

# THE APPLICATION OF THE INTERNATIONAL LAW OF STATE SUCCESSION TO THE UNITED STATES: A REASSESSMENT OF THE TREATY BETWEEN THE REPUBLIC OF TEXAS AND THE CHEROKEE INDIANS

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*Perhaps no event in the modern era has been more profoundly consequential than the European “discovery” of the Americas. . . . Over a succession of generations, Europeans devised rules intended to justify the dispossession and subjugation of the native peoples. . . . Of these rules, the most fundamental were those governing the ownership of land.<sup>1</sup>*

## INTRODUCTION

In the eighteenth and early nineteenth centuries, long before the end of slavery, many American Indians (Indians) lost vast land holdings on the eastern coast of the United States.<sup>2</sup> For instance, consider the removal of the so-called “Five Civilized Tribes”—the Cherokee, Choctaw, Seminole, Chickasaw, and Muscogee—from the southeastern United States.<sup>3</sup> Professor Robert Clinton has analogized the removal of these indigenous peoples to the Nazi relocation of Jewish populations from all over Europe.<sup>4</sup> This analogy is appropriate, not only because the Indians lost their real and personal property, but also because many of them lost their lives. For example, an estimated four thousand Cherokees died from hunger,

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1. LINDSAY G. ROBERTSON, *CONQUEST BY LAW* ix (2005).
2. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 83 (1993).
3. *Id.*
4. *Id.*

exposure, and disease in the well known “Trail of Tears,” when President Andrew Jackson defied the Supreme Court and forced Cherokees to relocate to Indian Territory.<sup>5</sup> Such egregious acts of territorial expropriation did not cease in the nineteenth century, but have continued into the modern era. Tribes such as the Cayuga and Oneida of New York, and the Passamaquoddy and Penobscot of Maine have lost significant tribal land holdings in contemporary times.<sup>6</sup> In numerous cases, these property losses occurred via the unilateral acts of state governments, and often violated treaties that date back to the colonial period.<sup>7</sup> As a result, a plethora of Indian land claims have surfaced in recent decades, as Indians are granted standing to redress these wrongs.<sup>8</sup>

Yet, not all Indian land losses have achieved the notoriety of the removal of the Five Civilized Tribes. For instance, long before the Trail of Tears—in the year 1775—Judge Richard Henderson negotiated the “Transylvania purchase,” which illegally deprived the Cherokees of a substantial amount of land in what is now Kentucky.<sup>9</sup> Although the state of Virginia eventually recognized the sale of this land was void under its preemption law, it did not return the land to the Cherokees; the state retained the land and retroactively designated Judge Henderson as the “state’s purchasing agent.”<sup>10</sup> This example is but one of many historical instances in which individual tribes were wrongfully dispossessed of their lands. Today, many of these same tribes dwindle on the edge of extinction—lacking federal or state recognition—as they struggle to maintain a cultural identity. One such tribe that repeatedly attempted to reclaim its lands and heritage is the Tsalagiya Nvdagi (translated as “Cherokee in Texas”),<sup>11</sup> which settled in Texas territory around 1820.<sup>12</sup>

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5. Cherokee Nation, *A Brief History of the Trail of Tears*, <http://www.cherokee.org/home.aspx?section=culture&culture=culinfo&cat=R2OKZVC/B7c=&ID=aZ38KzfgbsI=> (last visited Jan. 23, 2006). For those interested in exploring the illegal nature of the Cherokees’ forced removal, see *Worcester v. Georgia*, 31 U.S. 515, 596 (1832) (the U.S. Supreme Court held that the removal of the Cherokees to Indian Territory was unconstitutional).

6. Clinton, *supra* note 2, at 83.

7. *Id.*

8. *Id.* at 84.

9. ROBERTSON, *supra* note 1, at 14-15.

10. *Id.* at 15.

11. D. L. Utsidihi Hicks et al., *History of the Tsalagiya Nvdagi*, TSALAGIYA NVDAGI: CHEROKEE IN TEXAS, <http://www.texascherokees.org/history.html> (last visited Jan. 23, 2006); see also Carol A. Lipscomb, *Cherokee Indians*, in THE HANDBOOK OF TEXAS ONLINE, <http://www.tsha.utexas.edu/handbook/online/articles/CC/bmc51.html> (last visited Oct. 8, 2006).

12. See MARY WHATLEY CLARKE, CHIEF BOWLES AND THE TEXAS CHEROKEES 3 (1971).

The Texas Cherokees (Cherokees or Tribe) spent nearly two decades living at peace in the region, under both the governments of Mexico and the Republic of Texas, before being driven from their homes and land by force in 1839, and losing their leadership in the process.<sup>13</sup> Over the next century and beyond, the Cherokees unsuccessfully tried to reorganize as a tribal entity and promulgate legal claims for their expropriated land.<sup>14</sup> Regrettably, their pursuits were unsuccessful. Nevertheless, the Cherokees remained unwavering in their quest to regain tribal sovereignty, and in August of 1993, a group met to reinstate the Tribe.<sup>15</sup> In the words of the elected Chief D.L. Utsidihi Hicks: “We who have come together to reinstate our tribe are very proud people. We will last as long as there is a drop of Ani-Tsalagi [Cherokee] blood left among us.”<sup>16</sup> Without question, the Cherokees had a right to reconstitute their tribe for cultural preservation, but the question remains as to whether the Cherokees have a viable legal claim to the expropriated territory.

To address this question, the following analysis considers whether the Cherokees had a valid and binding treaty that was negotiated with the Republic of Texas in 1836,<sup>17</sup> and if so, whether the U.S. government violated international principles of state succession when it annexed the Republic of Texas in 1845 and failed to act as a successor-in-interest to this treaty obligation. In order to properly evaluate this two-part claim, this Article will proceed through five Parts. In Part I, the Article summarizes the history of the Cherokees in Texas, including their migration to the territory, the Tribe’s permanent settlement, and their execution of a land treaty with the Republic of Texas, which was allegedly breached (spurring the Cherokee War). Next, Part II analyzes the validity of the Cherokees’ treaty under both domestic and international law. In Part III, the analysis discusses the United States’ annexation of the Republic of Texas in 1845 and evaluates whether the United States had an obligation to succeed to the treaty under international principles of

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13. See *infra* Part I.

14. See CLARKE, *supra* note 12, at 121-25.

15. Hicks, *supra* note 11.

16. Tsalagiyi Nvdagi: Cherokee in Texas, <http://www.texascherokees.org> (last visited Jan. 23, 2006). The reader should note that the Cherokees led by Chief D.L. Utsidihi Hicks are not the only Cherokee band in Texas. In fact, there are several other groups that claim Cherokee heritage. Notwithstanding, the Hicks’ band appears to be the largest and best organized group in the state.

17. DIANNA EVERETT, *THE TEXAS CHEROKEES: A PEOPLE BETWEEN TWO FIRES, 1819-1840*, 71 (1990).

state succession. Next, Part IV considers whether the Cherokees' inchoate right to the land that they inhabited matured into perfect title, and if so, whether the Tribe should have been able to pursue a claim of title to the land under the doctrine of adverse possession. Finally, Part V explores the continued failure of the United States to acknowledge the Cherokees' claim and considers if this stance offends international sentiments on the treatment of indigenous peoples. The Conclusion then sums up the Article's findings, shortcomings, and implications, and offers potential solutions to the present-day Cherokees.

## I. AN ABRIDGED HISTORY OF THE TEXAS CHEROKEES

A comprehensive account of the Cherokee migration to Texas, and the subsequent events that transpired, is beyond the scope of this Article. Nevertheless, an abbreviated historical account is required in order to place the legal issues that are at the crux of this analysis in the proper context, especially for those who are unfamiliar with Texas history. This summary does not purport to do justice to the struggles faced by the Cherokees and other affiliated tribes during this turbulent historical period. Instead, it serves only to provide the nescient student of Texas history with helpful background on the allegedly broken Cherokee treaty.<sup>18</sup>

The Cherokees<sup>19</sup> call themselves the Ani-Yunwiya, which means "principal people."<sup>20</sup> Indeed, the Cherokees were arguably worthy of this title as one of the principal tribal nations in the southeastern United States before their nineteenth century removal<sup>21</sup>: they occupied parts of Alabama, Georgia, North and South Carolina, Tennessee, and Virginia.<sup>22</sup> When the first white men ventured into Cherokee territory in the sixteenth century, the Cherokees had approximately sixty-four towns and villages, roughly six thousand

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18. For a contemporary historical account of the Texas Cherokees, see *id.* For additional accounts, see CLARKE, *supra* note 12; Hicks et al., *supra* note 11; Lipscomb, *supra* note 11. For one of the earliest historical accounts of the Texas Cherokees, see EMMET STARR, HISTORY OF THE CHEROKEE INDIANS 187-224 (Jack Gregory and Rennard Strickland eds., Indian Heritage Ass'n 1967) (1921).

19. The word Cherokee is derived from two words: a-che-la, meaning "fire," and ah-gi, meaning "he takes." CLARKE, *supra* note 12, at 4 (citing Albert Woldert, *The Last of the Cherokees in Texas, and The Life and Death of Chief Bowles*, in 1 CHRONICLES OF OKLAHOMA, NO. 2, at 179-226 (1921-1923)).

20. EVERETT, *supra* note 17, at 4.

21. *Id.*

22. CLARKE, *supra* note 12, at 4.

warriors,<sup>23</sup> and numbered around sixteen thousand people.<sup>24</sup> Over the next two centuries, economic expansionism and colonization in North America put tremendous pressure on the Cherokees, as well as all native peoples, in the areas of trade, military alliances, and territorial concessions.<sup>25</sup> Notwithstanding, the Cherokees proved to be an adaptive tribe: new and useful material objects, new people, and even new ideas were adapted to fit Cherokee ways.<sup>26</sup>

As European empire building continued during the eighteenth century, wars, epidemics, and food shortages plagued the Cherokees and resulted in a chronically shrinking population and territory.<sup>27</sup> These issues arose as the tribe was fractionalized, which meant the Cherokees could not produce a united front before their enemies.<sup>28</sup> Thus, by 1791, the Cherokees were defeated militarily, and had negotiated a treaty with the nascent U.S. government in which the United States stated its intention to “civilize” the Tribe.<sup>29</sup> After 1794, Indian agents also coaxed many Cherokees into farming for their livelihoods, which further dislocated the Cherokee community, both socially and culturally.<sup>30</sup> From this period through 1810, continuing pressure for social change, along with concomitant pressure from the United States for additional land cessions, prompted the development of more significant factions within the Tribe.<sup>31</sup> As a result, many Cherokees decided to cross the Mississippi River to preserve what remained of their traditional culture and way of life.<sup>32</sup>

One departing sect, headed by Chief John Bowles<sup>33</sup> (also known as “Duwali” and “Bold Hunter”<sup>34</sup>), decided to make its home in the valley of the St. Francis River, which was in the French territory of

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23. *Id.*

24. EVERETT, *supra* note 17, at 5.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 5-6.

29. *Id.* at 6. The agreement negotiated with the Cherokees—the Treaty of Holston (1791)—was meant to create a perpetual peace and friendship between the United States and the Cherokee Nation. See Treaty of Holston, U.S.-Cherokee Nation, pmbll., July 2, 1791, 7 Stat. 39, reprinted in 2 INDIAN AFFAIRS: LAWS AND TREATIES 29 (Charles J. Kappler ed., 1904).

30. EVERETT, *supra* note 17, at 6.

31. *Id.* at 9.

32. *Id.*

33. CLARKE, *supra* note 12, at 8.

34. EVERETT, *supra* note 17, at 10.

Missouri<sup>35</sup> (present-day Missouri and Arkansas<sup>36</sup>). Bowles was joined by another headman, Saulowee (also known as “Tsulawi” or “Fox”), and later by another prominent chief, Talontuskee.<sup>37</sup> In 1811, a great earthquake struck this fertile region, and Chief Bowles moved his people out of the valley and further into Arkansas territory.<sup>38</sup> Bowles’ new settlement was at the mouth of Petit Jean Creek, an area about four miles from the Arkansas River, near the present-day city of Perryville, Arkansas.<sup>39</sup> Because this territory was virgin hunting ground and free of white settlers, other Cherokees soon joined them.<sup>40</sup> In fact, by 1813, perhaps one-third of the “Eastern” Cherokees were living west of the Mississippi.<sup>41</sup> Unfortunately, these new “Western” Cherokees would face the arrival of white settlers in a few short years.<sup>42</sup> Furthermore, when the United States ceded land to the Cherokee Nation of Arkansas in 1819, Chief Bowles’ village was in an area that was not included in the land cession and he and his people were forced to move once again.<sup>43</sup>

Many Cherokees, Delawares, Creeks, and Choctaws had settled in a region called “Lost Prairie,”<sup>44</sup> which was an area about twenty miles east of present-day Texarkana, Arkansas.<sup>45</sup> Chief Bowles and his tribe probably joined these Indians briefly after leaving Arkansas,<sup>46</sup> while Bowles’ eventual move into Texas was likely preceded by “hunting sojourns to the buffalo prairie of the Brazos River region.”<sup>47</sup> In short, Bowles liked what he saw in this new country, and he believed that the Cherokees “could live in peace under the Spanish government in Texas,” as they had done under the

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35. CLARKE, *supra* note 12, at 11-12. Chief Bowles was involved in an altercation with white settlers where many were killed, though it was not clear he was at fault. *Id.* at 9-12. Nonetheless, because the Cherokee were at peace with the U.S. government, he fell into disfavor with many of the Cherokee Nation. *Id.* at 11. By fleeing into French territory, Bowles felt that he and his followers would be safe. *Id.* at 11-12.

36. EVERETT, *supra* note 17, at 10.

37. *Id.* at 10-11.

38. CLARKE, *supra* note 12, at 13.

39. *Id.*

40. *See* EVERETT, *supra* note 17, at 13.

41. CLARKE, *supra* note 12, at 13.

42. *See* EVERETT, *supra* note 17, at 17.

43. CLARKE, *supra* note 12, at 13.

44. *Id.* at 14.

45. *Id.* (citing Woldert, *supra* note 19, at 190).

46. *Id.*

47. STANLEY W. HOIG, *THE CHEROKEES AND THEIR CHIEFS* 177 (1998).

French government in Missouri.<sup>48</sup> Hence, during the winter of 1819-20,<sup>49</sup> Bowles relocated about one hundred warriors and two hundred women and children to an area known as “Three Forks of the Trinity,” which is within the city limits of modern-day Dallas.<sup>50</sup> Regrettably, Bowles and his people were forced to abandon the settlement following a number of conflicts with the Prairie Tribes, in which the Cherokees suffered heavy casualties.<sup>51</sup> Bowles retreated to the dense forests of East Texas and established a new village near Nacogdoches.<sup>52</sup> Over time, Chief Bowles’s people were joined by other displaced Cherokee bands, and they linked up with other refugee Indians to form a “loose confederacy”; these Indians included the Biloxis, Shawnees, Delawares, Kickapoos, Choctaws, Alabamas, and Coushattas.<sup>53</sup> However, the “Cherokees were the largest and most important band,” and Chief Bowles was regarded as the chief of them all.<sup>54</sup>

Yet Bowles did not remain chief in Texas for long, as he was soon replaced by Richard Fields, an educated man of mixed blood.<sup>55</sup> There is no consensus as to why Bowles was replaced by Fields, but it is possible that the Cherokees believed Fields would be better able to negotiate rights to Texas land from the Mexican government.<sup>56</sup> In 1822, the Cherokees met with the provincial governor in San Antonio, and entered into a treaty whereby the Cherokees agreed to subject themselves to Spanish laws as citizens, and “[i]n return they were granted the right to [peacefully] reside in Texas.”<sup>57</sup> Regrettably, the provincial governor did not have the right to make land grants.<sup>58</sup> Instead, he issued Fields, Bowles, and several other companions a

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48. CLARKE, *supra* note 12, at 14.

49. *Id.*

50. HOIG, *supra* note 47.

51. *Id.* For further reading on the Prairie Tribes, see AKE HULTKRANTZ, PRAIRIE AND PLAINS INDIANS (1997), as well as MICHAEL JOHNSON, NATIVE TRIBES OF THE PLAINS AND PRAIRIE (2004).

52. HOIG, *supra* note 47, at 177 (citing Woldert, *supra* note 19, at 190).

53. CLARKE, *supra* note 12, at 17 (citing James Mooney, *Myths of the Cherokee*, NINETEENTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY, Pt. I, 141 (1900)).

54. *Id.*

55. CLARKE, *supra* note 12, at 18 (citing Dorman H. Winfrey, *Chief Bowles of the Texas Cherokee*, 32 CHRONICLES OF OKLAHOMA, NO. 1, at 31 (1954)). Notably, Chief Bowles was also a mixed-blood Indian; he was rumored to be half-Scottish. *Id.* at 7-8.

56. HOIG, *supra* note 47, at 178.

57. *Id.*

58. *Id.*

permit to travel to Mexico City to seek a colonial land grant from the Mexican government.<sup>59</sup>

The Cherokees' trip to Mexico City took place at an inopportune time, as a revolution and change in the leadership of Mexico occurred during the spring of 1823.<sup>60</sup> Thus, despite having been promised a grant of land, "the Mexican colonization laws that were passed in 1824 and 1825 failed to include the Cherokees."<sup>61</sup> Rather, the land the Cherokees claimed was granted to a "disgruntled" American colonist who was in the process of inspiring a revolution against the government of Mexico.<sup>62</sup> Chief Fields was angry at the turn of events, and he threatened to join the Comanches and other tribes in North Texas resisting Mexican control.<sup>63</sup>

In 1825, John Dunn Hunter—a writer who had much experience chronicling the western Indians—arrived at the Cherokees' village.<sup>64</sup> Hunter was keenly interested in Indian affairs, and whatever his true intentions were in coming to Texas, he was well-liked by Chief Fields. Fields, in fact, commissioned Hunter to travel to Mexico City in another effort to secure Cherokee title to Texas land.<sup>65</sup> The trip was unsuccessful, and upon his return, Hunter convinced the Cherokees that the Mexican government had contempt for them.<sup>66</sup> Though the Cherokees were ready to go to war, Hunter convinced the Tribe to instead join a rebellion incited by Hayden Edwards,<sup>67</sup> a man that had been granted a contract by the Mexican government to settle families in Texas.<sup>68</sup> Joining Edwards's short-lived independence surge—which became known as the "Fredonian Rebellion"—proved to be a deleterious move for Hunter and Fields because the Mexican army, joined by a Texas militia commanded by Stephen F. Austin, moved to

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59. EVERETT, *supra* note 17, at 27.

60. HOIG, *supra* note 47, at 178. For further reading on the history of Mexico, see THE OXFORD HISTORY OF MEXICO (Michael C. Meyer & William H. Beezley eds., 2000).

61. HOIG, *supra* note 47, at 179.

62. *Id.*

63. *See id.*

64. CLARKE, *supra* note 12, at 30.

65. HOIG, *supra* note 47, at 180.

66. *Id.*

67. *Id.*

68. *See* CLARKE, *supra* note 12, at 37 (citing EUGENE C. BARKER, LIFE OF STEPHEN F. AUSTIN, FOUNDER OF TEXAS, 1793-1836: A CHAPTER IN THE WESTWARD MOVEMENT OF THE ANGLO-AMERICAN PEOPLE, 148-50 (1925)). *See also* Archie P. McDonald, *Fredonian Rebellion*, in THE HANDBOOK OF TEXAS ONLINE, <http://www.tsha.utexas.edu/handbook/online/articles/FF/jcf1.html> (last visited Oct. 8, 2006).



crush the uprising.<sup>69</sup> Edwards and his coterie fled to the safety of Louisiana, and both Fields and Hunter were assassinated.<sup>70</sup> The Cherokee council had ordered the men to be executed for violating the community interest to benefit an enemy, which was a decision not only consistent with tribal law, but also showed the Mexican government that this momentary intransigency was not a disloyal act by the Cherokees.<sup>71</sup> The strategy proved successful: the Mexican government commended Bowles and Gatunwali (also known as “Big Mush”) for their prompt action in the affair.<sup>72</sup> In fact, “[t]he Texas governor ordered the military command to issue a title for a Cherokee land grant,” but “[b]efore this could be done, unfortunately, the governor died and the military command was changed.”<sup>73</sup>

Bowles resumed his post as head of the Cherokee people, and he persevered in his efforts to secure title to land.<sup>74</sup> In the summer of 1833, Bowles guided a party of Cherokees to Saltillo—the capital of Texas—where he was assured that the land issue would soon be resolved.<sup>75</sup> Eventually, the government offered the Cherokees land through a resolution, but rather than granting them title to the land in East Texas that the tribe occupied, the land offered was farther north, and was selected strategically to defend Texas against the Comanches.<sup>76</sup> Understandably, the Cherokees rejected the land grant.<sup>77</sup> Moreover, by 1835 Texas was in “a state of confusion and uncertainty,”<sup>78</sup> where “[t]alk of revolution was on every tongue.”<sup>79</sup> In short, “a new player” had arrived to take part in the impending Texas revolution: Sam Houston, who was a close friend of Chief Bowles.<sup>80</sup>

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69. CLARKE, *supra* note 12, at 180-81.

70. *Id.* at 181.

71. EVERETT, *supra* note 17, at 47.

72. *Id.*

73. HOIG, *supra* note 47, at 183.

74. *Id.*

75. *Id.*

76. EVERETT, *supra* note 17, at 69.

77. *See* HOIG, *supra* note 47, at 183.

78. *Id.*

79. CLARKE, *supra* note 12, at 57.

80. HOIG, *supra* note 47, at 183. In fact, Sam Houston and Chief Bowles had formerly lived within seven miles of one another in Tennessee. *Id.*

Houston had Indian roots, and was sympathetic to the plight of the Cherokees.<sup>81</sup>

In November of 1835, delegates convened at San Felipe de Austin to establish a provisional government for those seeking independence in Texas.<sup>82</sup> This convention—referred to as the “Consultation”—drafted the “Plan and Powers of the Provisional Government of Texas” (Plan and Powers), which created the positions of Governor, Lieutenant Governor, and General Council, established a judiciary, and spelled out the powers of the provisional government.<sup>83</sup> After completing the Plan and Powers, a resolution known as the “Solemn Declaration” was issued on November 13, and it was unanimously adopted by the fifty-four members of the Consultation.<sup>84</sup> The parts pertinent for the Cherokees read as follows:

Be it solemnly decreed . . . [t]hat the Cherokee Indians, and their associate bands, . . . have derived their just claims to lands . . . from the government of Mexico, from whom we have also derived our rights . . . .

We solemnly declare, that the boundaries of the claims . . . to the land is as follows, to wit: lying north of the San Antonio road and the Neches, and west of the Angelina and Sabine Rivers.

We solemnly declare, that the governor and the general council, immediately on its organization, shall appoint commissioners to treat with the said Indians, to establish the definite boundary of their territory, and secure their confidence and friendship.

We solemnly declare, that we will guarantee them the peaceful enjoyment of their rights to the lands, as we do our own.<sup>85</sup>

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81. CLARKE, *supra* note 12, at 57. Sam Houston was made a citizen of the Cherokee Nation of Arkansas in 1829. *Id.*

82. HOIG, *supra* note 47, at 184. In order to better comprehend the governmental structure of the Republic of Texas during its bid for independence, one can view Texas as having proceeded through four governments: an initial Permanent Council, a Consultation, a Provisional Government and General Council, and the Constitutional Convention of 1836. See John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH L. REV. 1089, 1119 (1995). It is not possible to address each stage individually in this concise historical summary, but the reader is invited to explore this topic further.

83. See JOURNALS OF THE CONSULTATION HELD AT SAN FELIPE DE AUSTIN, OCTOBER 16, 1835 (1838), reprinted in 1 GAMMEL'S THE LAW OF TEXAS 505 (George P. Findlay & D. E. Simmons eds., 1906) [hereinafter JOURNALS]. See also Plan and Powers of the Provisional Government of Texas, reprinted in 1 GAMMEL'S THE LAW OF TEXAS, *supra*, at 908, available at <http://tarlton.law.utexas.edu/constitutions/text/1836ppindex.html> [hereinafter Plan and Powers]. For a comprehensive account of the early judiciary's composition in the Republic of Texas and thereafter, see James W. Paulsen, *The Judges of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 305 (1986).

84. CLARKE, *supra* note 12, at 60-61. See also JOURNALS, *supra* note 83, at 546.

85. JOURNALS, *supra* note 83, at 546.

Houston, the newly elected commander-in-chief of the Texas army, supported the resolution and was thrilled after it was unanimously approved.<sup>86</sup>

Later that month, Houston and two other emissaries began negotiating a treaty with the Cherokees.<sup>87</sup> The agreement—known as the “Treaty between Texas Commissioners and the Cherokee Indians” (Treaty)—was the first pact negotiated by the nascent Texas government, and was signed on February 23, 1836.<sup>88</sup> Houston and Colonel John Forbes signed for the Texas government, and Chief Bowles, Big Mush, and six others signed for the Cherokees, Shawnees, Delawares, Kickapoos, Quapaws, Bulloies, Iowanes, Alabamas, Coushattas, Caddoes of Neches, Tamocuttakes, and Untanguous.<sup>89</sup> The Treaty specified lands to be allocated and settled by the Indians, which they agreed to locate within, and also established a lasting peace between the Texas government and the signatory tribes.<sup>90</sup> On February 29, Houston transmitted the Treaty to Texas Governor Henry Smith for presentation to the Consultation.<sup>91</sup> Unfortunately, no formal ratifying action was taken on the Treaty during this turbulent period,<sup>92</sup> as the Texans were in the midst of

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86. CLARKE, *supra* note 12, at 61.

87. EVERETT, *supra* note 17, at 70.

88. See CLARKE, *supra* note 12, at 63.

89. *Id.*

90. Treaty between Texas Commissioners and the Cherokee Indians arts. I-II, Rep. of Tex.-Cherokees, Feb. 23, 1836, *reprinted in* 1 GAMMEL’S THE LAW OF TEXAS, *supra* note 83, at 204, *available at* <http://www.tsl.state.tx.us/treasures/giants/cherokee-1.html> [hereinafter Treaty]. Article II of the Treaty delimited the boundaries of the Cherokee lands as follows:

It is agreed and declared that the before named Tribes, or Bands shall form one community, and that they shall have and possess the lands, within the following bounds. Towit,—laying West of the San Antonio road, and beginning on the West, at the point where the said road crosses the River Angeline, and running up said river, until it reaches the mouth of the first large creek, (below the great Shawanee Village) emptying into the said River from the north east, thence running with said creek, to its main source, and from thence, a due north line to the Sabine River, and with said river west—then starting where the San Antonio road crosses the Angeline river, and with the said road to the point where it crosses the Naches river and thence running up the east side of said river, in a North West direction.

*Id.*

91. EVERETT, *supra* note 17, at 73.

92. *Id.* at 73-74 (explaining that the Consultation did not consider the Treaty); *id.* at 75 (explaining that the Constitutional Convention of 1836 did not take action to ratify the Treaty). The historian Emmet Starr offers an alternative view to Everett. More particularly, Starr explains that the Treaty was delivered to the Republic of Texas provisional government, as per instructions, on February 29, 1836; the documents were subsequently surrendered to the Constitutional Convention on March 11. STARR, *supra* note 18, at 210. If the government did not approve of the Treaty, which was the purpose of the Consultation, there appears to be no

drafting the “Texas Declaration of Independence,” which was completed on March 2, 1836,<sup>93</sup> and the subsequent “Constitution of the Republic of Texas,” which was completed on March 17, 1836.<sup>94</sup> Even so, the bond of friendship between Chief Bowles and Houston gave Bowles confidence that Texas would honor the Treaty.<sup>95</sup>

On April 21, 1836, the Mexican army was defeated at the historic Battle of San Jacinto.<sup>96</sup> As the Texas revolution concluded and Houston was elected the new President of the Republic of Texas, he continued to support the Treaty.<sup>97</sup> Yet, there was opposition to the Treaty among the Texas citizenry because of general white prejudice against Indians, as well as contempt flowing from rumors that the Indians were organizing to aid Mexico.<sup>98</sup> Notwithstanding this opposition, Houston submitted the Treaty to the Senate for ratification under the country’s new constitution.<sup>99</sup> In the fall of 1837, the Senate debated the Treaty at great length, but decided that it was null and void.<sup>100</sup> The Senate reasoned that the provisional government had exceeded its powers in negotiating the Treaty, which was not only detrimental to the Republic of Texas, but also violated the legal rights of many citizens.<sup>101</sup> Moreover, the land encompassed under the Treaty was already subject to numerous settled land titles and many more were in the process of fulfillment.<sup>102</sup> Houston was outraged at the Senate’s refusal to ratify the Treaty, and he moved forward with his promise to Bowles to mark off a boundary line between the Cherokees and whites.<sup>103</sup> This action was Houston’s last

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record of it (though Starr acknowledges that the government and army were in a perilous state of affairs). *See id.*

93. DECLARATION OF INDEPENDENCE OF THE REPUBLIC OF TEXAS para. 1 (1836), available at <http://tarlton.law.utexas.edu/constitutions/text/1836dindex.html>.

94. REP. OF TEX. CONST. OF 1836 [hereinafter TEX. CONST.], available at <http://tarlton.law.utexas.edu/constitutions/text/1836cindex.html>.

95. HOIG, *supra* note 47, at 184. *See also* CLARKE, *supra* note 12, at 67.

96. L.W. Kemp, *Battle of San Jacinto*, in THE HANDBOOK OF TEXAS ONLINE, <http://www.tsha.utexas.edu/handbook/online/articles/view/SS/qes4.html> (last visited Jan. 23, 2006).

97. HOIG, *supra* note 47, at 184-85.

98. *Id.*

99. *Id.*

100. *Id.* at 185.

101. CLARKE, *supra* note 12, at 72.

102. *Id.*

103. HOIG, *supra* note 47, at 185.

for the Cherokees; his term expired and he was replaced by President Mirabeau Buonaparte Lamar.<sup>104</sup>

Lamar had migrated to Texas from Georgia, where the “Old Nation Cherokees” had been severely treated, and he was adamant that the Cherokees must be forced out of Texas.<sup>105</sup> With the support of the white population, Lamar wasted little time before alleging that the Cherokees were plotting with the Mexicans to overthrow the Texas government, and that an Indian uprising was a serious danger.<sup>106</sup> Lamar employed these pretexts as justification to send troops into Cherokee territory.<sup>107</sup> Understandably, Chief Bowles was angered by these accusations, and he threatened to fight if the troops remained on Cherokee lands. But Lamar was unrelenting in his decision to stay on, and he sent word to Bowles that the Cherokees would be removed from Texas by force if necessary.<sup>108</sup> Lamar then sent commissioners to meet with the Cherokees, and an agreement was proposed for the Cherokees’ eviction from Texas.<sup>109</sup> The terms were unfavorable to the Cherokees, offering *de minimus* compensation for land improvements and belongings that would be left behind, and demanding that the Cherokees surrender the bulk of their firearms and leave Texas under an armed escort.<sup>110</sup> Bowles did not sign the agreement, thereby setting off the “Cherokee War.”<sup>111</sup>

When the dust settled, it was clear that the Texas army had easily defeated the Cherokees. Eighty-three year-old Chief Bowles lost his life; he was killed by a gunshot to the head at close range.<sup>112</sup> Bowles’ corpse was mutilated on the battlefield in a ghoulish manner—strips of flesh were cut from his back to be used as reins for a horse, and his scalp was also taken.<sup>113</sup> The captured Cherokees were eventually sent to Indian territory, while the others fled to Louisiana, Mexico,<sup>114</sup> or

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104. CLARKE, *supra* note 12, at 76.

105. HOIG, *supra* note 47, at 186-87.

106. *Id.*

107. *See id.*; *see also* STARR, *supra* note 18, at 213 (“Pretext after pretext was sought in order to find some excuse for the sin the government [of Texas] was about to commit upon an innocent [Cherokee] people.”).

108. HOIG, *supra* note 47, at 187.

109. *Id.*

110. *See* CLARKE, *supra* note 12, at 98-100 (quoting the articles from the agreement that was submitted to the Texas Cherokees).

111. *Id.* at 105-06.

112. EVERETT, *supra* note 17, at 108.

113. CLARKE, *supra* note 12, at 110.

114. HOIG, *supra* note 47, at 190.

the forests of East Texas.<sup>115</sup> When Houston learned about the Cherokees' slaughter and the death of Chief Bowles, he condemned the actions publicly, despite threats against his life.<sup>116</sup> Regrettably, Houston's public outrage occurred after the tragic climax to the Cherokees' struggle. Just a few years later, the incident seemed long past when the Republic of Texas was annexed by the United States in 1845.<sup>117</sup>

## II. TREATY LAW

To determine whether the United States should have succeeded the Republic of Texas's obligations under the pact with the Cherokees, the legally binding nature of the Treaty must be considered. This point is critical because the Texas Senate concluded that the Treaty was invalid.<sup>118</sup> Not only was this decision vexing to Houston and others in 1837, but it also disturbs modern legal scholars today.<sup>119</sup> In fact, historians have frequently averred that the Treaty was a legally binding document that was properly concluded by the Texas provisional government. For instance, a historian of the era—Henderson Yoakum—argued that the Texas Senate's claim that the Consultation lacked the authority to pledge land is preposterous.<sup>120</sup> He continued by stating that the “ink was scarcely dry on the treaty

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115. EVERETT, *supra* note 17, at 108-09. See also Lipscomb, *supra* note 11 (“Some Cherokees continued to live a fugitive existence in Texas . . .”).

116. HOIG, *supra* note 47, at 190. When Sam Houston was elected to a second presidential term in 1841, he inaugurated a peace policy with the Indians, and treaties were negotiated in 1843 and 1844. Lipscomb, *supra* note 11.

117. TEX. CONST. OF 1845, reprinted in 1 GAMMEL'S THE LAW OF TEXAS, *supra* note 83, at 1069, available at <http://www.tarlton.law.utexas.edu/constitutions/text/1845index.html>. See also generally, S.S. McKay, *Constitution of 1845*, in THE HANDBOOK OF TEXAS ONLINE, <http://www.tsha.utexas.edu/handbook/online/articles/CC/mhc3.html> (last visited Jan. 23, 2006). For an analysis as to whether the annexation of Texas was Constitutional, compare Ralph H. Brock, *The Republic of Texas is No More: An Answer to the Claim that Texas was Unconstitutionally Annexed to the United States*, 28 TEX. TECH L. REV. 679 (1997), with Jennifer M. L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawaii's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463 (1995).

118. EVERETT, *supra* note 17, at 88.

119. See generally Victoria Sutton, *American Indian Law—Elucidating Constitutional Law*, 37 TULSA L. REV. 539, 545-46 (2001) (discussing how the United States recognizes pre-Constitutional treaties with successor-in-interest logic, while a different relationship arises in the case of the treaty between the Republic of Texas and the Texas Cherokees).

120. CLARKE, *supra* note 12, at 78 (quoting 2 HENDERSON YOAKUM, HISTORY OF TEXAS FROM ITS FIRST SETTLEMENT IN 1685 TO ITS ANNEXATION TO THE UNITED STATES IN 1846, at 266 (1855)).

paper” when Texas began violating the Treaty’s terms: an accusation that land surveyors were in Cherokee territory marking off land for settlement long before the Senate refused to ratify the Treaty.<sup>121</sup>

Although the facts appear to support the assertion of bad faith on the part of the Republic of Texas, a proper determination of the merit of the Cherokees’ claim can only be ascertained by employing a systematic legal analysis of the Treaty. First, the analysis must determine whether the Treaty was a binding agreement that should have been honored under domestic and international law. If the Treaty was indeed valid, a second and more complex question must be tackled: whether the United States should have succeeded to the Treaty after it annexed the Republic of Texas pursuant to the international law of state succession.

#### A. Treaty Validity Under Domestic Law

When Sam Houston became President of Texas again in 1842,<sup>122</sup> he wrote to Texas Attorney General George Whitfield Terrell to get an opinion on the Cherokees’ title to the disputed property in East Texas.<sup>123</sup> Terrell believed the Treaty was valid for multiple reasons: first, the treaty was signed in good faith; and second, the provisional government was the only government active in Texas at the time of the Treaty’s signing, and thus it was the government *de facto*.<sup>124</sup> This conclusion jibed with Houston’s belief that the Consultation had full power to treat with the Cherokees, and to assert that it did not was nothing more than a pretext to dishonor an otherwise valid agreement.<sup>125</sup> Upon carefully reviewing the Plan and Powers of the provisional government, it appears that both Houston and Terrell were correct in their conclusions.

When the Consultation issued the “Solemn Declaration” in 1835, this action represented more than a simple good faith gesture aimed at the Indians.<sup>126</sup> In reality, the Solemn Declaration was meant to

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121. *Id.*

122. For further reading on Sam Houston, see RANDOLPH B. CAMPBELL, *SAM HOUSTON AND THE AMERICAN SOUTHWEST* (2d ed. 2001). *See also*, RANDOLPH B. CAMPBELL, *GONE TO TEXAS: A HISTORY OF THE LONE STAR STATE* (2003); JAMES L. HALEY, *SAM HOUSTON* (2002); MARQUIS JAMES, *THE RAVEN: A BIOGRAPHY OF SAM HOUSTON* (1988).

123. CLARKE, *supra* note 12, at 78.

124. *Id.* at 78-79.

125. *Id.*

126. *See id.*, at 60 (stating that one of the “primary duties” of the provisional government “was to treat with the Indians regarding their land titles and to secure their friendship if possible”).

fulfill the obligations of the provisional government enumerated in the Plan and Powers. More particularly, Article III of the Plan and Powers stated: “They [the Governor and General Council] shall have power, and it is hereby made the duty of the Governor and Council, to treat with the several tribes of Indians concerning their land claims, and if possible, to secure their friendship.”<sup>127</sup> One of the first questions that comes to mind when reading this section of the Plan and Powers is why the Governor and General Council would have been given a “duty” to treat with the Cherokees and other tribes. The answer to this query is straightforward: the Texans were concerned that the Indians would ally with Mexico and fight against them.<sup>128</sup> In fact, had the Cherokees allied with Mexico, Texans may have lost the Battle of San Jacinto.<sup>129</sup>

Undoubtedly, the Consultation wanted to settle the Cherokees’ land claim to secure Cherokee allegiance to the Texas cause, or at the very least, to keep the Cherokees neutral during the coming war with Mexico.<sup>130</sup> The Consultation made their intentions known by crafting specific language in the Plan and Powers that obliged the provisional government to treat with the Indians,<sup>131</sup> by issuing a grant of territory to the Cherokees in the resolution known as the Solemn Declaration,<sup>132</sup> and by incorporating the Solemn Declaration into the Treaty.<sup>133</sup> This aim also clarifies why Houston and two other emissaries hastily negotiated and executed a binding agreement with the Cherokees.<sup>134</sup> Accordingly, the critical legal inquiry must focus on the provisional government’s intent in treating with the Cherokees, as the party’s intent determines whether a treaty requires ratification.<sup>135</sup>

Here, the consecutive measures taken by the Texas government in an effort to treat with the Cherokees, along with its failure to

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127. Plan and Powers, *supra* note 83, art. III.

128. See HOIG, *supra* note 47, at 185. Accord EVERETT, *supra* note 17, at 69-70.

129. CLARKE, *supra* note 12, at 120.

130. See STARR, *supra* note 18, at 210 (explaining that Cherokee neutrality was essential during the Republic of Texas’s struggle for independence).

131. Plan and Powers, *supra* note 83, art. III (Article III states that it is “the duty of the Governor and Council to treat with the several tribes of Indians concerning their Land Claims . . .”).

132. See CLARKE, *supra* note 12, at 60-61. See also JOURNALS, *supra* note 83, at 546-47.

133. See Treaty, *supra* note 90, pmbl. (“This Treaty is made conformably to a declaration [the Solemn Declaration] made by the last General Consultation, at St. Felipe, and dated 13th November A.D. 1835.”).

134. See HOIG, *supra* note 47, at 184.

135. See Vienna Convention on the Law of Treaties art. 14, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].



include a ratification provision in the Plan and Powers<sup>136</sup> and the Treaty,<sup>137</sup> show that there was no overt expectation of Treaty ratification on the government's behalf. These points are telling, especially given that there was no senatorial body in existence to ratify the agreement at the time it was executed.<sup>138</sup> As such, the evidence plainly quashes any assertion that Senate ratification was either intended or required.

In addition, the Plan and Powers provided the provisional government with a variety of other powers, including the ability "to contract for loans, . . . to hypothecate the Public Lands, and pledge the faith of the Country for the security of the payment."<sup>139</sup> Because the Senate did not question the provisional government's decisions to borrow money, or undertake other activities required to secure Texas' independence,<sup>140</sup> it seems dubious to argue that the provisional government was not empowered to treat with the Indians; the language in the Plan and Powers was patently clear in this regard.<sup>141</sup> As such, it seems that Houston may have erred by submitting the Treaty to the newly established Senate for ratification after Texas declared its independence.<sup>142</sup> He probably assumed that a stamp of legitimacy would help the Cherokees, but Senate ratification was neither required nor intended under the Plan and Powers.<sup>143</sup>

Taken as a whole, these findings support the claim of Treaty validity by Attorney General Terrell and the historians. The

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136. Plan and Powers, *supra* note 83, art. III (Article III makes it the duty of the provisional government to treat with the Indians, though a ratification requirement is not included.).

137. *See* Treaty, *supra* note 90. In fact, the terms of the Treaty seem to indicate that the agreement was to go into effect upon signing. *Id.* arts. 10-11 (describing precise time limits from the date of the Treaty within which certain parties must relocate).

138. *Compare* Plan and Powers, *supra* note 83, art. I, with TEX. CONST., *supra* note 94, art. I.

139. Plan and Powers, *supra* note 83, art. III.

140. *See* CLARKE, *supra* note 12, at 78 (quoting 3 SAM HOUSTON, THE WRITINGS OF SAM HOUSTON 323-47 (Amelia W. Williams & Eugene C. Parker eds., 1938-43)).

141. Article III of the Plan and Powers states: "They [the General Council] shall have power, and it is hereby made the duty of the Governor and Council, to treat with the several tribes of Indians concerning their Land Claims, and if possible, to secure their friendship." Plan and Powers, *supra* note 83, art. III.

142. *See id.* (The provisional government had full authority to treat with the Cherokees.). *See also generally* CLARKE, *supra* note 12, at 77-79 (explaining that the opinions of historians, Sam Houston, and Texas Attorney General G.W. Terrell all agree that the provisional government had the power to treat with the Cherokees).

143. This supposition may explain why Houston made no further attempt to secure the Senate's ratification during his term as the first president of the Republic of Texas. *See* STARR, *supra* note 18, at 211. Instead, Houston proceeded in marking off the boundaries of the Cherokees territory. *See* CLARKE, *supra* note 12, at 73.

Republic of Texas was vying for independence, and needed the Cherokees' neutrality. To secure this neutrality, the government crafted targeted language in the Plan and Powers, granted the Cherokees territory in the Solemn Declaration, and quickly executed the Treaty, an agreement that neither intended nor required the Senate's ratification. As such, the evidence refutes the Texas Senate's claims that the Treaty was detrimental to the Republic of Texas and violated the rights of its citizens.<sup>144</sup> The Treaty simply fulfilled the provisional government's obligation to help Texas secure its independence,<sup>145</sup> as did the provisional government's other acts, which the Senate did not question. What is more, the Treaty met its objective: the Cherokees' neutrality proved to be a significant factor in Texas winning the war with Mexico.<sup>146</sup> Therefore, when all facts are considered, the Treaty appears to have been a valid agreement under domestic law.

#### B. Treaty Validity Under International Law

Beyond basic rules of domestic law, the Republic of Texas should also have been aware of a key principle under international law known as "*pacta sunt servanda*," which is the idea that states must keep their word.<sup>147</sup> *Pacta sunt servanda* has been claimed as a basic norm of the law of nations, with a rich history beyond the modern context.<sup>148</sup> Thinkers throughout the ages, including Socrates, Plato, and Cicero, have stressed the concept's fundamental role in any legal system.<sup>149</sup> Consequently, this norm was far from novel when Texas negotiated the Treaty, though it was apparently given little consideration when the Senate decided to abrogate its commitment under the agreement.<sup>150</sup> In any case, the application of this norm connotes that Texas could not terminate the Treaty without suitable

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144. CLARKE, *supra* note 12, at 71-72.

145. Compare Plan and Powers, *supra* note 83, with Treaty, *supra* note 90 (the Treaty fulfilled this obligation). See generally HOIG, *supra* note 47, at 184 (discussing the convention that established the Republic of Texas provisional government and its vow to recognize the Cherokees' land claims).

146. See CLARKE, *supra* note 12, at 72-73.

147. Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 567 (1995).

148. See *id.*

149. *Id.*

150. See generally CLARKE, *supra* note 12, at 71-73 (discussing the Senate's decision to nullify the Treaty).

justification under international law.<sup>151</sup> More specifically, states may justify abrogating a treaty by any one of three reasons: (1) a breach of the treaty; (2) a fundamental change in circumstances; or (3) a lack of capacity to treat.<sup>152</sup>

First, a state may terminate a treaty when another party has breached its obligations under the agreement.<sup>153</sup> Any breach would of course not be adequate, since customary international law as well as the modern Vienna Convention on the Law of Treaties (VCLT) Article 60—which codifies this customary principle—holds that a nation cannot terminate a treaty unless another party has materially breached a provision essential to the purpose of the treaty.<sup>154</sup> In other words, there can be no treaty termination for an accidental breach or a trivial violation.<sup>155</sup> In this case, Texas never alleged that the Cherokees failed to live up to their responsibilities in the Treaty, and history also has failed to provide such evidence.<sup>156</sup> As a result, this justification does not seem applicable.

Second, a treaty may be terminated under the doctrine of fundamental change in circumstances, known under international law as “*rebus sic stantibus*.”<sup>157</sup> The idea behind this right is that the conditions that led to the conclusion of a treaty have changed so fundamentally that it is appropriate for any party to unilaterally terminate the agreement.<sup>158</sup> One such condition that would be considered a fundamental change in circumstances would be the outbreak of war.<sup>159</sup> For example, the United States offered this justification for terminating an international agreement on shipping load restrictions during World War II.<sup>160</sup>

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151. See generally DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 38 (2001) (discussing justifications for treaty abrogation).

152. *Id.*

153. *Id.*

154. *Id.*; VCLT, *supra* note 135, art. 60.

155. BEDERMAN, *supra* note 151, at 38.

156. President Mirabeau Buonaparte Lamar claimed the Cherokees were threatening to join forces with Mexico in an effort to overthrow the Republic of Texas government, and as a result, they would never be permitted to establish a permanent and sovereign jurisdiction within Texas. HOIG, *supra* note 47, at 187. However, these alleged events transpired after the Senate refused to ratify the Treaty. *Id.* at 185. What is more, Lamar had little evidence to prove his claim. *Id.* at 186-87.

157. BEDERMAN, *supra* note 151, at 38.

158. *Id.*

159. *Id.*

160. *Id.* The agreement that the U.S. Attorney General terminated was the 1930 International Load Lines Convention. *Id.*

In the modern context, Article 62 of the VCLT has sought to limit the use of *rebus sic stantibus* to a limited set of circumstances,<sup>161</sup> and it explicitly forbids exercising this right in the case of agreements that establish a boundary, or where the party invoking the right has contributed to the changed circumstances by its own violation.<sup>162</sup> The VCLT does not address the issue of war, as the termination of a treaty by war has always been a matter resolved by customary international law.<sup>163</sup> When applying this principle to Texas in the 1830s, there does not appear to be any evidence that a fundamental change in circumstances occurred during the period from 1836 to 1837 that would justify unilateral Treaty termination (aside from the fact that after winning the Battle of San Jacinto, Texas no longer needed the Cherokees' neutrality). Hence, this reason appears unpersuasive.

Finally, there is one remaining justification that Texas could have proffered when it abrogated the Treaty: that the Cherokees, the Republic of Texas, or both lacked the capacity to enter the agreement. Unfortunately, there is no hard and fast rule for determining the competence of less than fully-sovereign states to engage in treaty-making.<sup>164</sup> Rather, the outcome depends exclusively on the facts of the case in question.<sup>165</sup> Notwithstanding the principle's lack of clarity, the Cherokees probably had the capacity to treat with the Republic of Texas. This argument is supported by ample historical fact: during the nineteenth century and before, it was common practice to consider agreements between colonizing settlers and indigenous peoples, such as the American Indians in North America, as treaties, even though indigenous peoples do not necessarily constitute a "state" as the term is used in the modern context.<sup>166</sup> Thus, one can readily make a *prima facie* case for the Cherokees' capacity to treat.

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161. See VCLT, *supra* note 135, art. 62.

162. *Id.* art. 62(2)(a).

163. BEDERMAN, *supra* note 151, at 39.

164. 1 OPPENHEIM'S INTERNATIONAL LAW § 595 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (1905).

165. *Id.*

166. *Id.* § 595 n.2. In addition, many of these agreements are still accepted as treaties under domestic law, even though they may not have this standing in the international realm. *Id.* See also GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW & THE ISRAELI-PALESTINIAN PEACE AGREEMENTS 92-94 (2000) (discussing how early colonial practice in Great Britain, New Zealand, and the United States adhered to the view that indigenous peoples had treaty-making capacity); Wiessner, *supra* note 147, at 591 (discussing commitments arising from Indian treaties as international obligations).

In the case of the less-than-fully-sovereign Republic of Texas, its capacity to treat is probably best understood by examining the criteria for statehood that were codified under the “1933 Montevideo Convention on the Rights and Duties of States” (Montevideo), at least to the extent that the Montevideo codified pre-existing customary international law.<sup>167</sup> Article 1 of the Montevideo provides that “states” should possess the following: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.<sup>168</sup> After a cursory examination of these criteria, one can convincingly argue that the Republic of Texas met the requirements of a permanent population and a defined territory. Moreover, Texas had a fully functioning, stable, and effective government<sup>169</sup> beginning with the Consultation in November of 1835.<sup>170</sup> Thus, the remaining question concerns the Republic of Texas’s capacity to enter into relations with extant states; this criterion requires that the government possess both requisite constitutional authority and accompanying “political, technical, and financial capabilities.”<sup>171</sup> Although the Plan and Powers seems to have provided the provisional government with only limited ability to enter into international agreements, it did include a modicum of such

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167. Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo]. The Montevideo criteria support the declarative theory of statehood, which holds that a state’s existence depends solely upon meeting the objective factors established under international law. See Kelly Malone, *The Rights of Newly Emerging Democratic States Prior to International Recognition and the Serbo-Croatian Conflict*, 6 TEMP. INT’L & COMP. L.J. 81, 91-93 (1992). The recognition of an emerging entity—like the Republic of Texas—by an established state simply indicates that state’s willingness to treat the emerging entity as if it possesses international standing. *Id.* In other words, statehood arises independently of recognition by other states. *Id.* In contrast, the constitutive theory of statehood, which is the minority position, holds that it is the act of recognition by states—the constitutive act—that establishes legal statehood for an emerging entity. *Id.*

168. Malone, *supra* note 167, at 91-93. Note that in practice (meaning customary international law), the third and fourth characteristics—government and capacity to enter into relations with other states—are often combined into a single characteristic: authority. Professor Joel H. Samuels, Lecture at the University of Michigan Law School (Jan. 13, 2002). Since the 1960s, the requirement of democracy has emerged as a fifth characteristic under customary international law. Malone, *supra* note 167, at 86-87.

169. See generally Malone, *supra* note 167 at 84-85 (discussing the requirement of a stable and effective government for statehood under international law).

170. See *supra* Part I. The historian Emmet Starr explained that the Republic of Texas inaugurated an independent government with the Consultation, while the Cherokees remained a separate and quasi-independent nation, and were treated as such by Texas. STARR, *supra* note 18, at 224.

171. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. e (1987).

power and capability,<sup>172</sup> and specifically enumerated the government's duty to treat with the Indians.<sup>173</sup> As such, this criterion appears to be satisfied. Nevertheless, some commentators might assert that the provisional government's limited constitutional authority and technical and financial constraints during this period cast doubt upon it having met the last statehood trait. Accordingly, it is critical to note that there is some flexibility in meeting the statehood requirements under international law—the criteria are not absolute.<sup>174</sup> This point explains not only why the Montevideo's language holds that states "should" possess the aforesaid characteristics,<sup>175</sup> but also why an agreement executed between an emerging state and a sovereign state has been held as a valid international agreement from the date of the emerging state's independence.<sup>176</sup> Therefore, both the Cherokees and the Republic of Texas seem to have had the capacity to treat.

In summary, based on the analysis in this Article, the Treaty appears to be valid under both domestic and international law. It was properly entered into by the Republic of Texas provisional government under the Plan and Powers, and aside from providing a ceremonial and legitimacy-enhancing aspect to the process, ratification by the Texas Senate was neither intended nor required. Moreover, pursuant to the well known principle of *pacta sunt servanda*, Texas was required to fulfill its obligations to the Cherokees under the agreement. Finally, there does not appear to

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172. See Plan and Powers, *supra* note 83, art. III ("[T]hey shall pass no laws except such as, in their opinion, the emergency of the country requires . . . they shall pursue the most effective and energetic measures to rid the country of her enemies, and place her in the best possible state of defence . . .").

173. *Id.* ("They shall have power, and it is hereby made the duty of the Governor and Council, to treat with the several tribes of Indians.").

174. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 74 (3d ed. 1979).

175. See Montevideo, *supra* note 167, art. 1. See also BROWNLIE, *supra* note 174, at 74 (explaining that Albania was recognized as a state even though its frontiers had yet to be firmly established).

176. See *State v. Eliasov* 1967 (4) SA 583 (A) (S. Afr.). In this case, shortly before the dissolution of the Federation of Rhodesia and Nyasaland in 1963, one of the entities that was about to emerge—Southern Rhodesia—executed an agreement with South Africa that was held to be a valid international agreement from the date of the Federation's dissolution. *Id.* This case reflects the modern view that emerging states are considered successor states and therefore are "equal heirs to the rights and obligations of the predecessor state." See Paul Williams & Jennifer Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 HARV. INT'L L.J. 355, 362 (2001). See also WATSON, *supra* note 166, at 97 (discussing binding international agreements between the United States and the emerging states of Micronesia and Palau). See generally *id.* at 95-99 (discussing numerous cases where state actors—including Britain, Portugal, France, and the Arab States—have entered agreements with non-state actors such as liberation movements).

have been any justification for treaty abrogation: there is no evidence of the occurrence of a material breach or fundamental change in circumstances, and both parties possessed the capacity to treat. As a result, in all likelihood, the Treaty remains a valid instrument.

### III. STATE SUCCESSION

Because the Treaty between the Republic of Texas and the Cherokees is probably valid under both domestic and international law, especially when one considers that it appears to meet the rigors of contemporary international legal doctrine, the remaining question is whether the United States should have succeeded to the Treaty when it annexed Texas in 1845. Admittedly, this question is not one of first impression in the legal community. In fact, the Texas Cherokees have pursued an action for the Treaty's breach on three prior occasions.<sup>177</sup> Thus, before addressing the international law of state succession, these prior cases will be briefly considered. The first two actions that the Cherokees pursued can be quickly summarized, while the third action, which involved an administrative tribunal, requires more extensive treatment.

#### A. Prior Lawsuits by the Texas Cherokees

In the Cherokees' first action, approximately nine hundred heirs hired legal counsel to represent them in a \$100 million suit against the state of Texas in 1915, where they requested compensation for the territory lost as a result of the Republic of Texas's breach of the Treaty.<sup>178</sup> Counsel petitioned the Supreme Court in 1920 for permission to sue, but the Court denied the request based upon authority in *Cherokee Nation v. Georgia*.<sup>179</sup> In that case, the Supreme Court held that it lacked jurisdiction to hear a claim because the Cherokee Nation was not a foreign state within the meaning of the U.S. Constitution.<sup>180</sup> Nevertheless, the Cherokees did not abandon their quest for restitution. In a second case, which occurred in 1924, the Tribe's counsel enlisted the help of the Commissioner for Indian

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177. In March 1964, Earl Boyd Pierce, General Counsel for the Cherokee Nation of Oklahoma, presented a plan to the Texas Government to settle the Texas Cherokees' claim; the proposal was rejected. CLARKE, *supra* note 12, at 122-25. Because the plan was offered by the Cherokee Nation of Oklahoma, and not the Texas Cherokees, it is not considered here. *Id.*

178. EVERETT, *supra* note 17, at 120.

179. *Texas-Cherokees v. Texas*, 257 U.S. 615 (1921) (citing *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)).

180. *Cherokee Nation*, 30 U.S. at 20.

Affairs to pursue the claim.<sup>181</sup> Unfortunately, this effort also failed to make any progress.<sup>182</sup>

The Cherokees filed their third action alleging breach of the Treaty in 1948, but this time the claim was against the U.S. government for \$5 million in compensation.<sup>183</sup> The Cherokees had finally found an audience for their claim, but it was not a traditional court of law; rather, the Cherokees appeared before a now defunct administrative tribunal known as the Indian Claims Commission (ICC), which was created by Congress in 1946 to address grievances between Indian Tribes and the United States.<sup>184</sup> Unfortunately for the Cherokees, the ICC poorly adjudicated their claim.<sup>185</sup>

There are no bright spots in the ICC opinion for the Cherokees, as the court quashed all the claims that the Tribe promulgated. From the outset, the ICC unequivocally disapproved of the Cherokees' claim, stating their opinion by hastily narrating the Texas Cherokees' history,<sup>186</sup> and citing *Western Cherokee v. United States*, which held that an organization of Indians created to pursue a claim is not a "tribal organization" in the sense of the term that would permit Indians to pursue claims under the Indian Claims Commission Act.<sup>187</sup> More importantly, the ICC seemed to unduly emphasize the point that the Cherokees that had relocated to "parent tribes" in Oklahoma never attempted to return to Texas or to reclaim their distinct status

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181. EVERETT, *supra* note 17, at 120.

182. *Id.*

183. *Texas-Cherokees v. United States*, 2 Indian Cl. Comm'n 522 (1953).

184. The Indian Claims Commission (ICC) was an administrative tribunal created in 1946, and abolished in 1978. Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049 (omitted from 25 U.S.C. § 70 upon termination of Commission on Sept. 30, 1978). For further reading on the ICC, see generally H.D. ROSENTHAL, *THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION* (1990).

185. See *infra* (discussing the ICC opinion); see also generally Richard J. Ansson, Jr., *The Indian Claims Commission: Did the American Indians Really Have Their Day in Court?*, 23 AM. INDIAN L. REV. 207 (1998) (discussing various problems with the ICC, including evidentiary and jurisprudential issues with claims, commissioner ignorance of Indian culture, lawyers who poorly represented tribes, and the tenacity with which the Department of Justice litigated against the Indians); Nell Jessup Newton, *Indian Claims in the Court of the Conqueror*, 41 AM. U. L. REV. 753, 771-73 (1992) (exploring the ICC and reasons for its adoption of the adversary model); JOHN R. WUNDER, *RETAINED BY THE PEOPLE* 111-15 (1994) (discussing the establishment and operation of the Indian Claims Commission, including key points such as: how Indians were not treated equally because they had to obtain permission to hire their lawyers; how the Department of Justice acted reprehensibly, employing outrageous litigation tactics; and how the ICC ultimately represented a miserable failure for American Indians).

186. See *Texas-Cherokees*, 2 Indian Cl. Comm'n at 523-27.

187. *Id.* at 529 (citing *Western Cherokee v. United States*, 1 Indian Cl. Comm'n 165 (1949)).



as a separate tribe.<sup>188</sup> This logic was patently flawed because the ICC ignored three key issues: (1) there were Cherokees massacred in Texas;<sup>189</sup> (2) there were Cherokees who did not join other tribes;<sup>190</sup> and (3) there were likely Cherokees spurned to regroup as a separate tribe, but who lacked the financial resources to pursue the endeavor.<sup>191</sup>

To make their case, the Cherokees averred that the United States was under an obligation to help them pursue a claim for payment from the state of Texas for violation of the Treaty,<sup>192</sup> and also that the United States was bound to deal honestly and fairly with the Indians because of the general fiduciary relationship existing between the Indians and the U.S. government.<sup>193</sup> The ICC readily dismissed these claims. First, the ICC stated that according to the holding in *League v. De Young*, it was strictly the province of the state of Texas alone to decide whether it would honor debts from the former Republic of Texas.<sup>194</sup> Second, in addressing the fiduciary

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188. *See id.* at 528-29.

189. *See supra* Part I (discussing the Cherokee War). *See also generally Indian Relations, in THE HANDBOOK OF TEXAS ONLINE*, <http://www.tsha.utexas.edu/handbook/online/articles/II/bzi1.html> (last visited Jan. 23, 2006) (“Mirabeau B. Lamar, who followed Houston as president, had neither experience with nor sympathy for the Indians; he wanted to destroy them or drive them from Texas.”); MARK M. CARROLL, *HOMESTEADS UNGOVERNABLE: FAMILIES, SEX, RACE, AND THE LAW IN FRONTIER TEXAS, 1823-1860*, 33 (2001) (explaining that President Lamar’s policy of Indian removal was based on the belief that Indians were “irredeemably primitive and unassimilable”); CLARKE, *supra* note 12, at 76 (discussing how President Lamar’s cabinet boasted they would “kill off Houston’s pet Indians”); EVERETT, *supra* note 17, at 100 (describing President Lamar as “an inveterate enemy of the Cherokees”); DOUGLAS V. MEED, *COMANCHE 1800-1874* (2003) (describing how President Lamar favored a policy of Indian extermination).

190. *See* EVERETT, *supra* note 17, at 108-14; Hicks, *supra* note 11.

191. *See generally* Alan L. Sorkin, *The Economic Basis of Indian Life*, 436 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 1 (1978); ALAN L. SORKIN, *AMERICAN INDIANS AND FEDERAL AID* (1971). *See also generally Native Americans Still Poorest in the United States*, INDIANZ.COM, Aug. 30, 2006, <http://indianz.com/News/2006/015687.asp> (discussing 2005 U.S. Census Bureau data on American Indian poverty).

192. *Texas-Cherokees*, 2 Indian Cl. Comm’n at 534.

193. *Id.* at 532.

194. *Id.* at 534 (citing *League v. De Young*, 52 U.S. 185 (1850)). What may be of interest to the reader is that Texas appeared to follow *League* in 1964 when Attorney General Waggoner Carr issued an opinion to Governor John Connally regarding a newly proposed settlement of the Cherokees’ claim. *See* CLARKE, *supra* note 17, at 123-25. In short, Carr concluded that the Cherokees’ claim was against the former Republic of Texas, and based on his analysis, the state of Texas did not intend to honor any such claims that had not been established by 1876. *Id.* What also may be of interest, regarding the ICC opinion, is the ICC’s odd attempt to draw an analogy between the Cherokee case and *Wichita Indians v. United States*, 89 Ct. Cl. 378 (1927). *Texas-Cherokees*, 2 Indian Cl. Comm’n at 530-31. In that case, the Wichita Indians were suing

relationship that the United States owed the Indians, the ICC stated: “[I]t will be remembered that the plaintiffs voluntarily left this country and became inhabitants of a foreign state . . . thus severing their right to the protection of this government.”<sup>195</sup> Both of these rulings were incorrect.

First, the ICC misinterpreted the *League v. De Young* opinion in which the U.S. Supreme Court was unconcerned with treaty law, state succession, or indigenous peoples, but was instead focused on the right of the former Republic of Texas to repudiate forged and fraudulent land titles.<sup>196</sup> In this case, the Court held that the State of Texas alone had the authority to decide whether it would acknowledge land titles held by its citizens.<sup>197</sup> Hence, *League* was inapplicable to the Cherokees’ claim. Second, the ICC’s assertion that the Cherokees voluntarily left U.S. territory, and thereby forfeited fiduciary protection owed to them by the United States, is terribly misguided because the colonists encroached and forced the Tribe to leave the United States.<sup>198</sup> More particularly, the Cherokees moved to preserve some semblance of their traditional way of life, and not because of any prior or burgeoning allegiance to a foreign state.<sup>199</sup> Furthermore, the Cherokees were subsequently driven by force out of this “foreign” country—the Republic of Texas<sup>200</sup>—which shortly thereafter became a U.S. state.<sup>201</sup> Thus, the ICC’s argument cannot stand because it ignores critical facts surrounding the Cherokees’ resettlement.

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for the value of 5,200,000 acres of land that they lost as a result of the United States relocating the Tribe from the state of Texas to a reservation. *Id.* It is unclear how a case of U.S. Indian removal from a state to a reservation is related to a case involving treaty abrogation and state succession under international law.

195. *Texas-Cherokees*, 2 Indian Cl. Comm’n at 533.

196. 52 U.S. at 202-03.

197. *Id.* at 203.

198. *See, e.g.*, THE REMOVAL OF THE CHEROKEE NATION: MANIFEST DESTINY OR NATIONAL DISHONOR 2 (Louis Filler & Allen Guttman eds., 1962) (“Those of its members who preferred the life of hunters moved away to the Far West, while the bulk of the [Cherokee] tribe remaining settled down to the pursuit of agriculture.”); HOIG, *supra* note 47, at 113 (“[S]ome of the Western Cherokees were already considering moving farther away from the mountains or to Mexico’s province of Texas to escape once again from the advancing tide of white intruders.”). *See also* WILSON LUMPKIN, THE REMOVAL OF THE CHEROKEE INDIANS FROM GEORGIA (Arno Press 1969) (1907); ROBERTSON, *supra* note 1.

199. *See generally* HOIG, *supra* note 47, at 101-13.

200. *See id.*, at 186-87. *Accord* CLARKE, *supra* note 12, at 98-101; EVERETT, *supra* note 17, at 104-08.

201. *See generally* TEX. CONST. OF 1845, *supra* note 117.

To recapitulate, the Cherokees' first two actions for breach of the Treaty failed because the Tribe found no audience, while the third action was poorly adjudicated by the ICC. In particular, the ICC misinterpreted and misapplied case precedent, and chose to ignore key historical facts required to properly adjudicate the claim. Additionally, the ICC should have considered the international law of state succession as persuasive authority, as the next section of this Article will demonstrate. As a result, the Cherokees have yet to receive a fair and balanced hearing on their claim.

## B. The Law of State Succession

While state succession is an amorphous term, it can be defined as occurring when a former state becomes extinct, in whole or in part, and a new state replaces it.<sup>202</sup> More specifically, state succession comes about when there has been a fundamental transformation in the state itself; it does not result from a mere change in government.<sup>203</sup> A change in the identity of a state can happen for a variety of reasons, including annexation, territorial cession, merger, decolonization, or dissolution.<sup>204</sup> Whatever the cause, an identity change is a critical component of a state succession, as it determines whether the successor state begins life anew—“*tabula rasa*”—meaning the successor state succeeds to no rights or obligations of the predecessor state, or in the alternative, the successor state is responsible for all the prior obligations and liabilities of the predecessor state.<sup>205</sup> As such, the only proper legal generalization that can be made about a state succession is that the nature of the change in a state's identity and the type of issue involved will determine the legal consequences.<sup>206</sup>

In the case at hand, the Republic of Texas ceased to exist when it was annexed by the United States in 1845: the annexation produced a fundamental change in the state's identity.<sup>207</sup> Thus, because this Article previously concluded that the Treaty was in all likelihood a

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202. Carsten Thomas Ebenroth & Matthew James Kemner, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards*, 17 U. PA. J. INT'L ECON. L. 753, 756 (1996).

203. Michael John Volkovitsch, Note, *Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts*, 92 COLUM. L. REV. 2162, 2164 (1992).

204. *Id.*

205. Ebenroth & Kemner, *supra* note 202, at 783.

206. BEDERMAN, *supra* note 151, at 58.

207. See Volkovitsch, *supra* note 203, at 1264 (noting annexation as one event that changes a state's identity).

binding agreement between the Republic of Texas and the Cherokees, the remaining question is whether the United States should have succeeded to the obligation of the predecessor state. The ICC held that the United States did not have to assume the obligation in its 1953 decision. However, the ICC opinion failed to address the international law of state succession.<sup>208</sup> Three legal principles merit consideration before one can fully understand the implications of the ICC's mistake: (1) the international law on state succession; (2) the behavior of the United States during colonization, prior annexation cases, and the post-Civil War period; and (3) the policy views on state succession promulgated by the United States in the global community.

*1. The International Law of State Succession.* When the United States annexed the Republic of Texas, Texas was merged into the United States. At that precise moment of annexation, the Republic of Texas ceased to be a distinct nation, and instead became part of a larger state.<sup>209</sup>

In order to better understand the rights and responsibilities of the United States after this annexation, one would expect to apply the contemporary codification of international principles of state succession: the Vienna Convention on Succession of States in respect of Treaties (VCSST).<sup>210</sup> However, the United States has chosen not to subscribe to the VCSST, instead choosing to follow the Restatement (Third) of Foreign Relations Law (Restatement), which more closely reflects the views promulgated in the VCLT.<sup>211</sup> Thus, the Restatement is the more appropriate doctrine to apply. The pertinent section in the Restatement reads:

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, except . . . (b) where a state is absorbed by another state, the public

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208. See *Texas-Cherokees v. United States*, 2 Indian Cl. Comm'n 522, 522-35 (1953) (The opinion of the Commission contains no discussion of state succession doctrine.).

209. See Volkovitsch, *supra* note 203, at 1264 (noting annexation as one event that changes a state's identity).

210. For a critique of the failings of the Vienna Convention on Succession of States in Respect of Treaties in comporting with actual state practice, see Sari T. Korman, Note, *The 1978 Vienna Convention on Succession of States in Respect of Treaties: An Inadequate Response to the Issue of State Succession*, 16 SUFFOLK TRANSNAT'L L. REV. 174 (1992).

211. Ebenroth & Kemner, *supra* note 202, at 783.

debt, and rights and obligations under contracts of the absorbed state, pass to the absorbing state.”<sup>212</sup>

The Republic of Texas was the “absorbed state,” and land that Texas promised the Cherokees is akin to a “former debt” of the predecessor state. As such, if the United States were allowed to nullify the debt owed to the Cherokees, the United States would be unlawfully enriched by obtaining land already ceded to another entity. This conclusion also jibes with the more contemporary VCSST: under Article 11, a state succession does not affect a boundary established by a treaty, and Article 12 ensures that a state succession does not affect obligations relating to the use of any territory for the benefit of a foreign state (where “state” implies the Texas Cherokees).<sup>213</sup> Thus, the international law of state succession probably answers that the United States should have succeeded to the Treaty.

2. *Behavior of the United States—Colonization, Prior Annexation Cases, and Post-Civil War.* The historical behavior of the United States during colonization, prior annexation cases, and the post-Civil War era contradicts its decision not to assume the Treaty. First, consider the behavior of the United States during the colonial period, which was consistent with state succession principles. Presently, the United States remains subject to agreements between

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212. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 209 (1987). Section 209 states:

(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, 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.*

213. Vienna Convention on Succession of States in Respect of Treaties arts. 11-12, Aug. 23, 1978, 1946 U.N.T.S. 3 [hereinafter VCSST].

Indian tribes and states that predate the states' admittance into the union. For example, two such tribes are the Pamunkey Tribe and the Mattaponi Tribe, both of which treated with Virginia on May 29, 1677.<sup>214</sup> These two tribes are currently recognized by the state of Virginia, and also maintain land holdings in the state.<sup>215</sup> As Professor Victoria Sutton aptly noted, such pre-Constitutional treaties were accepted by the United States with successor-in-interest logic: the United States was the successor to the obligations of the former colonies.<sup>216</sup>

Second, the United States chose to recognize property claims in prior historical annexation cases. For instance, the Treaty of Guadalupe Hidalgo (the Hidalgo Treaty), which was signed in 1848, put an end to the Mexican War.<sup>217</sup> Under the Hidalgo Treaty, Mexico ceded the upper portion of California, New Mexico, and Arizona to the United States, and recognized American claims over Texas, with the Rio Grande demarcating its southern boundary.<sup>218</sup> The United States paid Mexico \$15 million for the land, assumed the claims of American citizens against Mexico, recognized prior southwest land grants, and offered citizenship to Mexicans that were residing in the ceded territories.<sup>219</sup> Although this territorial acquisition differs somewhat from the Republic of Texas case, the salient point is that Article VIII of the Hidalgo Treaty specified that property owned by Mexicans in the ceded territories would be inviolably respected, regardless of whether the owners were absentee owners or ever physically present in such territories.<sup>220</sup> In brief, the case illustrates

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214. The Treaty Between Virginia and the Indians, May 29, 1677, Colony of Va.-Indians, reprinted in *EARLY AMERICAN INDIAN DOCUMENTS: TREATIES & LAWS, 1697-1789, VIRGINIA & MARYLAND LAWS* 83 (Alden T. Vaughan & Deborah A. Rosen eds., 1998), available at <http://www.baylink.org/treaty/>.

215. See Virginia Council on Indians: Virginia Tribes, <http://indians.vipnet.org/tribes/index.cfm> (last visited Oct. 10, 2006).

216. Sutton, *supra* note 119, at 545.

217. Treaty of Peace, Friendship, Limits, and Settlements, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

218. *Id.*

219. *Id.*

220. *Id.* art. VIII. The text of Article VIII states:

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they

that “the transfer of sovereignty via state succession [had] no effect on private property rights.”<sup>221</sup> This legal principle had already been settled under U.S. law in the earlier case of *United States v. Percheman*, where the Supreme Court held that the cession of territory from one sovereign to another does not interfere with private property rights.<sup>222</sup> Furthermore, in the later case of *Barker v. Harvey*, the Supreme Court held that mission Indians were allowed to make private property claims following the Mexican War, even though the claim in that case failed because the Indians did not comply with a statute requiring the claim to have been submitted within a two-year statute of limitations period.<sup>223</sup>

Third, the United States again adhered to state succession principles at the end of the Civil War.<sup>224</sup> The basic question that surfaced during this period was whether Confederate property “passed to the United States upon the demise of the Confederacy.”<sup>225</sup> Following the state succession model presented by international law, Confederate property did pass to the United States at the end of the Civil War.<sup>226</sup> This conclusion was also supported by the Supreme Court in cases immediately after the Civil War, where the court concluded that as a matter of law, “the U.S. was entitled to all the property and rights of the conquered confederate government.”<sup>227</sup>

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shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

*Id.*

221. Ebenroth & Kemner, *supra* note 202, at 777.

222. 32 U.S. 51, 87 (1833). *See also* *Townsend v. Greeley*, 72 U.S. 326, 337 (1866) (holding that municipal land held by the city of San Francisco as successor to the former pueblo (meaning town) existing there was not held in absolute property; this land was held in trust for the city’s inhabitants as it had been held under the laws of Mexico prior to cession under the Hidalgo Treaty).

223. 181 U.S. 481, 490 (1901).

224. For further reading on the United States Civil War, see LIBRARY OF CONGRESS CIVIL WAR DESK REFERENCE (Margaret E. Wagner et al. eds., 2002).

225. William J. Pallas, *The Doctrine of State Succession and the Law of Historic Shipwrecks, The Bell of Alabama: United States v. Steinmetz*, 17 TUL. MAR. L.J. 343, 344 (1993).

226. *Id.* at 344-45.

227. *Id.* at 345 (citing *United States v. Huckabee*, 83 U.S. 414 (1873); *Titus v. United States*, 87 U.S. 475 (1874); *Whitfield v. United States*, 92 U.S. 165 (1875)).

These principles were summarized by Justice Clifford in *United States v. Huckabee*:

Complete conquest . . . carries with it all the rights of . . . the conqueror, [and] by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy, nation, or state. His rights are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the conquered state, including even *debts* as well as personal and real property.<sup>228</sup>

Hence, the Supreme Court held in *Huckabee* that the liabilities of the conquered become the liabilities of the conqueror.<sup>229</sup> This outcome is compelling because in the case of the Confederacy, the United States absorbed a group of states that had seceded of their own volition; it appears that in this scenario the United States had justifiable grounds for refusing to honor the liabilities of the rogue government. Nevertheless, the Supreme Court unequivocally proclaimed that assets and liabilities accrued to the absorbing state.

In sum, the United States has historically behaved consistently with state succession principles. To begin, the United States applied successor-in-interest logic to assume Indian treaties from the colonies. Next, the United States recognized the inviolable nature of private property in prior annexation cases such as the Hidalgo Treaty. Finally, the United States followed the state succession model post-Civil War, and even incorporated this logic into Supreme Court precedent. Thus, this behavior implies that the United States should have succeeded to the Treaty.

3. *Historical Views Proclaimed by the United States.* The United States' failure to assume the Treaty contradicts its behavior just over a decade before the ICC decided the Cherokees' claim. More particularly, the United States was quite vocal about other states being obliged to follow state succession principles. For instance, when Germany absorbed Austria through the Anschluss of 1938, the United States argued that Germany should assume the debts of Austria.<sup>230</sup> Not to be deterred, Germany retorted that the

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228. 83 U.S. at 434-35 (emphasis added).

229. *See id.*

230. *See* Detlev F. Vagts, *State Succession: The Codifiers' View*, 33 VA. J. INT'L L. 275, 285 (1993) (citing James Wilford Garner, *Questions of State Succession Raised by the German Annexation of Austria*, 32 AM. J. INT'L L. 421 (1938)). *See also* M.H. Hoeflich, *Through a Glass*



United States had failed to follow its own prescription when it annexed the Republic of Texas.<sup>231</sup> This dispute was not resolved until after World War II, and then it was decided in favor of the U.S. position: Germany agreed to assume Austria's liabilities.<sup>232</sup> The key point to glean from this example is that the United States was keenly aware of the international law on state succession. As such, the United States should have followed state succession principles and succeeded to the Treaty.

To sum up, this section addressed the following issue: whether the United States should have succeeded to the Treaty after it annexed the Republic of Texas, given that this agreement was in all likelihood a valid obligation of the predecessor state. The ICC held that the United States was not responsible for the obligation in 1953, but in reaching its dubious holding, the tribunal failed to consider the international law on state succession. As such, an exploration of this issue produces three conclusions. First, the United States failed to adhere to state succession principles as codified in the contemporary Restatement and VCSST. Second, the United States ignored its own behavior during the colonization period, prior annexation cases, and the post-Civil War era. Third, the United States contradicted its own policy views as promulgated in the global community. The culmination of this evidence presents a cogent case for the proposition that the United States should have succeeded to the Treaty.

#### IV. ADVERSE POSSESSION—AN ALTERNATE CLAIM TO RIGHT BY TREATY

When President Sam Houston wrote to then Attorney General G. W. Terrell for an opinion on the Cherokee matter in 1842, Terrell raised another legal issue that merits discussion. He opined that the Cherokees' claim was legally valid because "by settling and continuously occupying their lands, the Cherokee had acquired an inchoate right to them, which should have matured into a perfect

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*Darkly: Reflections upon the History of the International Law of Public Debt in Connection with State Succession*, 1 U. ILL. L. REV. 39, 63-65 (1982).

231. See Detlev F. Vagts, *International Law in the Third Reich*, 84 AM. J. INT'L L. 661, 690 (1990) (citing Garner, *supra* note 230).

232. Timothy W. Guinnane, *Financial Vergangenheitsbewältigung: The 1953 London Debt Agreement 21-22* (Yale Univ. Econ. Growth Ctr. Discussion Paper No. 880, 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=493802](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=493802).

title.”<sup>233</sup> Terrell correctly asserted that title to land could be perfected through settlement and continuous occupation. The Cherokees probably had a valid legal claim to the land under the doctrine of adverse possession, which is a method of acquiring title to property by possession for a statutory period.<sup>234</sup>

Adverse possession is a doctrine recognized in the civil codes and legal traditions of many countries.<sup>235</sup> Though adverse possession does further utilitarian ends by quieting land titles,<sup>236</sup> Oliver Wendell Holmes succinctly stated another key underpinning of the doctrine in terms of personhood: “the foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser.”<sup>237</sup> Because the Cherokees immigrated to Texas, constituting their lives and beings in land that they occupied for nearly twenty years, a claim of title by adverse possession would have plainly satisfied personhood concerns. Moreover, the doctrine would have also served a utilitarian purpose by quieting title to property that the Cherokees claimed while living under the sovereign jurisdiction of both Mexico and the Republic of Texas. As a result, there is no viable reason why the Cherokees could not have proffered an adverse possession claim to the disputed territory as an alternative to a claim under the Treaty.<sup>238</sup>

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233. CLARKE, *supra* note 12, at 79.

234. For the general elements of adverse possession, see 3 AM. JUR. 2D *Adverse Possession* § 10 (2006) [hereinafter AMJUR]. For further reading on adverse possession, see Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122 (1985); William G. Ackerman & Shane T. Johnson, Comment, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER L. REV. 79 (1996); Henry W. Ballantine, *Claim of Title in Adverse Possession*, 28 YALE L. J. 219 (1918); Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918).

235. Winter King, *Illegal Settlements and the Impact of Titling Programs*, 44 HARV. INT’L L. J. 433, 452 (2003).

236. Edward G. Mascolo, *A Primer on Adverse Possession*, 66 CONN. B. J. 303, 303 (1992).

237. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

238. Patently, this exercise is academic in nature because the hostile nature of the Texas courts toward Indians during this period raises doubts as to whether the Cherokees would have met with any success in pursuing an adverse possession claim, even if such claim had merit. See, e.g., TEX. CONST., *supra* note 94, gen. provisions § 10 (denying Indians citizenship); Herndon v. Casiano, 7 Tex. 322, 335 (1851) (“[T]hey were driven out of their homes and ancient possessions by the incursions of hostile savages.”); Horton v. Crawford, 10 Tex. 382, 389 (1853) (“[E]xtensive portions of our frontiers were also infested by the incursions of ferocious and hostile savages.”); Kilpatrick v. Sisneros, 23 Tex. 113, 113 (1859) (discussing how Africans, African descendants, and Indians were not citizens of Texas). Notwithstanding, the Supreme Court of the Republic of Texas recognized in dicta that the Cherokees may have acquired title to lands in Texas pursuant to their settlement while under Mexican rule. See Herbert v. Moore, Dallah 592, 594 (Tex. 1844) (“With one exception, assumed by some to have been made in

In early Texas history, there were five basic elements to an adverse possession claim,<sup>239</sup> and these requirements remain generally unchanged today.<sup>240</sup> First, there must have been “actual” occupation,<sup>241</sup> which is equivalent to the modern understanding of entry and exclusive use. Entry and exclusive use of the property is a central construct because it differentiates between simply seeing

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favor of the Cherokees and their associates by the Mexican government, we know of no lands to which the Indians ever set up an absolute, indefeasible title within the limits of the republic . . .”). Hence, although it would have been difficult to proffer, the claim did have merit. The purpose of briefly exploring the topic in this article is to show that the Republic of Texas likely acted in bad faith by refusing to abide by the Treaty (meaning Texas was acutely aware that the Cherokees had probably acquired an alternative right to the disputed territory via adverse possession). Without question, a rigorous analysis of the adverse possession claim given the complex issues accompanying this historical period is beyond the scope of this Article (for example, the potential conflict among Spanish, Mexican, and Texan laws, the likely title disputes among land speculators, settlers, and the Cherokees regarding the territory, and so on).

239. *Satterwhite v. Rosser*, 61 Tex. 166, 171 (1884). In the preface to the list of adverse possession elements, Associate Justice West stated: “It is well settled that, where a party relies upon naked possession alone as the foundation for his adverse claim, it must be such an actual occupancy that the law recognizes as sufficient, if persisted in for a long enough period of time, to cut off the true owner’s right of recovery.” *Id.* While this case was decided several decades after the Texas revolution, the elements enumerated in *Satterwhite* were discussed in earlier Texas precedent, though not in well-articulated terms. See *Jones v. Borden*, 5 Tex. 410, 414 (1849) (“In support of possession, where this has been continued for the period prescribed by or analogous to the statutes of limitation, a grant, deed, or any other instrument effectual to convey title will be presumed. But possession is the essential basis of such presumption.”); *Lewis v. San Antonio*, 7 Tex. 288, 305 (1851) (“If this enjoyment has been not only not interrupted, but exclusive and adverse in its character, for the period . . . this also has been held at common law as a conclusive presumption of title.”); *Wheeler v. Moody*, 9 Tex. 372, 372 (1853) (“It must be, in the language of the authorities, an actual, continued, adverse, and exclusive possession for the space of time required by the statute.”); *Charle v. Saffold*, 13 Tex. 94, 108 (1854) (“This possession was notoriously in their own right, adverse to the plaintiff and all others, and had, prior to the institution of suit, been continued for nearly sixteen years.”); *Lambert v. Weir*, 27 Tex. 359, 361 (1864) (“[T]hey claim and hold, had and held adverse, peaceable, continuous and uninterrupted possession for five years . . . under color of title . . .”); *Parker v. Baines*, 65 Tex. 605, 609 (1886) (“It is necessary, to set the statute of limitations in motion, that the possession be actual, visible, notorious, distinct, and hostile.” (citation omitted)). This Article avers that by analyzing the Cherokees’ claim under the more rigorous adverse possession elements as recited in *Satterwhite*, the result—a right to possession of the claimed lands—would be more cogent than analyzing the Cherokees’ claim under earlier cases where the elements of adverse possession were not well-articulated (meaning that if the Cherokees could have succeeded in proffering a claim under *Satterwhite* then, *a fortiori*, they could have succeeded in their claim during the period in question, *ceteris paribus*).

240. Texas continues to cite the elements of adverse possession as outlined in *Satterwhite*. *E.g.*, *Rhodes v. Cahill*, 802 S.W.2d 643, 645 (Tex. 1990) (citing *Satterwhite*, 61 Tex. at 171). In the modern context, Texas defines adverse possession by statute as “an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person.” TEX. CIV. PRAC. & REM. CODE ANN. § 16.021(1) (Vernon 2005).

241. *Satterwhite*, 61 Tex. at 171.

property and claiming it.<sup>242</sup> In addition, this criterion provides a precise moment from which one can count the years specified in the statutory period required for an adverse possession claim, and also provides a way to limit the geographical scope of the territorial title.<sup>243</sup> In the case of the Cherokees, there is sufficient evidence to support the assertion that there was actual possession of the claimed land. The Cherokees began occupying the land shortly before negotiating a treaty with the Mexican government in 1922 to inhabit the territory,<sup>244</sup> and continued their occupation until being forcibly removed in 1839.<sup>245</sup> If there is any uncertainty in meeting this criterion, it would be regarding the amount of land the Cherokees actually possessed. But even this concern is negligible, because the Republic of Texas recognized the location of the Cherokees' holding—as evidenced by the precise boundary demarcations identified in the Treaty.<sup>246</sup> As such, the element appears to have been satisfied.

The second adverse possession element is that the possession must have been visible and notorious.<sup>247</sup> Visibility and notoriety are important because the true property owner must notice that the land is being adversely possessed to have the opportunity to evict or take other action against the adverse possessor.<sup>248</sup> The Cherokees plainly satisfied these criteria, as both Mexico and the Republic of Texas were aware that the Cherokees occupied the territory and claimed that they owned the land. This assertion is supported by the numerous attempted negotiations that the Cherokees had with the Mexican government in their attempt to obtain official title to the occupied lands,<sup>249</sup> as well as by the Treaty with the Republic of Texas.<sup>250</sup> Hence, the Cherokees satisfied the visibility and notoriety requirements.

The third adverse possession element is that the occupation must have been hostile (meaning adverse, or without the legal right to

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242. See *Parker*, 65 Tex. at 608-09.

243. *Id.*

244. See HOIG, *supra* note 47, at 178 (The Cherokees occupied territory in Texas and went to San Antonio to meet with the provincial governor, where they entered into a treaty.).

245. CLARKE, *supra* note 12, at 110-11.

246. Treaty, *supra* note 90.

247. *Satterwhite v. Rosser*, 61 Tex. 166, 171 (1884).

248. *Parker*, 65 Tex. at 606, 609-10.

249. See HOIG, *supra* note 47, at 183.

250. See Treaty, *supra* note 90.

possess the property),<sup>251</sup> and “of such a character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant.”<sup>252</sup> It is unequivocal that the Cherokees entered the territory without the permission of Mexico in 1821, and that they intended to claim the land as their own.<sup>253</sup> Granted, the Cherokees made repeated attempts to obtain legal title to the property from the Mexican government, but all such efforts failed.<sup>254</sup> Even so, they never relinquished or subordinated their territorial claim.<sup>255</sup> What is more, despite having executed the Treaty with the Republic of Texas in 1836, the Cherokees were acutely aware that their right to hold and occupy the land was in serious doubt.<sup>256</sup> Notwithstanding, they steadfastly refused to surrender the territory; this defiance eventually led to the Cherokee War (and their forced removal).<sup>257</sup> Thus, there is significant evidence to show hostility, and the element was most likely satisfied.

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251. See Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2426 (2001).

252. *Satterwhite*, 61 Tex. at 171 (citation omitted). More often than not, the hostility element presents the greatest amount of difficulty for an adverse possession claim; it remains a hotly debated topic today. See Stake, *supra* note 251, at 2426. Nevertheless, our purpose is not to prove conclusively that the Cherokees acquired title to the land via adverse possession, but instead to show that the claim was feasible, which illustrates bad faith on the part of the Republic of Texas in abrogating the Treaty. Recall as well that the former Republic of Texas Attorney General G.W. Terrell, a lawyer of this historical period, previously averred that the Cherokees had acquired an inchoate right to the land. CLARKE, *supra* note 12, at 78-79.

253. See *Chance v. Branch*, 58 Tex. 490, 492-93 (1883) (The original entry must have been without the owner’s permission and with the intent to claim the property for an adverse possession to occur; one cannot enter or hold in subordination to the owner.).

254. See *supra* Part I.

255. *Id.* See also CLARKE, *supra* note 12, at 78-79 (discussing how the Cherokees drove “intruders” off their land during Mexico’s rule).

256. See, e.g., CLARKE, *supra* note 12, at 70-71 (explaining that by 1837 the Indians were restless and distrustful of the white settlers, and that the Mexicans were attempting to woo the Indians into their favor; this prompted Houston to offer Chief Bowles a post in the Texas Army); *id.* at 73-74 (discussing how Houston attempted to lay out the boundary lines to the Cherokees’ territory in 1838, but this act created anger among land speculators, citizens, and soldiers with competing claims to the land; the Cherokees were aware that the whites contested to their territorial claim). Note that even if one argues that the Cherokees held the land subordinate to the Republic of Texas after the Treaty was executed, by this point in time, the Cherokees had possessed the land for approximately fifteen years; this holding period was probably long enough to meet the statutory requirements. See *infra* notes 258-63 and accompanying text. Notwithstanding, this counterargument is problematic because land speculators, settlers, and others were staking claims to the Cherokees’ land. CLARKE, *supra* note 12, at 73-74.

257. CLARKE, *supra* note 12, at 73-74.

The fourth adverse possession element requires that the claimant occupy the property for a continuous statutory period.<sup>258</sup> This element is important because the period of occupation fixed by law should be “continuously and consistently adverse.”<sup>259</sup> The Supreme Court of Texas aptly characterized the policy behind this element when it stated: “[A] party will not be allowed to blow hot and to blow cold, for such conduct is calculated to trick and deceive the true owner and lull him to sleep.”<sup>260</sup> In the case of the Cherokees, at no time did they subordinate their title claim to other individuals, as they persistently occupied and claimed their lands for nearly two decades.<sup>261</sup> Because no true owners exercised their right of entry within the ten year period specified by the statute of limitations, the owners’ right to enter the property was barred by law.<sup>262</sup> Moreover, it remains critical to acknowledge that the Cherokees deserted their territory because they were removed by force—not because they voluntarily abandoned their claim.<sup>263</sup> Hence, it seems that this element was met.

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258. *Satterwhite v. Rosser*, 61 Tex. 166, 171 (1884).

259. *Id.*

260. *Id.* at 172.

261. *See supra* Part I. *See also generally* CLARKE, *supra* note 12, at 3 (explaining that the Cherokees “claimed a large area of East Texas” from 1819 to 1839), 79 (discussing the former Texas Attorney General G.W. Terrell’s opinion that “by settling and continuously occupying their lands, the Cherokees had acquired an inchoate right to them”).

262. *See* *Charle v. Saffold*, 13 Tex. 94, 111 (1854). *See also* *Portis v. Hill*, 3 Tex. 273, 279-80 (1848) (“Of the several pleas of limitation of the defendant, Samuel A. Cummings, the first appears to have been framed with especial reference to the 17th section of the act of limitations of 1841, alleging that the defendant had been in the ‘adverse, peaceable possession of the said land, using and enjoying the same,’ for a period of more than ten years. No reason is perceived why this is not a good plea of the limitation prescribed by the 17th section of the statute.”). *See* *Redding v. Redding’s Ex’rs and Heirs*, 15 Tex. 249, 251 (1855); *Lambert v. Weir*, 27 Tex. 359, 363 (1864); *McMasters v. Mills*, 30 Tex. 591, 594-95 (1868). For further evidence that a ten-year statute of limitations was in effect during the years after the Texas revolution—and prior to codification by statute—see *Duncan v. Rawls*, 16 Tex. 478, 482-85 (1856); *Hall v. Phelps, Dallam* 435, 440 (Tex. 1841) (discussing the application of a ten-year statute of limitations to a suit involving land title).

263. This point is noteworthy not only because it shows the Cherokees did not voluntarily abandon a claim to title, but also because the Republic of Texas passed legislation in 1836 that declared a lawsuit was the only means to interrupt an adverse possessor’s peaceable possession. An Act, Organizaing the Inferior Courts, and Defining the Powers and Jurisdiction of the Same, § 39 (1836) (Rep. of Tex.), *reprinted in* 1 GAMMEL’S THE LAW OF TEXAS, *supra* note 83 [hereinafter Act of 1836]. As the Supreme Court of Texas stated: “In the act of 20th December, 1836, it was said, that ‘a peaceable possession can only be interrupted by an actual suit being instituted, and prosecuted agreeably to the due forms of law. . . .’ We do not think the legislature intended to change this rule [by the act of 1841].” *Shields v. Boone*, 22 Tex. 193, 198 (1858). As such, even if one argues that the English common law statute of limitations of

Finally, though not required,<sup>264</sup> color of title would have assisted the Cherokee's claim that they adversely possessed the disputed territory (including the extent of such possession).<sup>265</sup> Color of title generally requires that the adverse possessor's claim is founded upon a document that is defective in some respect.<sup>266</sup> Here, of course, the Cherokees relied on the Treaty, which contained a conveyance of a demarcated territory. So even though the Treaty was declared null, their continued occupation was based upon a document that the Cherokees believed was legally valid. As such, color of title was likely established for at least a portion of the statutory period.<sup>267</sup>

In summary, the Cherokees probably met the elements required to claim title to the disputed territory under the doctrine of adverse possession. Furthermore, the Tribe invested its labor to improve the land, developed personhood connected to it, and presented the requisite utility in quieting land title that is critical to the policy underlying the adverse possession doctrine. Although it seems highly improbable that the Cherokees could maintain an adverse possession claim today, the foregoing analysis offers evidence of bad faith on the Republic of Texas's behalf in abrogating the Treaty. Attorney General Terrell recognized that the Cherokees probably had an inchoate right to the occupied territory that had matured into perfect title,<sup>268</sup> so it seems implausible that members of the Republic of Texas Senate were not also aware of the applicability of the adverse possession doctrine.<sup>269</sup> Therefore, the Senate's argument that the provisional government exceeded its powers by entering the Treaty,

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twenty years was applicable to an adverse possession claim, see, for example, *Lewis v. San Antonio*, 7 Tex. 288, 308 (1851), the Act of 1836 implies that forcibly removing the Cherokees did not stay the statute of limitations from running (as there was never a legal action filed against the Cherokees).

264. See *Satterwhite*, 61 Tex. at 171.

265. See *Lambert*, 27 Tex. at 365; *Charle*, 13 Tex. at 111-12. This type of claim is known as constructive possession. See AMJUR, *supra* note 234, § 124 (stating “[c]olor of title is required to extend an actual possession of a part of a tract of land constructively over the rest of it”).

266. AMJUR, *supra* note 234, § 123.

267. Although not explored here, a claim under color of title reduced the requisite statute of limitation period under Texas law. Act of 1836, *supra* note 263, § 39 (The legislature passed a five year statute of limitations in cases of adverse possession where the property was held by a Republic of Texas citizen under color of title that was recorded in the proper county.).

268. CLARKE, *supra* note 12, at 79.

269. See generally Act of 1836, *supra* note 263, § 39 (The Republic of Texas Senate enacted statutory law governing adverse possession.). See also generally *supra* note 239 (There were numerous adverse possession cases during this historical period.).

thereby injuring the citizenry and the country,<sup>270</sup> appears spurious when one recognizes that the Cherokees were likely already entitled to the property under the doctrine of adverse possession.

## V. TREATMENT OF INDIGENOUS PEOPLES

This Article previously averred that the ICC mistakenly held that the Cherokees forfeited the traditional fiduciary relationship existing between the United States and its indigenous peoples by emigrating to the Republic of Texas.<sup>271</sup> However, rather than being a result of simple ignorance as to the facts surrounding the Cherokees' decision to emigrate, the ICC's argument resembles a mere pretext when one considers the plethora of cases in which the United States has not acted in a way that would even come close to fulfilling the requirements of a fiduciary relationship.<sup>272</sup> Moreover, throughout the nation's history, the United States has repeatedly stripped land away from Indians, and this reprehensible conduct should not be ignored.<sup>273</sup>

The purported fiduciary role applicable to the Indians was spelled out early in U.S. history with the 1787 passage of the Northwest Ordinance: "The utmost good faith shall always be observed towards the Indians; their lands shall never be taken from them without their consent . . . ."<sup>274</sup> The fulfillment of this fiduciary role did not always fall upon deaf ears: Justice Marshall echoed this sentiment in *Worcester v. Georgia*, where he explained that the Cherokee Nation was a sovereign entity, in which the laws of the state of Georgia had no force, as "[t]he whole intercourse between the

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270. CLARKE, *supra* note 12, at 72.

271. *Texas-Cherokee v. United States*, 2 Indian Cl. Comm'n 522, 533 (1953).

272. See Clinton, *supra* note 2, at 99. See also Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 258-65 (discussing how the United States has a long and egregious history of violating treaties with American Indians). For further reading on how the modern-day U.S. Supreme Court has stripped inherent powers away from tribes and transferred those powers to states, see Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003).

273. See Clinton, *supra* note 2, at 82-85. See also Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 42-51 (1991) (exploring the implications of placing American Indian property rights on equal footing with non-Indian property rights); Rebecca Tsosie, *Land, Culture and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1306-12 (2001) (proposing a framework on "intercultural justice" that incorporates indigenous people's interests in sovereignty and property).

274. An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, 32 Journals of the Continental Congress 340-41 (1787), *quoted in* Wiessner, *supra* note 147, at 571.



United States and this nation, is, by our constitution and laws, vested in the government of the United States.”<sup>275</sup> The Supreme Court again reiterated the fiduciary role in *Barker v. Harvey*, when Justice Brewer stated: “It is undoubtedly true that this government has always recognized the fact that the Indians were its wards, and entitled to be protected as such, and this court has uniformly construed all legislation in the light of this recognized obligation.”<sup>276</sup> Given its well-documented and long-standing fiduciary obligation, it is surprising that the U.S. government has frequently been unjust toward the Indians.<sup>277</sup>

Of course, the United States is not alone in its mistreatment of indigenous peoples. For instance, the abhorrent treatment of the Aboriginal people of Australia is infamous throughout the international community. The British reduced Australia’s Aboriginal population to four percent of its former strength in one century,<sup>278</sup> and like the United States, the Australian government now faces retribution as the Aborigines proffer land claims to vast areas of the continent.<sup>279</sup> More proximate to the United States is Canada, where the government recently offered a formal apology to its indigenous peoples for years of neglect, including the widespread abuse of Indian children in the country’s federally-funded boarding schools.<sup>280</sup> In Latin America—another region characterized by large Indian populations—similar cases of injustice abound. For example, Brazil’s Karaja Indians made headlines in recent years after journalists discovered that local activists contract with the Karjas to capture fish, turtles, and animal skins in exchange for alcohol.<sup>281</sup> Because a large percentage of the Karajas are addicted to alcohol, exchanging alcohol for these services puts these people in a position of slavery and

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275. 31 U.S. 515, 561 (1832).

276. 181 U.S. 481, 492 (1901).

277. For a contemporary view of the atrocities committed against the American Indians, as well as a newly proposed theory of justice that might serve to redress these wrongs, see William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1 (2005).

278. See Ben Kiernan, *Cover-Up and Denial of Genocide: Australia, the USA, East Timor, and the Aborigines*, 34 CRITICAL ASIAN STUD. 163, 177 (2002).

279. See Phil Mercer, *Aborigines Dreaming of Land*, BBC NEWS, Oct. 8, 2002, <http://news.bbc.co.uk/1/hi/world/asia-pacific/2309249.stm>.

280. *Indigenous Canadians Get Apology*, BBC NEWS, Jan. 8, 1998, <http://news.bbc.co.uk/1/hi/world/americas/45797.stm>. See also Rosie Goldsmith, *Abuse in Canada*, BBC NEWS, Dec. 28, 2000, [http://news.bbc.co.uk/1/hi/programmes/crossing\\_continents/americas/1091198.stm](http://news.bbc.co.uk/1/hi/programmes/crossing_continents/americas/1091198.stm).

281. *Karaja Indians are Exploited by Alcohol*, Institute Centro de Vida, July 16, 1998, available at <http://www.hartford-hwp.com/archives/42/091.html>.

exploitation.<sup>282</sup> In fact, governments throughout the Americas are failing in their commitment to the region's indigenous peoples, as these groups remain some of the most marginalized and poverty-stricken in the world.<sup>283</sup> Thus, with such commonplace abuse, it has become increasingly vital for concerned actors on the global stage to keep a watchful eye on the maintenance and advancement of indigenous peoples' rights.

Without question, contemporary international thinking has advanced the cause of indigenous peoples. For instance, the United Nations (U.N.) now has an established body—the Permanent Forum on Indigenous Issues (PFII)—which serves in a consultative capacity to the Economic and Social Council (ECOSOC).<sup>284</sup> The PFII provides expert advice to the ECOSOC, raises awareness and promotes integration and coordination of indigenous-related activities within the U.N. system, and prepares and disseminates information on matters of indigenous import.<sup>285</sup> In addition, the U.N. has also benefited from the efforts of the Working Group on Indigenous Populations, which drafted the “United Nations Declaration on the Rights of Indigenous Peoples” in 1993.<sup>286</sup> The Commission on Human Rights set up an open-ended intercessional working group to review and expand this instrument in 1995,<sup>287</sup> and after more than a decade of refinement, the Human Rights Council adopted a final version of the document in 2006 (Declaration).<sup>288</sup> If the Declaration is adopted by the U.N. General Assembly, it will

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282. *Id.*

283. *Americas 'Failing Native Peoples,'* BBC NEWS, Oct. 11, 2002, <http://news.bbc.co.uk/1/hi/world/americas/2318757.stm>.

284. Office of the United Nations High Commissioner for Human Rights, History and Mandate of the Permanent Forum, <http://www.unhchr.ch/indigenous/history.htm> (last visited Aug. 14, 2006) [hereinafter Permanent Forum]. For a brief overview of the principal organs of the United Nations, see United Nations, Organization Chart of the United Nations System, <http://www.un.org/aboutun/unchart.pdf> (last visited Aug. 14, 2006).

285. Permanent Forum, *supra* note 284.

286. FACT SHEET NO. 9 (REV. 1), U.N. HIGH COMM'R FOR HUMAN RIGHTS, THE RIGHTS OF INDIGENOUS PEOPLES (1997), <http://www.ohchr.org/english/about/publications/docs/fs9.htm> (last visited Aug. 14, 2006) [hereinafter FACT SHEET NO. 9]. See also, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. Of Minorities, *Draft Declaration on the Rights of Indigenous Peoples*, at 103, U.N. Doc. E/CN.4/Sub.2/1994/56 (Oct. 28, 1994).

287. FACT SHEET NO. 9, *supra* note 286.

288. The Vice-President of the Human Rights Council, *Report to the General Assembly on the First Session of the Human Rights Council*, at 58, *delivered to the General Assembly*, U.N. Doc. A/HRC/1/L.10 (June 30, 2006) [hereinafter Declaration].

probably be the most comprehensive statement of indigenous peoples' rights ever developed, as it establishes collective rights to an unprecedented degree in the field of international human rights law.<sup>289</sup>

The Declaration reflects modern international thinking on the rights of indigenous peoples and therefore offers persuasive moral guidance to the United States should the Cherokees renew their claim. More specifically, an examination of three pertinent articles in the Declaration will suffice to demonstrate its utility. First, Article 10 states: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."<sup>290</sup> Without question, the historical evidence shows that the Republic of Texas forcibly removed the Cherokees.<sup>291</sup> Thus, this principle was violated. Second, the first paragraph of Article 28 discusses the restoration of confiscated property by stating:

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.<sup>292</sup>

Pursuant to this principle, the Cherokees are entitled to recovery of lands that were confiscated without their consent by the Republic of Texas, or in the alternative, compensation for the property. Nevertheless, these two principles are probably inapplicable because they apply to actions taken by the Republic of Texas, a now-extinct state. Consequently, a third section—Article 37, paragraph 1—likely provides the strongest guidance regarding the Cherokees' claim: "Indigenous peoples have the right to the recognition, observance and enforcement of Treaties, Agreements and other Constructive Arrangements concluded with States or their successors and to have States honour and respect such Treaties, Agreements and other

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289. UNITED NATIONS GUIDE FOR INDIGENOUS PEOPLES, LEAFLET NO. 5: THE DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, <http://www.unhchr.ch/html/racism/indileaflet5.doc> [hereinafter LEAFLET] (last visited Aug. 14, 2006).

290. Declaration, *supra* note 288, art. 10.

291. See HOIG, *supra* note 47, at 190.

292. Declaration, *supra* note 288, art. 28, ¶ 1.

Constructive Arrangements.”<sup>293</sup> Here, the principle is unequivocal in advocating that the United States honor the Treaty because it was in all likelihood a valid agreement when the United States annexed the Republic of Texas.

Throughout U.S. history, the government has systematically violated the rights of Indians despite having promulgated a role of interaction characterized by good faith, honesty, and fair dealing. Regrettably, United States’ behavior is not anomalous: similar incidences of mistreatment of indigenous peoples have occurred in Australia, Canada, and countries in Latin America. The U.N. has taken a lead role on the issue of indigenous rights in recent years, and though it has not yet produced a binding treaty, it has contributed substantively to the maintenance and improvement of such rights by crafting the Declaration. By applying key sections of this persuasive instrument to the Cherokees’ claim, the analysis concludes that there is a compelling moral justification for the United States to honor the Treaty. Furthermore, as a leader on the world stage, the United States has a unique opportunity to show genuine support for the Declaration’s principles.

## CONCLUSION

The Treaty executed in 1836 between the Republic of Texas and the Cherokees appears to have been a binding agreement. The pact was properly executed by the provisional government of the Republic of Texas, which had the authority and obligation to treat with the Indians under the Plan and Powers.<sup>294</sup> Furthermore, while the agreement did incorporate the Solemn Declaration,<sup>295</sup> which granted territory to the Cherokees,<sup>296</sup> the Treaty neither contained a provision that required Senate ratification,<sup>297</sup> nor did the provisional

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293. *Id.* art. 37, ¶ 1. See generally Angela R. Hoeft, *Coming Full Circle: American Indian Treaty Litigation from an International Human Rights Perspective*, 14 LAW & INEQ. 203, 248-55 (1995) (discussing the canons of treaty construction and their application to the agreements of indigenous peoples).

294. See Plan and Powers, *supra* note 83, art. III.

295. See Treaty, *supra* note 90, pmbl. (“This Treaty is made—conformably to a declaration [the Solemn Declaration] made by the last General Consultation, at St. Felipe, and dated 13th November A.D. 1835.”).

296. CLARKE, *supra* note 12, at 60-61. See also JOURNALS, *supra* note 83, at 546-47.

297. See *supra*, Part II.A. However, the Senate ultimately did reject the treaty. See also generally Treaty, *supra* note 90; Plans and Powers, *supra* note 83, art. 3 (“They shall have power, and it is hereby made the duty of the Governor and Council, to treat with the several tribes of Indians concerning their Land Claims.”).

government have a mechanism by which to ratify treaties under the Plan and Powers.<sup>298</sup> The simple fact is that the Republic of Texas was at war with a powerful nation—Mexico—and the allegiance of the Cherokees and affiliated tribes was believed to be critical to the burgeoning state if its war for independence was to succeed.<sup>299</sup> As such, the Republic of Texas was bound to keep its word and honor the Treaty under the well known international principle—*pacta sunt servanda*—which means that agreements must be kept.<sup>300</sup> Each party explicitly recognized the capacity of the other party to treat by entering the pact,<sup>301</sup> and more importantly, the Republic of Texas did not justify abrogating the Treaty.<sup>302</sup> For these reasons, the Treaty was probably valid under domestic and international law.

The most noteworthy decision regarding the Cherokees' claim issued from the ICC in 1953,<sup>303</sup> but this administrative tribunal reached what was likely an inequitable outcome that was the result of a flawed analysis. The ICC misinterpreted and misapplied case precedent, ignored key historical facts required to properly adjudicate the claim, and failed to consider the Treaty within the rubric of international law. More particularly, the ICC's conclusion that the United States did not have to succeed to the Treaty after the annexation of the Republic of Texas ignored three key issues: first, the decision violated traditional state succession principles as codified in both the modern Restatement and VCSST;<sup>304</sup> second, the decision cannot be reconciled with U.S. precedent concerning private property rights in historical cases of annexation;<sup>305</sup> and third, the decision contradicted earlier policy positions on state succession promulgated by the United States in the international arena.<sup>306</sup> Hence, it seems that the United States should have succeeded to the obligation.<sup>307</sup>

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298. See Plan and Powers, *supra* note 83.

299. See CLARKE, *supra* note 12, at 64 (explaining that the Republic of Texas wanted Cherokee neutrality with regard to its military campaign against Mexico); *id.* at 120 (stating that Chief Bowles “may have been the single most important man in Texas’ struggle for independence” because he kept the Texas Cherokees neutral).

300. See Wiessner, *supra* note 147, at 567.

301. See *supra* text accompanying notes 166-76.

302. See *id.*

303. See Texas-Cherokees v. United States, 2 Indian Cl. Comm’n 522, 522 (1953).

304. See *supra* Part III.B.1.

305. See *supra* Part III.B.2.

306. See *supra* Part III.B.3.

307. The fact that the United States probably should have succeeded to the Treaty does not imply that the agreement could not be abrogated. The U.S. Supreme Court held long ago that

While the Treaty in all likelihood remains a valid instrument, there is another legal argument that suggests the Cherokees had already gained title to the land in question. In short, the Cherokees probably had acquired an inchoate right to the disputed territory that matured into perfect title under the doctrine of adverse possession.<sup>308</sup> Satisfying the essential elements of this traditional rule of law bolsters the Cherokees' claim to the property because even if the Treaty was invalid, then adverse possession provided an alternative right of title to the land that met both personhood and utilitarian concerns. Though it seems marvelous that the Cherokees could pursue a claim for adverse possession at this late point in time, the fact that this matter has long been ignored shows bad faith on the part of the former Republic of Texas government, the state of Texas government, and the U.S. government in refusing to honor the Treaty.

Finally, even if one concludes that the Treaty was invalid, or in the alternative, that the Cherokees had no sustainable claim to the land under the doctrine of adverse possession, any decision that denies the Treaty's validity proves difficult to reconcile for a nation that has held steadfast to its obligations as a fiduciary to its indigenous peoples since as early as 1787.<sup>309</sup> When the putative fiduciary role is considered alongside the historical legal precedent, policy, and behavior of the United States, the decision to dishonor the Treaty is even more perplexing. In fact, one can argue that by failing to acknowledge and honor the obligation of the former Republic of Texas, especially in the context of contemporary thinking on the rights of indigenous peoples as expressed in the Declaration,<sup>310</sup> the behavior of the United States is ignominious.

This Article is not without its faults. Most notably, it is not written by a legal historian, and some students of law may argue that it is inappropriate—even in a scholarly pursuit—to apply modern codification of international law to the analysis of a historical treaty. However, given the exceedingly slow, almost “ablation-like” process by which international law evolves, the codification of doctrine

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Indian rights derived from a treaty could be abrogated unilaterally by Congress through subsequent statutory enactments. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

308. See *supra* Part IV.

309. See generally Wiessner, *supra* note 147, at 571 (discussing U.S. passage of the Northwest Ordinance of 1789, which pledged the U.S. would show the “utmost good faith . . . towards the Indians”).

310. See LEAFLET, *supra* note 289.

exemplified by the contemporary instruments cited in this article is at best a *de minimis* issue in the analysis of the Treaty. All the same, such issues foster opportunities for students of both domestic and international law to offer further insight and analysis into the interpretation of the Treaty, not only within the context of the law itself, but by encouraging interest in specific cases of historical precedent—such as the Treaty of Guadalupe Hidalgo—which may shed further light on the instrument’s validity.<sup>311</sup> Furthermore, students of history and law can analogize this matter to similar cases of broken treaties with indigenous peoples occurring in places such as the United States, Australia, Canada, and Latin America.<sup>312</sup> In the end, the numerous branches that one can explore serve not only to shed light on the Cherokees’ claim, but also can help other domestic and international tribes facing like circumstances better understand and resolve their own issues.

The reader is the final arbiter regarding the validity of the Treaty, but the evidence presented in this Article lays out a cogent case for the Cherokees should they decide to renew their claim. Yet, even if the United States recognizes the Treaty as binding, the unanswered question is if the government should provide restitution to the Cherokees in the form of federal recognition bringing federal money, compensation and land, or both.<sup>313</sup> Whatever the final outcome, any redress should accomplish one essential objective: it must help what was historically the most important tribe in the region save what remains of its cultural heritage.

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311. See generally Treaty of Guadalupe Hidalgo, *supra* note 217, 9 Stat. at 926-32 (ceding territory from Mexico to the United States).

312. For example, the Oneida Nation recently sparred with the City of Sherrill, New York, in the U.S. Supreme Court regarding the Tribe’s ability to assert sovereignty over its land. *Passage of Time at Issue in Oneida Nation Case*, INDIANZ.COM, January 12, 2005, <http://www.indianz.com/news/2005/005975.asp>. Despite being recognized by a Treaty in 1794, the Oneida’s 300,000 acre reservation fell out of possession of the Tribe over the next two hundred years, and the city argued that the passage of time barred the territory from being labeled as “Indian Country,” which makes it free from state and local taxation. *Id.*

313. Sutton, *supra* note 119, at 545.