] The Court began its analysis by examining the portion of the West Virginia Constitution that addressed the pre-war outstanding debt of Virginia.[190] That provision of the West Virginia Constitution provided that "[a]n equitable proportion of the public debt of the [C]ommonwealth of Virginia, prior to the first day of January in the year one thousand eight hundred and sixty-one shall be assumed by this state; and the legislature shall ascertain the same as soon as may be practicable . . . ."[191] Through this constitutional provision, West Virginia attempted to unilaterally determine the amount of public debt for which it was responsible.

In an earlier decision addressing the provision of the West Virginia Constitution, a court held that the unilateral declaration constituted a binding agreement between Virginia and West Virginia.[192] The Supreme Court, however, never ruled on whether West Virginia had the right to resolve the dispute unilaterally. Instead, the Court opted to decide what would be an "equitable" division.[193] Unlike what would have been the case in purely international matters, the Court ruled that it had jurisdiction to settle the question, as it was a judicial matter, thereby preventing West Virginia from unilaterally resolving the dispute politically.[194]

West Virginia's position was that its constitution spoke for itself, and that the State had not only the contractual right to bind Virginia to "an equitable proportion," but its legislature could also decide for itself what would be an equitable proportion.[195] This

---

[188] *See id.* at 26.

[189] *See id.* at 22-23.

[190] *See id.* at 25-26.

[191] W. VA. CONST. art. 8, § 8, *cited in Virginia*, 220 U.S. at 26.

[192] *Virginia*, 220 U.S. at 26 (citing Virginia v. West Virginia, 78 U.S. (11 Wall.) 39 (1870)).

[193] *See id.* at 30-31, 34-35.

[194] *See id.* at 31.

[195] *See id.* at 20.

last argument, however, "[did] not impress" the Court.[196] West Virginia argued, in the alternative, that if the Court were to rule upon what constituted an equitable division of the former Virginia's debt, it should consider that the debt in dispute disproportionately benefited the territory that eventually comprised post-war Virginia, compared to the territory that became West Virginia.[197]

Virginia, on the other hand, proposed that the equitable solution was to divide the debt roughly two-thirds for Virginia, and one-third for West Virginia.[198] That allocation would correspond to the proportionate division of the original territory and the population of the Commonwealth of Virginia as of 1861.[199]

The Supreme Court followed neither the suggestion of Virginia nor that of West Virginia. Analogizing the public debt to the subscription of stock in a corporation, the Court decided that the debt was aimed to benefit the prior Commonwealth as a whole, and declined to proportion it based on the benefits received by each geographic region.[200] It noted that all "expenditures [of public debt] had the ultimate good of the whole state in view," and attempting to look further would make the Court "lost in futile detail."[201] The Supreme Court finally held that "the nearest approach to justice that we can make is to adopt a ratio determined by the master's [a court-appointed accountant] estimated valuation of the real and personal property of the two states on the date of the separation, June 20, 1863."[202] Based on the master's preliminary results, Virginia's share of the total wealth of the two territories as of 1861 was 76.5% and West Virginia's share was 23.5%.[203] Responsibility for the debt was to be thus divided, pending the final conclusion of the master.[204]

The task of the Supreme Court in interpreting the West

---

[196] *Id.* at 30.
[197] *See id.* at 17-18.
[198] *See id.* at 24.
[199] *See id.*
[200] *See id.* at 29-30.
[201] *Id.*
[202] *Id.* at 34.
[203] *See id.* at 35.
[204] *See id.*

Virginia constitutional provision was to determine what were the "equitable proportions" for Virginia and West Virginia to bear. Equity is an inexact concept.[205] Justice Holmes' decision in *Virginia* was fair, to an extent. The responsibility for the debt was matched to the wealth of the two territories, recognizing that certain geographical areas might not necessarily be as economically strong and thus able to repay debts as others of corresponding size.

The Court failed to address the inevitable change in wealth caused by the conflict which precipitated the division. After bearing a disproportionately high percentage of the destruction of the war, the territory that became the new Virginia must have experienced a dramatic decrease in net wealth by the end of the war in April 1865. This reduction of wealth would have included the diminution in value that occurred between the war's commencement in 1861 and the legal division of the two states in 1863. The economic effect of the war was not taken into account in the opinion.

The principles demonstrated in *Virginia* have endured. The Court's basic quest for equity is reflected in Articles 37, 40, and 41 of the Convention on the Succession of States in Respect to State Property, Archives and Debts, which calls for division in "equitable proportions" under similar circumstances.[206]

Unfortunately, while *Virginia* provided useful guidance for equitable debt division following a civil war, the case provides no helpful suggestions on how to enforce such decisions in the international arena. For example, in discussions on apportionment of the debt of the former Yugoslavia among surviving entities following its civil war, *Virginia* principles are of little value. Even though the conflict between Virginia and West Virginia was quasi-international in nature, it was still considered an intra-national[207] conflict over which U.S. courts had jurisdic-

---

[205] *See, e.g.*, BLACK'S LAW DICTIONARY, 540 (6th ed. 1990) (defining equity as "[j]ustice administered according to fairness as contrasted with the strictly formulated rules of common law").

[206] Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, *supra* note 27, at 323-24.

[207] *See* Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 293 (7th Cir. 1990) (suggesting that the characterization of wars fought for independence are largely outcome determinative).

tion. On the other hand, the questions facing the former Yugoslavia as well as the former Czechoslovakia are truly international, and could not be determined by the U.S. Supreme Court since the issue would be a nonjusticiable political question under the U.S. judicial system.

Although *Virginia* cannot serve as legally binding authority to the Yugoslavian debt situation, the general principles may still be of assistance to its resolution. Problems arising thereunder will probably not be resolved by judicial exercise of power, such as that of the World Court, but rather through the use of international diplomatic negotiations. The U.S. Executive Branch could apply the Court's reasoning in *Virginia* if it participates in the final resolution of debt questions in the former Yugoslavia.

4.4.3. Obligations Under International Agreements

The responsibilities of successor states to comply with international agreements vary with the type of succession. The *Restatement* lays out four distinctions.[208] Generally, agreements of the predecessor are not binding on the successor, but the successor's agreements are binding with respect to the new territory.[209] Likewise, a seceding state does not succeed to the international agreements of the state with which it was formerly associated unless the seceding state expressly or impliedly chooses to do so.[210] The only exceptions are agreements on preexisting

---

[208] *See* RESTATEMENT, *supra* note 23, § 210.

§ 210. State Succession: International Agreements
(1) When part of the territory of a state becomes territory of another state, the international agreements of the predecessor state cease to have effect in respect of that territory and the international agreements of the successor state come into force there.
(2) When a state is absorbed by another state, the international agreements of the absorbed state are terminated and the international agreements of the absorbing state become applicable to the territory of the absorbed state.
(3) When part of a state becomes a new state, the new state does not succeed to the international agreements to which the predecessor state was party, unless, expressly or by implication, it accepts such agreements and the other party or parties thereto agree or acquiesce.
(4) Pre-existing boundary and other territorial agreements continue to be binding notwithstanding Subsections (1) - (3).

Id.

[209] *See id.*

[210] *See id.*

territorial boundaries, which remain binding on the successor state.[211]

5. THE ROLE OF THE IMF AND THE WORLD BANK

As governments decide whether to recognize successor states, the IMF and World Bank must decide whether to grant these countries membership. After the breakup of the former Yugoslavia and Czechoslovakia, the IMF and the World Bank developed a conditional approach to the succession of states, and the IMF openly began taking political considerations into account as it considered granting new memberships. One goal of these political considerations with respect to the former Yugoslavia was to exclude Serbia Montenegro from participating in the IMF and the World Bank based on their view that Serbia Montenegro was responsible for the war in the Balkans. Few outside Serbia Montenegro would disagree with such treatment. Nonetheless, the openly political considerations were somewhat new in the history of the two international financial institutions.

5.1. The History of the IMF and the World Bank

After World War II, many of the countries involved in the conflict were devastated by its effects and lay in ruins. At the United Nations Monetary and Financial Conference, the United Nations established the IMF and the World Bank in order to aid in the rebuilding of the affected countries and the world economy in general.

The IMF sought to create a monetary system that would insure orderly currency payments among various debtor and creditor countries.[212] To accomplish this, the IMF loaned money to member states facing balance of payment deficits.[213] The IMF focused it efforts, *inter alia*, on promoting international monetary cooperation, encouraging the growth and balance of international trade, and promoting the stability of international

---

[211] *See id.*

[212] *See* 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, 777 (1994); *see also* Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 2 U.N.T.S. 40-133 [hereinafter IMF Agreement].

[213] *See* Williams, *supra* note 212, at 777.

monetary exchange rates while eliminating barriers associated with such rates.[214]

The IMF has another important role: membership in the IMF is an absolute prerequisite to membership in the World Bank.[215] Thus, even if prospective members desire only World Bank financing, they must obtain membership in the IMF to gain such financing. The IMF grants new membership to those applicants approved by its Board of Governors.[216]

The primary focus of the IMF and the World Bank today is to assist underdeveloped countries and states moving away from centrally planned economies to a market approach. The IMF and the World Bank are involved in Eastern Europe and the former Soviet Union, regions that have recently experienced instances of state succession. The policies of the financial lending institutions when confronted with state succession will vary depending on the conditions of each instance of succession.

5.2. Dissolution Versus Continuation

Generally, the breakup of a state can be categorized as either a dissolution or a continuation. A continuation normally involves any number of new states representing relatively smaller territories breaking away, or seceding, from a larger state with whom it was formerly associated.[217] In such a case, the larger state continues to exist with the same international status as before it lost territory.[218] The newly-formed states, on the other hand, after solidifying their independence, must pursue international recognition and membership in various international organizations. Continuation was associated typically with the occurrences of state succession in the de-colonization period following World

---

[214] *See* IMF Agreement, *supra* note 212, Art. I.

[215] *See* Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, Art. II(1)(b) 2 U.N.T.S. 134, 136 [hereinafter World Bank Agreement].

The original role of the World Bank was to provide financing for reconstruction of countries devastated by World War II. *See* Williams, *supra* note 212, at 777.

[216] *See* IMF Agreement, *supra* note 212, Arts. II(2), XII, at 2 U.N.T.S. 40, 42, 78-89; *see also* Williams, *supra* note 212, at n.2.

[217] *See* Williams, *supra* note 212, at 781.

[218] *See id.*

War II.[219] At that time, former colonies became independent states, and the colonial power was the continuing state, presumably maintaining its rights and obligations in international organizations.[220]

When no clear survivor emerges from the breakup of a state in terms of retained population, land, and wealth, the result is likely a dissolution.[221] In a dissolution, the predecessor state dissolves, and the newly formed states divide the rights and responsibilities of the predecessor.[222] It is unclear whether these newly formed states automatically succeed to the predecessor state's memberships in international organizations or whether each state must apply independently for a new membership.[223]

To distinguish continuation and dissolution, three factors are generally examined: the relative size of the continuing state's remaining population, remaining land, and resources in relation to that of its lost territories.[224] If one country has a substantial majority in each of these three categories, that would suggest the occurrence of a continuation rather than a dissolution.[225]

5.3. The Disintegration of the Eastern Bloc

As the former Eastern Bloc disintegrated, so too did many of the states that existed there. Yugoslavia and Czechoslovakia were two such states. The disintegration of one stood out as an example of good order and amicable negotiations; the other was marked by chaos, violence, and genocide.

5.3.1. The Breakup of Czechoslovakia

Less than four years after the Berlin Wall fell in 1989, the Federal Assembly of the Czech and Slovak Federal Republic convened and passed a constitutional law providing for the cessation of the existence of Czechoslovakia, effective January 1,

---

[219] *See id.* at 781 n.35.

[220] *See id.*

[221] *See id.* at 781.

[222] *See id.* at 792. *But see id.* at 781 n.37 (noting that the *Restatement* takes the position that none of the successor states are bound by the rights and obligations of the predecessor state).

[223] *See id.* at 784.

[224] *See id.* at 785.

[225] *See id.* at 785 n.58.

1993.[226] Since the former Czechoslovakia was a member of the IMF and the World Bank prior to its division into the Czech and Slovak Republics, the newly formed republics faced the issue of deciding which of them, if either, might be entitled to the predecessor's memberships.[227]

The Czech and Slovak Republics addressed their rights to succeed to memberships in international organizations the same way they approached their separation — they negotiated an agreement whereby they succeeded to Czechoslovakia's memberships in various international organizations.[228] In these negotiations, the republics gave special consideration to the nature of the organization involved.[229]

In what may be described as an exercise in the freedom of contract, the two new republics essentially supplanted international law on state succession. The criteria for determining whether an occurrence of state succession constitutes a continuation or a dissolution usually turns on which state, if any, between or among the newly formed states, retains the greater share of the former state's population, land, and net resources.[230] In the division of Czechoslovakia, a strong argument could have been made that the Czech Republic should have succeeded to the rights and obligations of the former state. The Czech Republic retained 71% of the net resources, 66% of the population, and 62% of the land

---

[226] *See id.* at 783. By contrast, the creation of Czechoslovakia some 73 years earlier sprung from a far less democratic process. Following the First World War, the victorious powers entered into the 1920 Peace Treaty of Trianon, which created Czechoslovakia out of a portion of the former Austro-Hungarian Empire. *See id.* at 778 (citing W.V. WALLACE, CZECHO-SLOVAKIA (1976)).

[227] While Czechoslovakia was an original member of both the IMF and the World Bank from their creation in 1946, its memberships lapsed for failure to pay its capital subscription requirement. *See* IMF Agreement, *supra* note 212, at 114-20; World Bank Agreement, *supra* note 215, at 192-99; THE BRETTON WOODS AGREEMENTS, 800-02 (1972). The memberships were not renewed until after the end of the Cold War in 1990. *See* Williams, *supra* note 212, at 778 (citing World Bank, Czech Republic and Slovak Republic — Succession to Membership Status of the Czech and Slovak Republic 3 (1992)).

[228] *See* Williams, *supra* note 212, at 783 (citing Agreement on Membership in International Governmental Organizations between the Czech Republic and the Slovak Republic (1992)).

[229] *See id.*

[230] *See supra* Section 5.2.

formerly comprising Czechoslovakia.[231] Had the parties not independently agreed to share responsibility for the outstanding foreign debt, interested creditor countries and lending institutions might have taken the position that the Czech Republic had indeed succeeded to the position of Czechoslovakia, thereby insuring that its international financial obligations would be paid. Furthermore, international law would have supported interested creditor nations in such an endeavor.[232] The agreements between the republics, however, supplanted the need for legal analysis.

While the parties agreed to allocate between themselves Czechoslovakia's various memberships in international organizations, they chose not to do so with regard to the IMF and World Bank memberships. In late 1992, the finance ministers of the Czech Republic, the Slovak Republic, and Czechoslovakia formally requested that both the IMF and the World Bank allow each new state to succeed to the memberships of Czechoslovakia.[233] In the request, they notified the lending institutions that the Czech and Slovak Republics had voluntarily reached an agreement on the division of Czechoslovakia's debts and assets.[234]

Following the dissolution of Czechoslovakia, the IMF allowed the two new republics to succeed simultaneously to the membership of the former Czechoslovakia, subject to various conditions.[235] The World Bank followed the lead of the IMF, passing

---

[231] *See* Marc Fisher, *Feelings Mixed as Czechs, Slovaks Split*, WASH. POST, Jan. 1, 1993, at A21, A24.

[232] While little legal precedent exists regarding the allocation of memberships in international organizations, it is generally accepted under international public law that where a continuing state exists following the breakup of a predecessor state, the continuing state will inherit the membership of the predecessor, while the new states will apply for membership independently. *See* Williams, *supra* note 212, at 784. Precedent does exist in the analogous case of decolonization, where international organizations applied this principle. *See* 2 O'Connell, *supra* note 137, at 184-187.

[233] *See* Williams, *supra* note 212, at 804-05.

[234] The Czech and Slovak Republics agreed to divide territorial debt according to the territory to which it corresponded, and agreed to national debt proportionally based on the population ratios. *See* Letter from Jan Klak, Minister of Finance of Czechoslovakia, 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 (Dec. 4, 1992).

[235] IMF, Czech and Slovak Federal Republic Cessation of Membership, Allocation of Assets and Liabilities in the Fund, and Succession to Membership

a resolution that granted membership to both new applicants and mandated that the new states comply with the same conditions which the IMF had earlier required.[236] By this time, the republics had already fulfilled the IMF requirements.[237]

By negotiating the cessation of their former state, the newly-formed Czech and Slovak Republics amicably relieved the IMF and World Bank of having to resolve disputes between them. In doing so, the new states preserved the rights of international creditors.

5.3.2. The Breakup of Yugoslavia

5.3.2.1. The History of the Breakup

In December of 1990, the breakup of Yugoslavia commenced in marked contrast to the orderly dissolution of Czechoslovakia. The differences between the two situations were apparent from the beginning. When the breakup of Yugoslavia began, it still existed as a state and as a member of the United Nations.[238] The breakup began with an election in Slovenia. In that election, 88.4% of the voters supported Slovenia becoming a sovereign and independent state.[239] Two months later, Croatia joined the independence movement and issued a joint statement with Slovenia that invalidated Yugoslavian laws in their respective territories. The statement also called for the formation of a confederation of republics from the territories of the Yugoslavian state.[240] Four months later, on June 25, 1991, both Croatia and

---

in the Fund, 1-3 (Dec. 21, 1992). The conditions were: (1) that the parties consent to the allocation of assets and liabilities as determined by the IMF; (2) that the parties agree to become "members in accordance with the terms and conditions of membership specified in the decision" and take "all the necessary steps to that effect and to carry out their obligations under the Articles;" and, (3) that the parties clear any arrears then owed to the IMF. *See id.*

[236] *See* Czech Republic and Slovak Republic — Succession to the Membership of the Czech and Slovak Federal Republic, World Bank Res. No. 93-1, at 3-5 (Jan. 4, 1993).

[237] *See* Williams, *supra* note 212, at 806.

[238] For a discussion of the attempts to restructure the federal system of Yugoslavia prior to its piecemeal disintegration, see Lawrence S. Eastwood, Jr., *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. COMP. & INT'L. LAW 299, 322-325 (1993).

[239] *See* Williams, *supra* note 212, at 779.

[240] *See id.*

Slovenia issued proclamations of independence.[241] Both territories adopted their own constitutions and were printing their own currencies by December of that year.[242]

Germany formally recognized Slovenia and Croatia as independent states on December 23, 1991. Formal recognition of the two new states followed from the European Union on January 15, 1992, and from the United States on April 7, 1992.[243] The United Nations admitted both states as new members on May 22, 1992.[244]

Other Yugoslavian states followed the lead of the first two breakaway republics. Citizens of Bosnia Herzegovina voted 63% in favor of independence from Yugoslavia on March 1, 1992, and the new nation received formal recognition from the United States and the European Union on April 7, 1992. The United Nations subsequently granted membership to Bosnia Herzegovina on May 22, 1992.[245] Macedonia, the final breakaway state, declared its independence in November of 1991, but was not admitted as a member of the United Nations until April of 1993.[246] Left with nothing from which to break away, the remaining Yugoslavian territories, Serbia and Montenegro, issued a joint declaration on April 27, 1992, legally dissolving the former Yugoslavia and declaring themselves a joint state, the Federal Republic of Yugoslavia.[247]

The initial U.S. reaction favored a united Yugoslavia.[248] Neither the European Union nor the United States, however,

---

[241] These statements technically stopped short of formal proclamations of secession, which officially came for both countries on September 7, 1991. *See* Patricia Lee Dorf ed., *Chronology 1991*, 71 FOREIGN AFF. 1991/1992 at 184, 202.

[242] *See* Williams, *supra* note 212, at 779 n.19 (citations omitted).

[243] *See id.* at 780 (citations omitted).

[244] *See id.* (citations omitted).

[245] *See id.*

[246] *See id.*

[247] *See* John F. Burns, *Confirming Split, Last 2 Republics Proclaim a Small New Yugoslavia*, N.Y. TIMES, Apr. 28, 1992, at A1.

[248] When Croatia declared its independence, the response from the U.S. Executive Branch was against a divided Yugoslavia: "[l]ooking at the processes that are established for peaceful resolution as opposed to arbitrary secession and the use of force that [secession] can result in, it is simply our belief that the Yugoslav people would be best served by a country that's unified." Marlin Fitzwater, Statement at White House Press Briefing (June 27, 1991) *quoted in U.S. on Secession: Maybe*, N.Y. TIMES, June 28, 1991, at A8.

recognized Serbia Montenegro, in protest against its aggression against the other former Yugoslavian states, particularly Bosnia Herzegovina. Nonetheless, Serbia Montenegro claimed that it was the successor state to the former Yugoslavia and claimed the right to all of its predecessor's assets, as well as the responsibility for all its national debts.

The declaration by Serbia Montenegro seemed to conflict with its position that it was the successor to the former Yugoslavia. A state that believes itself to be the continuation of a preexisting state need not issue a proclamation of a statehood. Arguably, that statehood would never have been lost. Nonetheless, such was the position of Serbia Montenegro. Slovenia, Croatia, Bosnia Herzegovina, the United States, and the European Union stood together in opposition to Serbia Montenegro's claim of continuity.

The United Nations itself formally opposed Serbia Montenegro's position, and on May 30, 1992, passed Security Council Resolution 757, which stated that "the claim by the Federal Republic of Yugoslavia [Serbia Montenegro] to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted."[249] On September 29, 1992 the United Nations passed Security Resolution 777 which formally prohibited Serbia Montenegro from membership in the United Nations as Yugoslavia's successor.[250] Finally, the United Nations Security Council imposed extensive economic sanctions against Serbia Montenegro, including a ban on exports to and imports from the

---

[249] S.C. Res. 757, U.N. SCOR, 47th Sess., 3082 mtg. at 14 (1992).

[250] *See* S.C. Res. 777, U.N. SCOR, 47th Sess., 3116 mtg. at 34 (1992).

> *Considering* that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist,
> *Recalling* . . . 'that the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted',
> *Considers* that the Federal Republic of Yugoslavia (Serbia Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations, and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the world of the General Assembly . . . .

Id. (emphasis in original).

"country."[251] The intent was to punish Serbia Montenegro by disrupting its economy in response to its actions in other regions of the former Yugoslavia.[252] International consensus clearly opposed Serbia Montenegro's claim of continuation.[253]

5.3.2.2. Reaction of the IMF and the World Bank

The IMF and the World Bank faced the potentially troublesome effects of classifying the breakup of Yugoslavia as either a dissolution or a continuation. If classified as a continuation, then Serbia Montenegro would be the only available successor to the former Yugoslavia and would succeed to the responsibilities for the debts and the rights to the assets of the former nation. If classified as a dissolution, on the other hand, then there would be no successor, and the IMF would divide the debts and assets of the former Yugoslavia proportionally among the new states.[254] Additionally, a continuation would allow Serbia Montenegro to succeed to memberships in the IMF and World Bank while the other new states would have to reapply to the international organizations. A dissolution would mean that Yugoslavia's memberships would expire, and all new states would be required to reapply for membership. Since neither succession nor continuation provided an acceptable outcome, the IMF created a hybrid.

Following the lead of the international community, the IMF and the World Bank treated the members of the former Yugoslavia in a fashion based on a modification of the dissolution model. The alternatives were to grant memberships based on multiple succession to the old membership of Yugoslavia, like the Czechoslovakian model, or to admit the prospective members independently.

---

[251] *See* Williams, *supra* note 212, at 782-83.

[252] *See generally*, Scharf & Dorsin, *Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee*, 19 BROOK. J. INT'L. L. 771 (1993).

[253] *See* Williams, *supra* note 212, at 781-82.

[254] *See* Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. 29(c) 2 U.N.T.S. 40, 100 (as amended) (stating that "[w]henever a disagreement arises between the Fund and a member which has withdrawn, or between the Fund and any member during the liquidation of the Fund, such disagreement shall be submitted to arbitration by a tribunal . . . ."). Arguably, in the case of a dissolution, Yugoslavia would be considered a "withdrawn" member, and disputes between its successors and the IMF would likely be governed by this provision.

The IMF and the World Bank considered three options within the succession approach: complete, partial, and conditional.[255] Complete succession was an all-or-nothing approach whereby all the states of the former Yugoslavia could simultaneously succeed to the membership of their predecessor, but none would be allowed to do so individually without the group as a whole.[256] While this method had the advantage of insuring that the debts of the predecessor would be fully assumed, it had two disadvantages. First, any one member could unilaterally frustrate succession.[257] Second, it would provide membership to Serbia Montenegro against the international desire to isolate that "country."[258]

Another approach, partial succession, would allow an individual state to succeed independently to the predecessor's membership, but only if the state accepted the IMF and World Bank's apportionment of its share of Yugoslavia's assets and liabilities.[259] This option denied obstinate holdouts the ability to frustrate succession,[260] but it also had two disadvantages. First, there was a possibility that the IMF and the World Bank would fail to have all their debts accounted for since one state could hold out and then later refuse to agree with the apportionment reached with the other states.[261] Second, it would have allowed for membership of Serbia Montenegro.[262]

The ultimate goal of the IMF was to create a system of admission that would fully account for debt obligations and which would be capable of denying admission to Serbia Montenegro until its conduct was internationally acceptable. Clearly, economic considerations were not the only focus of the IMF and the World Bank as they sought a solution to the membership

---

[255] For an excellent discussion of the IMF and World Bank options, strategies, and actions in their relationship to the former Yugoslavia, see Williams, *supra* note 212, at 779-883, 793-805.

[256] *See* IMF, Secession of Territories and Dissolution of Members in the Fund, (July 14, 1992); Williams, *supra* note 212, at 798.

[257] *See* Williams, *supra* note 212, at 798.

[258] *See id.*

[259] *See id.*

[260] *See id.*

[261] *See id.*

[262] *See id.*

problem.[263] Normally, following an occurrence of state succession, the successor state is entitled to succeed to the membership of the predecessor as a matter of law. With a prospective new member state, however, conditions may be imposed.

In order to achieve an ideal solution to this problem, the IMF developed what could be termed "conditional succession."[264] The plan would allow successor states to succeed to the IMF memberships of the former Yugoslavia upon meeting several conditions. The conditions were: (1) notifying the IMF that the state agreed to the allocation of its share in the assets and liabilities of the former Yugoslavia; (2) notifying the IMF that the state agreed "in accordance with its law, to succeed to the membership in accordance with the terms and conditions specified by the IMF and has taken all the necessary steps to enable it to succeed to such membership and carry out all of its obligations under the Articles of Agreement;" (3) determination by the IMF that the state was "able to meet its obligations under the Articles;" and, (4) certifying that the state had no overdue financial obligations to the IMF.[265]

Three of the four conditions were objective. The third condition, however, was completely subjective because when considering the ability of the successor to meet those financial obligations, the IMF could take into account the effect of international sanctions on the state and its economy.[266] Therefore, the IMF could, at its discretion, refuse to admit any country enduring sanctions and base its refusal on economic factors.

The World Bank refused to include this subjective condition

---

[263] Arguably, political concerns should be prohibited from consideration by the World Bank.

> Section 10, Political Activity Prohibited: The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighted impartially in order to achieve the purposes stated in Article I [namely, to encourage economic growth].

World Bank Agreement, *supra* note 215, art. 4, § 10, 2 U.N.T.S. at 158.

[264] Williams, *supra* note 212, at 798.

[265] IMF Press Release No. 92/92, 1-2 (Dec. 15, 1992).

[266] *See* IMF, Issues of State Succession Concerning Yugoslavia in the Fund 8 (Nov. 20, 1992).

in its list, calling it "at best legally questionable."[267] The World Bank's position, however, was largely meaningless. According to its charter, no country can become a member of the World Bank without first being a member of the IMF.[268] Thus, the IMF's subjective condition aimed against Serbia Montenegro would effectively deny it membership in the World Bank. At least indirectly, the political will of those in control of the IMF was brought to bear on Serbia Montenegro. Relatively few outside of Serbia Montenegro would argue with the appropriateness of the IMF actions, but it would be inaccurate to consider the actions legal rather than political.[269]

The lasting danger of these actions is that at some point Serbia Montenegro may "successfully contend before an arbitration tribunal that it has been unjustly precluded from the right to succeed to the membership and assets of the predecessor State, and therefore should not be deemed liable for any portion of the debts of the predecessor State."[270] As the IMF and the World Bank place conditions on succession for potential new member states, there is the danger that they will do so inconsistently.[271] If the IMF and the World Bank do apply such conditions inconsistently, an international arbitrational tribunal board may set aside the actions of the international financial institutions.[272] In such an instance, the IMF's goal of insuring that all the debts of the former Yugoslavia are assumed would be lost.

The difficulties that the IMF and the World Bank experienced in dealing with the breakup of Yugoslavia mirrored the difficulties encountered by the international community. Although the

---

[267] World Bank, Effects of the Territorial Disintegration of the Socialist Federal Republic of Yugoslavia 6-7 (Nov. 25, 1992). The World Bank position, which it believed was the only legally defensible one, was that either all the states would have to apply for new membership independently, or that they would all simultaneously succeed to the former Yugoslavia's membership. *Id.*

[268] *See supra* Section 5.1.

[269] Even if one argues that this approach, requiring a subjective finding by the IMF that the member would be able to satisfy its obligations and thereby effectuating political goals, is consistent with the IMF Articles of Agreement, then the approach should have been applied uniformly to the other Yugoslavian successor states, as well as the Czech and Slovak Republics. *See* Williams, *supra* note 212, at 807.

[270] *Id.* at 808.

[271] *See id.* at 807-08.

[272] *See id.*

international financial institutions and the world community hoped to apply objective standards to the parties involved, Serbia Montenegro's deplorable conduct called for exceptions.

6. ATTEMPTING TO CREATE INTERNATIONAL LEGAL STANDARDS FOR SECESSION

Having examined the views of Continental Europe, the United States, and the international community on state succession and related issues, as well as the role of the international lending institutions during instances of succession, this Article now examines what must be done to insure more orderly and less violent transitions. When a state dissolves, no entity exists from which to secede. To fully "succeed," the potential new states merely need to negotiate with the international community for acceptance. Where the issue is secession involving dismemberment before dissolution, as was the case in the former Yugoslavia, the international community and its members must weigh the competing concerns of the new state and those of its predecessor. Although it is unlikely that the rule of international law will ever supplant political considerations, objective international standards on secession could prove useful in avoiding some of the bloodshed that often accompanies secession movements.

The goal of international law and the international community should be to preserve a presumption against secession, while simultaneously facilitating peaceful transitions of sovereignty when appropriate. To the extent possible, an objective rule of law should control. Neither a purely declarative theory nor a purely constitutive theory of state succession will suffice in achieving this goal. Therefore, the best answer seems to lie in a hybrid of the two.

In the future, with only limited exceptions, valid instances of secession should contain the following three elements: (1) the territory in question must have the traditional characteristics of a state; (2) the prospective state must be willing to follow the principles laid out in the U.N. Charter; and, (3) the international community should demand that the prospective new state obtain the consent and follow the applicable laws of its current sovereign (the "prospective predecessor"). Compliance with the first two criteria would insure admission to the United Nations and the international community after an occurrence of state succession. Admittedly, due in part to the continuing political nature of

questions of state succession, secession efforts that fail to meet these three conditions may still achieve success. Nonetheless, consistent application of these principles should create a more objective system that decreases the likelihood of armed conflict.

6.1. The Presumption Against Secession

Today an international presumption against secession seems to exist. The reasons for the presumption against secession are two-fold. First, there is the fear that widespread recognition of a right to secession would cause the practice to spread uncontrollably. Because of the large number of distinct societies in the world — cultural, ethnic, political, and religious — granting a right to secession to every distinct group could lead to an enormous number of new states.[273] The second reason, which is related to the first, is the duty of states to respect one another's sovereignty. Perhaps the most basic of all state powers is the right "to exercise jurisdiction within its borders and to take its own decisions regarding its internal and external affairs. Indeed, this is quite often referred to as the right of sovereignty."[274] When one country recognizes a secessionist movement in a formerly united country, it simultaneously denies the predecessor the right to exercise jurisdiction in the territory in question and meddles in the predecessor's internal affairs. States may be reluctant to engage in such action out of fear that such actions will be taken against them. Perhaps this presumption explains why most secessionist entities achieve recognition only after there is no longer any likelihood that the former sovereign will be able to reassert control.[275]

While international law carries a presumption against secessionist movements and therefore disfavors secession, the United Nations has sent mixed signals on the matter, at least with regard to the right of self-determination in general. Articles 1(2) and 55 of the U.N. Charter recite "respect for the principle of equal

---

[273] *See* ERNEST GELLNER, NATIONS AND NATIONALISM 2 (1983).

[274] ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY 200 (1986).

[275] *See generally*, JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 36-47 (1979) (explaining that when a prospective state has no real authority over a territory other than its own, the criteria for statehood are not entirely met).

rights and self-determination of peoples."[276] Another U.N. declaration states that "all people have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[277] In 1970, however, Secretary General U Thant claimed that the United Nations never accepted the principle of a right to secession.[278]

The United Nations' support of the right of all people to freely determine their political status and its failure to recognize a right of secession in general has been interpreted to mean that the U.N. supports self-determination only in the decolonization process.[279] This distinction has been described as "integrally linked to the need to free peoples from colonial and 'alien' subjugation."[280] One might speculate whether the American Revolution, where the United States "seceded" from the British Empire, would qualify under this modern standard as a valid attempt at self-determination. While the American Colonies were indeed trying to free themselves from colonialism, that subjugation was not "alien" in the same sense as European powers colonizing Africa, India, or Southeast Asia. Additionally, acceptance of the decolonization exception has been viewed as further evidence of states acting in their political interests.[281]

The view that a state's response to secession attempts will be

---

[276] U.N. CHARTER art. 1, para. 2, art. 55.

[277] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66-67, U.N. Doc. A/4684 (1960).

[278] *See Secretary-General's Press Conferences*, 7 U.N. MONTHLY CHRON., Feb. 1970, at 34, 36 (stating "[a]s an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of [a] Member State.").

[279] *See* LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 87 (1978).

[280] Lloyd, *supra* note 25, at 24.

[281] *See* Eastwood, *supra* note 238, at 315-16.

> Secession is disfavored by the international community because articulation of a secession right would threaten the territorial integrity of the states which themselves make international law. In contrast, decolonization is favored by the large number of states in the international community that were once former colonies or that opposed the colonial powers in furtherance of their own interests.

Id.

based on its political interests[282] seems accurate in the context of United States. The opinions of many U.S. Presidents on the issues of secession and self-determination reflect their individual political situations. President Abraham Lincoln's position reflected certain American sentiments in the time following the Mexican War.[283] As the political situation in the United States changed, so too did Mr. Lincoln's views on secession. Likewise, President Woodrow Wilson expressed strong support for self-determination following the First World War,[284] which in fact applied only to the defeated Central Powers and reflected the views of a newly victorious state emerging as a world leader.[285] Even Presidents Thomas Jefferson[286] and James Madison[287] expressed strong self-determination sentiments; Jefferson went so far as to look with favor on Americans who might attempt to shake off their own government and form a new one. Their comments, however, must be understood in the context of statements coming from leaders of a young nation born of

---

[282] *See* BUCHHEIT, *supra* note 279, at 105.

[283] *See supra* note 1 and accompanying text.

[284] President Wilson once said, "[n]o people must be forced under sovereignty under which it does not wish to live." Message from President Wilson to Russia on the Occasion of the Visit of the American Mission (June 9, 1917), *reprinted in* OFFICIAL STATEMENTS OF WAR AIMS AND PEACE PROPOSALS, DECEMBER 1916 TO NOVEMBER 1918, at 105 (James Brown Scott ed., 1921). Compare the position of the League of Nations at that time: "Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish . . . ." LEAGUE OF NATIONS O.J. Spec. Supp. 3, at 5 (1920).

[285] *See* BUCHHEIT, *supra* note 279, at 63; *see also* ALFRED COBBAN, THE NATION STATE AND NATIONAL SELF-DETERMINATION 53, 66 (1970).

[286] Jefferson spoke of those "who would wish to dissolve this union or change its republican form" as "monuments of safety." First Inaugural Address of Thomas Jefferson (Mar. 4, 1801), *quoted in* THE GREAT THOUGHTS, *supra* note 1, at 207.

[287] Madison said:

> If there be a principle that ought not to be questioned within the United States, it is that every man has a right to abolish an old government and establish a new one. This principle is not only recorded in every public archive, written in every American heart, and sealed with the blood of a host of American martyrs, but is the only lawful tenure by which the United States hold their existence as a nation.

James Madison, *quoted in* THE GREAT THOUGHTS, *supra* note 1, at 262.

revolution. The positions asserted by these and other U.S. Presidents reflect more the politics of the moment than unconditional support of the right to form a new government.

6.2. The Three Elements Necessary for a Valid Secession

Assuming that a presumption against state secession does exist, this Article now examines what should be required to overcome that presumption and to create an international right to secession. The presence of three distinct factors should be encouraged: (1) the traditional characteristics of a state; (2) willingness to follow the U.N. Charter; and, (3) consent of the sovereign.

6.2.1. Traditional Characteristics of a "State"

An entity must have the characteristics of a state in order to form such an entity and be accepted in the international community of nations. The most common definition of a state in international law is outlined in the Montevideo Convention on the Rights and Duties of States of 1933.[288] The four characteristics which a prospective state must possess under the Montevideo Convention are: (1) a permanent population; (2) a defined territory; (3) a government; and, (4) the capacity to enter into relations with other states.[289] U.S. law reflects the four factors of the Montevideo Convention in its definition of "state."[290]

At times, the United Nations has admitted as members and the international community has recognized states that failed to meet each of the four characteristics.[291] Nevertheless, compliance with these factors is usually required for statehood. These

---

[288] *See* Convention on Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter the Montevideo Convention].

[289] *See id.* art. 1, at 25.

[290] U.S. law defines a state as:

> people permanently occupying a fixed territory bound together by common-law habits and custom into one body politic exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace and of entering into international relations with other communities of the globe.

BLACK'S LAW DICTIONARY 1407 (6th ed. 1990) (citing United States v. Kusche, 56 F. Supp. 201, 207-08 (S.D. Cal. 1944)); *see also* Restatement, *supra* note 23, § 201 (defining "state").

[291] *See, e.g.*, CRAWFORD, *supra* note 275, at 255-56.

traditional characteristics of a "state" reflect the declarative theory of statehood followed under Continental European law, which holds that statehood rests on concrete facts and exists independent of recognition.[292]

6.2.2. Willingness to Follow the U.N. Charter

The second element of state succession on which the international community should insist is that the emerging state be willing to follow the terms of the U.N. Charter ("Charter"). Because the Charter came into existence only fifty years ago, none of the classic treatises on state succession and secession includes this provision. Nevertheless, the importance of this requirement has grown dramatically over the past half-century.

One commentator recently noted that four of the five conditions for admission of a state into U.N. membership outlined by the International Court of Justice ("I.C.J.") could be summed up as merely one requirement — that a prospective new state must agree to abide by the terms of the U.N. Charter.[293] The four conditions are that a state: (1) be peace loving; (2) accept the obligations of the Charter; (3) be able to abide by the Charter's provisions; and, (4) be willing to abide by the Charter's provisions.[294] These four conditions are logical. For example, a state cannot simultaneously accept the Charter's provisions and refuse to be peace loving, since such a position would be contrary to the Charter. Likewise, a state which is either unable or unwilling to carry out the Charter's provisions cannot "abide" by the Charter.

While the United Nations has admitted states that do not fully comply with the Charter or the traditional definition of state, the

---

[292] *See supra* Section 3.

[293] *See* Lloyd, *supra* note 25, at 770-71 (citing Conditions of Admission of a State to Membership in the United Nations 1947-1948 I.C.J. 57, at 62 (May 28, 1948) [hereinafter Conditions of Admission]).

[294] *See* Conditions of Admission, *supra* note 293, at 62. The fifth condition of the I.C.J. is that the entity in question have the traditional characteristics of a state.

Charter and its worthy requirements[295] have become universally accepted standards for U.N. membership. A state that violates these standards should, in principle, be denied admission to the United Nations.

A denial of membership in the United Nations is significant in countries following either the declarative or constitutive theories of state succession. Under international law, one state's recognition of another state will not make the new state internationally accepted, nor will one state's refusal to recognize another state keep the new state out of the international community.[296] Moreover, under the Charter, when the United Nations refuses to recognize a state created in violation of international law, its members are prohibited from recognizing that state.[297] Nonetheless, under international law, even unrecognized states must be accorded state treatment with respect to their territorial sovereignty and property, and their right to grant nationality to persons and vessels.[298]

The prohibition of recognition by the United Nations does not address situations in which one state recognizes another before the United Nations decides whether to recognize the potential new member. Such was the case when Germany and the United States recognized Croatia. In such situations, however, the United Nations can prevent an emerging state that was formed in violation of international law from receiving general recognition in the international community.

In this manner, membership in the United Nations is becoming equated with general international recognition. In addition, since membership is contingent on agreement to abide by the Charter, the growing importance of the Charter is clear. This requirement for recognizing a valid secession attempt, that the new nation demonstrate a willingness to follow the U.N. Charter, will further the goals of the Charter by encouraging groups contemplating secession to adopt the Charter's goals.

---

[295] The Charter requires, *inter alia*, U.N. members to work to maintain international peace and security, to uphold human rights of peoples, to uphold the right to self-determination, and to cooperate in solving economic, social, cultural, or humanitarian problems in the international community. *See* U.N. CHARTER art. 1.

[296] *See* Lloyd, *supra* note 25, at 767.

[297] *See id.*, at 767 & n.28.

[298] *See* RESTATEMENT, *supra* note 23, § 202(1) cmt. c.

6.2.3. Consent of the Sovereign

Some commentators and courts[299] have suggested that the requirements for internationally recognized statehood should contain only the first two criteria — being a "state" and exhibiting a willingness to follow the U.N. Charter. In instances where the former sovereign is a dissolved state, these two criteria should suffice. At other times, however, a third element must be included, particularly in state successions involving secession. This criterion, to be applied in cases of secession, would require that the sovereign's consent be obtained and its applicable laws be followed before the secessionist entity is recognized or aided.[300] The need for this element is based on respect for the sovereign and will encourage smooth and peaceful transitions.

At first glance, requiring the consent of the sovereign might seem stifling or unwise. Admittedly, it would make the presumption against secession much more difficult for emerging states to overcome. Perhaps, like the first two requirements, there will be, and at times should be, some exceptions where this third requirement is not fully met. Nevertheless, acquiring the consent and following the laws of the predecessor is critical to the development of an international objective standard for statehood that strives to avoid resolution through armed conflict.

6.3. Analysis of the Proposal

Respect for sovereignty rests at the core of these three criteria. The implementation of these criteria, particularly the third, would create a more orderly system for addressing secession crises. This system would assist in averting armed conflicts in cases of secession.

Not only should states be encouraged to follow these criteria, compliance with and violations of these criteria should also be subject to review by the U.N. Security Council and the I.C.J. The U.N. Charter states that the "Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide

---

[299] *See* Conditions of Admission, *supra* note 293.

[300] This factor should be distinguished from the third traditional element of a statehood, which requires a prospective state to have formed an effective government. *See* Montevideo Convention, *supra* note 288, art. 1, at 25.

what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[301] Determinations of the Security Council in this regard could be reviewed by the I.C.J. to insure conformity with that organ's authority under the Charter.[302] This constitutionalized system[303] of review would give the international community the option of imposing sanctions or taking other punitive actions to combat violations of international law. Such an enforcement system can be effective, as has been persuasively argued in the context of the *Lockerbie* decision.[304] While actions by third party states would not be mandatory — a member state might refuse to participate — when states choose to participate they could force violators of international law to pay a potentially heavy price for their actions. This system of review would also establish legal precedent which would contribute to more orderly transitions.

When a third party state either recognizes as legitimate or directly assists a secessionist movement, that third party necessarily creates a conflict with the former sovereign. Such actions directly challenge the former sovereign's rights by denying the former sovereign the rights to exercise jurisdiction in, to enter into international relations on behalf of, and to exact taxes from, a given territory.

This challenge to sovereignty will almost always result in the former sovereign attempting to reassert its challenged right militarily, resulting in violent conflict. In so doing, states would only be asserting their recognized rights under international law. One could only imagine the result of an I.C.J. decision had the former Yugoslavia approached the court in an action to secure its

---

[301] U.N. CHARTER art. 39.

[302] The "acts of the Security Council . . . can be reviewed for conformity with that organ's authority under the Charter, the United Nations' constitution, by the International Court, the judicial arm of the United Nations, at the instance of a state Member, i.e. a 'citizen' of the organization." Rubin, *Libya, Lockerbie and the Law*, 4 DIPLOMACY & STATECRAFT 1 (1993).

[303] *See* Matthias J. Herdegen, *The "Constitutionalization" of the UN Security System*, 27 VAND. J. TRANSNAT'L L. 135 (1994).

[304] *See generally*, Barbara Lorinser, BINDENDE RESOLUTIONEN DES SICHERHEITSRATES DER VEREINTEN NATIONEN ZUR FRIEDENSSICHERUNG UND DEREN ÜBERPRÜFUNG DURCH DEN INTERNATIONALEN GERICHTSHOF 174-84 (1995).

sovereign rights before the breakup of that state.

Even when motivated by good intentions, actions of third party states favoring secession movements are likely to cause serious loss of life and resources. To prevent such losses, members of the international community should await the consent of the sovereign and demand that the secessionist movement comply with the sovereign's laws before recognizing the secessionist movement. Legal precedence for such a rule already exists. The United Nations has indicated that one reason a secession attempt may be invalid is that the constitutional provisions of the sovereign member state in question were violated.[305]

Other criteria for recognition suggested by various legal scholars seem flawed and are likely to lead to inconsistent results. David Lloyd suggests that only the first two criteria should be met: (1) having the traditional characteristics of a state; and, (2) expressing the willingness to abide by the Charter.[306] These factors would suffice in some situations. For example, these factors would yield a proper result in Chechnya, where the secessionist movement arguably lacks an effective government. Chechnya's lack of a functional government therefore fails to meet the first criterion of having the traditional characteristics of a state.

Application of Lloyd's test to a potential secessionist movement in Taiwan, however, demonstrates that the first two factors without the third are insufficient. Taiwan has been attempting for decades to be admitted into the United Nations and to acquire the corresponding privileges and responsibilities of membership. Further, Taiwan currently has an effective government and its territory and population are reasonably well-defined. Admittedly, few countries now wish to enter into international relations with Taiwan for fear of incurring the wrath of The People's Republic of China ("China"), yet Taiwan's capacity for entering into international relations cannot be questioned. Much of the world is currently withholding recognition of Taiwan based on the third

---

[305] During Katanga's attempted secession from the Republic of the Congo in 1961, the Security Council adopted a resolution demanding an end to secessionist activities. The resolution was based in part on the assertion that such activities were contrary to the Congolese Constitution. *See* S.C. Res., U.N. SCOR, 16th Sess., 982d mtg., Supp. for Oct.-Dec. 1961, at 149, U.N. Doc. S/5002 (1961).

[306] *See* Lloyd, *supra* note 25.

factor, that mainland China, the practical "sovereign" in this context under a one-China policy, will not consent to independence for Taiwan. Recognition of Taiwan without China's consent would be seen by China, a world military power, as a threat to its sovereignty. This would likely precipitate a violent conflict. The reluctance exhibited by the international community regarding recognition of Taiwan would repeat itself in other cases where a powerful state's sovereignty is threatened.

For further illustration, compare the breakup of Yugoslavia to the secessions of the Baltic Republics in the former Soviet Union. The breakup of Yugoslavia represents the first time, outside of the colonial context, that widespread international state practice favored secession movements that were still engaged in armed struggles for independence.[307] International recognition preceded permission from the central Yugoslavian government, thereby arguably exacerbating the trend toward confrontation. In the Baltics, unlike the Balkans, the world wisely awaited the permission of the former sovereign, the Soviet government, before granting recognition to the Baltic Republics.[308] The secessions of Latvia, Lithuania, and Estonia went relatively smoothly.

The reason for the different approaches in the Baltics and Yugoslavia lies more in the respective power of the threatened sovereigns than in their human rights abuses.[309] Recognizing the Baltic Republics before Moscow agreed to their independence probably would have been viewed by the Soviet Union as an attack on its sovereignty. The international community was unwilling to risk such provocation. In the other situation, provocation of Belgrade seemed less risky, and recognition was in the West's interest because it would assist the dismantling of the communist world. If human rights abuses and not the power of the sovereign were the key factor, the Baltic Republics would have been recognized before Moscow agreed to their independence. Indeed, even as reprehensible as Serbian atrocities were, one wonders if they exceeded the Soviet atrocities committed under Joseph Stalin. Recognizing the secessionist entities of the then-existing Yugoslavia before the consent of the sovereign or the legal dissolution of Yugoslavia was an international mistake.

---

[307] *See* Eastwood, *supra* note 238, at 322.

[308] *See id.* at 321.

[309] *See generally id.* at 316-29.

If the international community wants objective legal criteria to determine the validity of secessionist movements, the criteria will have to apply equally to both powerful and weak states. Eastwood's criteria seem to miss this mark. Arguably, certain ethnic pockets in eastern Russia could meet his standards of having the majority of a population in a given area, suffering oppression at the hands of the parent state, and having a historical claim to the territory in which they live. Yet few would agree that these ethnic groups could validly secede from Russia. Eastwood also suggests that affirmative duties should be placed on third party states once a claim for secession is deemed to be valid. To require a third party state under international law to take affirmative steps against a powerful parent state resisting a secession movement, as was the case with the former Soviet Republics against Russia, could be dangerously destabilizing. The subjectivity of Eastwood's criteria — suffering oppression and having an historical claim — only exacerbates the problem.

The criteria for a valid state secession need to be clear, and should avoid subjectivity where possible. "Suffering oppression" is difficult to define, especially in countries such as China which reject the applicability of what they view as "western" human rights standards. What might be considered unacceptable oppression in the West might be seen as legitimate state action in China.

There should not be a distinction in the application of secessionist criteria to democratic and non-democratic countries. There is support for the proposition that in properly functioning democratic countries both sides in a secessionist conflict should agree to a split before a secession would be deemed valid.[310] The same should be required in non-democratic states. A distinction that would somehow validate secession movements in non-democratic states where the government in question was guilty of "oppression," for example, would have little effect. These non-democratic countries are probably the most likely places in which oppression will occur, and yet they are the countries least likely to accept an international decree condemning oppression and recognizing a valid secession movement therein.

In sum, absent gross violations of human rights, the interna-

---

[310] *See* Thomas Christiano, *Secession, Democracy and Distributive Justice*, 37 ARIZ. L. REV. 65, 70 (1995) (citing the Quebec example in Canada).

tional community should not concern itself with the reasons for a secessionist movement. Of course, the international community should oppose such oppressive actions by more traditional methods of international diplomacy. But such distinctions are difficult to objectify and are also subject to abuse.[311]

In addition to criteria addressing oppression and economic redistribution, criteria which would make a right to secession contingent on a people's racial, religious, or cultural minority status are also undesirable. Such characteristics should not be the basis for a legal right. Consider, hypothetically, Canada after a secession of Quebec: would it be fair to deny other provinces the opportunity afforded Quebec on the basis that they do not speak French or have an independent culture? If Quebec's reasons for secession were valid and other provinces' reasons were not, then what rule should be applied to analyze the distinction? Would Quebec's move toward independence have been more valid than the eighteenth-century movement for independence in America because the latter lacked the compelling ethnic or cultural flavor of the former? Indeed, it could be argued that the desire for cultural independence or purity is nearly as suspect as the desire for ethnic independence or purity.

Those who have suggested permitting race-based secessions believe they could be controlled "so long as [their] exclusionary principles do not depend on any perceived inferiority of the excluded populations."[312] Regrettably, this type of condition would cause all secessionist movements to adopt a platform denying that their movement was based on the perceived inferiority of other populations. While the Quebec example alone does not seem particularly threatening in this regard, any path toward a right of secession based on racial, religious, or cultural factors is simply too dangerous to consider taking. Secession movements

---

[311] For example, it is difficult to determine when the tax schemes of a federal authority surpass valid economic redistribution of state assets and become discriminatory distribution. Legal scholars who have noted the role of such economic factors in secession movements have disagreed regarding the extent of permissible redistribution. For a discussion on the proper limits of government wealth redistribution programs in the context of state secession, compare *id.* with Allen Buchanan, *Federalism, Secession, and the Morality of Inclusion*, 37 ARIZ. L. REV. 53 (1995).

[312] *See* Erik M. Jensen, *American Indian Tribes and Secession*, 29 TULSA L.J. 385, 394 (1993-94). Even Jensen admits that he is "uncomfortable" with a system of states based on racial or cultural lines. *Id.*

with a particular ethnic influence, however, may not necessarily be invalid. Their character should be judged within the affected state independent of ethnicity. Generally, the international community should not get involved in judging the relative worthiness of the reasons for secessionist movements except for instances involving clear violations of international law.

Although Quebec's secession attempt in October 1995 fell short of success, the process followed by Canada's federal government and Quebec's provincial government is nonetheless praiseworthy. The rule of law and the rule of the majority worked together to make the process run smoothly. The secession movement of the Baltic Republics stands with the Quebec movement as examples of the successful resolution of secession crises. In both cases, sovereignty was respected rather than threatened, and violence was averted. Similarly, although not an actual secession,[313] the Czechoslovakian dissolution was successful because sovereignty was not threatened. The successors emerged after the predecessor ceased to exist. In this way, voluntary dissolutions contemplating the formation of successor states are analogous to valid secessions.

Implementation of the three proposed criteria will discourage the use of force and violence to resolve the almost unavoidable conflict that develops when sovereignty is challenged. Admittedly, the third criterion will have a chilling effect on the number of valid secession movements, since most states are unlikely to sanction their own dismantling. The examples of Quebec, the Baltics, and Czechoslovakia, however, demonstrate that respecting sovereignty will not be a death knell to secession efforts.

Another concern is that when federalism is seen merely as the first step on a path towards secession, central governments will be less likely to experiment with federalism.[314] Strengthening sovereign rights will encourage experiments in federalism because central governments will be more likely to share powers with local governments. With the threat of secession less likely, especially where a valid secession would ultimately depend on the central governments' consent and not merely a majority vote in

---

[313] In practical terms, there would have been little difference in the Czechoslovakian split had the Czech portion allowed the Slovak portion to secede, as opposed to the dissolution option the two portions actually exercised.

[314] *See generally* Buchanan, *supra* note 311, at 56-57.

local plebiscites, governments will be more likely to allow experiments in federalism and limited self-determination. Such a redistribution of power will meet many of the demands of secessionist movements.

Admittedly, the three proposed criteria will not be a panacea, and there will be negative aspects to their implementation. When governments engage in oppressive policies, international efforts at change should focus on influencing the offending government rather than on the more dangerous path of recognizing a new one. Additionally, there will be exceptional situations where a secession movement will achieve success without the sovereign's permission, just as entities have achieved recognition of statehood without fully meeting the first or second criteria. The first situation is the pure power example, where an entity has the will and the power to achieve independence on its own, without international assistance. Abraham Lincoln's thoughts on the formation of new states are as accurate today as they were almost 150 years ago.[315] A people so inclined and having the power effectively do have the right or, at least, the ability to form their own government. One may wonder what good is a right whose validity is measured by the power one possesses to enforce it, but the international community is likely to continue to recognize secession movements that successfully establish new states.[316] Since such movements are likely borne out of bloodshed, the international community and its members should not encourage them except in situations involving the most egregious violations of international law or where a state legally fails[317] and the defunct state's acquiescence to a secession movement is therefore meaningless.

In sum, with respect to secession movements, the international community should apply the following three criteria: (1) that secessionist movements have the traditional characteristics of a state; (2) that they agree to follow the U.N. Charter; and, (3) that they follow the laws and obtain the consent of the sovereign. Implementation of these criteria will objectify the process,

---

[315] *See supra* note 1 and accompanying text.

[316] *See* Eastwood, *supra* note 238, at 313.

[317] *See generally* Matthias Herdegen, *Der Wegfall effektiver Staatsgewalt im Völkerrecht: "The Failed State"*, in BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT, 49 (Daniel Thürer et al. eds., 1996).

encourage limited self-determination through experiments in federalism, and discourage armed conflict.

7. CONCLUSION

International practice on questions of succession and secession continues to be based less on legal principles than on the will of powerful states. In the past, blood and iron — in actual or threatened use — have been the tools used to solve international disputes and direct policy. Today, the tools are blood, iron, and capital. Fortunately, capital is expanding in influence at the expense of blood and iron. While the tools have changed, the craftsmen have not. They remain the states capable of exerting international political influence. Yet, while influence can be beneficial to states, so too can the consistency provided by a rule of law.

Developing the rule of law for issues of state succession is particularly difficult. The dynamics surrounding state succession are multi-faceted indeed. Recognition is often the key issue. Under the constitutive theory of state succession followed by the United States, recognition of a new state effectively determines its rights and duties. It affects an emerging state's right to its predecessor's property and its right to be heard in courts within the United States. While a state seeks recognition, it also seeks admission to the United Nations and other international organizations such as the IMF and the World Bank. Issues relating to debt, property rights, human rights, and treaty responsibilities all influence succession questions.

Conflicts are inevitable — between the rights of established and potential sovereigns and between international creditors, the predecessor state, and the emerging state. The conflicts will concern property rights, both public and private, under the laws of the predecessor and successor, as well as conflicts among predecessors, successors, and the international organizations that hold highly sought after memberships.

The goal of international law must be to develop systems and practices which serve to resolve these inevitable conflicts as fairly and objectively as possible. The more international law reflects objective rather than subjective criteria for conflict resolution, the less volatile the conflicts will be. Objective criteria applied to questions of state succession will be crucial in this regard. States will likely continue to address these issues through their political

branches of government. Therefore, the process will remain partly political. Nonetheless, those governments must endeavor to move toward more objective criteria.