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Andrew M. Beato

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# NEWLY INDEPENDENT AND SEPARATING STATES' SUCCESSION TO TREATIES: CONSIDERATIONS ON THE HYBRID DEPENDENCY OF THE REPUBLICS OF THE FORMER SOVIET UNION

Andrew M. Beato\*

## INTRODUCTION

While the leadership of Russian President Boris Yeltsin heralded a welcome change in the historically antagonistic relations between the Soviet Union and the United States,<sup>1</sup> the dissolution of the Soviet Union<sup>2</sup> engenders grave concern over the stability of U.S. foreign relations with Eurasia.<sup>3</sup> Formerly composed of fifteen republics under one central authority,<sup>4</sup> the Soviet Union has fractured into fifteen independent

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\* J.D. Candidate, 1994, Washington College of Law, The American University; B.A., 1991, Boston University.

1. See Richard Pipes, *The Soviet Union Adrift*, FOREIGN AFF., Vol. 70, No. 1, at 70, 70-73 (1991) (discussing cold war hostilities between the United States and the Soviet Union, and former Soviet President Mikhail Gorbachev's reform efforts including *glasnost* and *perestroika*). See also AMERICAN BAR ASSOCIATION, CONFRONTATION IN THE AMERICAN-SOVIET RELATIONSHIP: CAN IT BE MANAGED? (1980) (discussing causes of conflict between the United States and the Soviet Union despite détente).

2. See ACCORD ON THE COMMONWEALTH OF INDEPENDENT STATES (1991), reprinted in PERESTROIKA IN THE SOVIET REPUBLICS: DOCUMENTS ON THE NATIONAL QUESTION 355-58 (Charles F. Furtado, Jr. & Andrea Chandler eds., 1992) (providing a translation of the accord officially disbanding the Soviet Union). The Accord dissolved the Soviet Union as a "subject of international law and geopolitical reality." *Id.* at 355. The named parties in the Accord—Belarus, Russia and the Ukraine—were founding members of the Union of Soviet Socialist Republics (U.S.S.R.) and original signatories of the Union Treaty of 1922. *Id.* See *infra* note 105 and accompanying text (discussing the Union Treaty of 1922).

3. See Dimitri Simes, *America and the Post-Soviet Republics*, FOREIGN AFF., Vol. 71, No. 3, at 73 (1992) (commenting that political changes in the former Soviet Union are destabilizing potentially and present opportunities for U.S. initiatives).

4. See ROBIN MILNER-GULLAND & NIKOLAI DEJEVSKY, CULTURAL ATLAS OF RUSSIA AND THE SOVIET UNION 185-224 (Andrew Lawson et al. eds., 1989) (citing the former republics of the constituent Soviet Union as Armenia, Azerbaijan, Belarus,

states.<sup>5</sup> Each of these states has proclaimed their sovereign independence;<sup>6</sup> with the exceptions of the Baltic countries and the former Republic of Georgia, each has joined voluntarily the loosely aligned confederation of the Commonwealth of Independent States (Commonwealth or CIS).<sup>7</sup>

The dismemberment of the Soviet empire seemed to signal the triumph of Western democratic institutions over the coercive rule of authoritarianism.<sup>8</sup> Nonetheless, it has become painfully apparent to observ-

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Estonia, Georgia, Kazakhstan, Kirghizia, Latvia, Lithuania, Moldova, Russia, Tadjikistan, Turkmenistan, Ukraine, and Uzbekistan.).

5. See *Focus on the Emerging Democracies: A Periodic Update*, U.S. Dep't of State Dispatch, Mar. 2, 1992, available in LEXIS, ITrade Library, DState File (stating that the former republics composing the confederation are Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan); George Bunn & John B. Rhineland, *The Arms Control Obligations of the Former Soviet Union*, 33 VA. J. INT'L L. 323, 323-24 (1993) (noting that fifteen nations were formed out of the dissolution of the Soviet Union). Each of these new states was accorded formal recognition by the United States Government. *Id.* at 324.

6. See Michael Mendelbaum, *Coup De Grace: The End of the Soviet Union*, FOREIGN AFF., Vol. 71, No. 1, at 164, 168 (1992) (explaining that each republic declared its sovereignty and asserted that its laws took precedence over those of the defunct Soviet Union). The republics declared independence in the period from April through December 1991. See *Chronology 1991*, FOREIGN AFF., Vol. 71, No. 1, at 184, 195-206 (Patricia Lee Dorff ed., 1992) [hereinafter *Chronology 1991*]. The first republic to declare its independence was Georgia on March 31, 1991. *Id.* at 197. The last republic to declare its independence was the Ukraine on December 1, 1991. *Id.* at 204. See also Bunn & Rhineland, *supra* note 5, at 323-24 (noting declaration of independence by the former republics).

7. See *Chronology 1991*, *supra* note 6, at 184, 205 (stating that on December 21, 1991, eleven republics coalesced to form the Commonwealth of Independent States (Commonwealth or CIS)). The agreement guarantees "separate sovereignties" to each signatory republic. *Id.* See also Armenia-Azerbaijan-Belarus-Kazakhstan-Kyrgyzstan-Moldova-Russian Federation-Tajikistan-Turkmenistan-Uzbekistan-Ukraine: Agreements Establishing the Commonwealth of Independent States, Dec. 8, 1991, reprinted in 31 I.L.M. 138 (1992). Neither the Republic of Georgia nor the Baltic States entered the Commonwealth. *Chronology 1991*, *supra* note 6, at 184, 205. Furthermore, the eleven members of the Commonwealth signed an additional accord stating that:

Until the complete elimination of nuclear weapons, the decision on the need for their use is made by the President of the Russian Federation in agreement with the heads of State of the Republic of Belarus, the Republic of Kazakhstan and Ukraine, and in consultation with the heads of the other Member States of the Commonwealth.

Minsk Agreement on Strategic Forces, Dec. 31, 1991, art. 4, reprinted in ARMS CONTROL TODAY, Jan./Feb. 1992, at 39.

8. See, e.g., Robert E. Hunter, *Starting at Zero: U.S. Foreign Policy for the*

ers of the emerging new world order<sup>9</sup> that international law provides few clear answers to some of the critical legal issues arising from the dismantling of the Soviet State. Out of concern for global security,<sup>10</sup> the foremost of these issues prompted inquiry into whether the former Soviet republics, vested with newly found independence, would inherit the bilateral treaty<sup>11</sup> rights and obligations that existed between the former Soviet Union and other nations, particularly the United States.<sup>12</sup>

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1990s, WASH. Q., Vol. 15, No. 1, at 24, 26 (1992) (suggesting that the breakup of the Soviet Union has been interpreted as a "triumph for two basic tenets of Western power and position: the market economy and the pluralistic society").

9. See generally Joseph S. Nye, Jr., *What New World Order?*, FOREIGN AFF., Vol. 71, No. 2, at 83 (1992) (providing text of a statement by former President George Bush that the new world order includes peaceful resolution of disputes, unity against aggression, and the fair treatment of all individuals).

10. See Bunn & Rhineland, *supra* note 5, at 323-27 (discussing the splintering of the former Soviet nuclear arsenal as a result of the dissolution of the Soviet Union). See also Pipes, *supra* note 1, at 76 n.6 (detailing concern over the fate of Soviet intercontinental nuclear missiles); Simes, *supra* note 3, at 91-95 (noting apprehension over the dismantling of the second most powerful military in the world and the presence of intercontinental ballistic missiles on Ukrainian soil); Martha Brill Olcott, *Central Asia's Catapult to Independence*, FOREIGN AFF., Vol. 71, No. 3, at 108, 118-19 (1992) (noting concern over safety and stability of nuclear weapons currently situated in the former republic of Kazakhstan).

11. See Vienna Convention on Succession of States in Respect of Treaties, *adopted* Aug. 22, 1978, *opened for signature* Aug. 23, 1978, art. 2(a), U.N. Doc. A/CONF. 80/31 (1978), *reprinted in* 17 I.L.M. 1488, 1490 [hereinafter Vienna Convention] (defining a treaty as an "international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation").

12. See *The Strategic Arms Reduction Treaty: Hearings on S. 607 Before the Senate Committee on Foreign Relations*, 102d Cong., 2d Sess. 309-19 (1992) [hereinafter *Hearings*] (memorandum of George Bunn and John Rhineland) (suggesting that the Nuclear Non-Proliferation Treaty, the Anti-Ballistic Missile Treaty, the Conventional Forces in Europe Agreement, and the Strategic Arms Reduction Treaty are bilateral accords of primary concern after the collapse of the Soviet Union); Bunn & Rhineland, *supra* note 5, at 323-50 (examining the status of specific arms limitation agreements of the former Soviet Union in the wake of dissolution by application of the conventional law of state succession); Edwin D. Williamson & John I. Osborn, *A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia*, 33 VA. J. INT'L L. 261, 264-70 (1993) (stating that bilateral agreements between the former Soviet Union and the United States, effective at the moment of dissolution, should continue to have effect in each former republic except the Baltic nations); Rein Mullerson, *New Developments in the Former USSR and Yugoslavia*, 33 VA. J. INT'L L. 299, 299-308 (1993) (concluding that the Russian Federation continues to exist as a successor state to the Soviet Union). Consequently,

International law endeavors to obviate the confusing effects that changes in sovereignty often have on the legal status of treaties through the law of state succession.<sup>13</sup> State succession law explores the implications that mutations of sovereignty have upon a state's international obligations.<sup>14</sup> The object of this investigation is to minimize the potentially deleterious effects of geopolitical alterations<sup>15</sup> by delineating when a new, or successor, state<sup>16</sup> is deemed responsible for the international

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the Russian Federation assumes legal responsibility for all treaty and international obligations of the Soviet Union. *Id.*; John B. Rhinelanders & George Bunn, *Who's Bound by the Former Soviet Union's Arms Control Treaties?*, ARMS CONTROL TODAY, Dec. 1991, at 3 (interpreting conventional law as requiring the former republics to adhere to pre-existing treaties).

13. See Vienna Convention, *supra* note 11, art. 2(b), at 1490 (defining a succession of states as "the replacement of one State by another in the responsibility for the international relations of territory"). See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Pt. II, § 208 (1987) [hereinafter RESTATEMENT] (defining the succession of states to include the termination of the rights and obligations of a predecessor state over a specific territory which are then absorbed by a successor state); Note, *Taking Reichs Seriously: German Unification and the Law of State Succession*, 104 HARV. L. REV. 588, 595-98 (1990) (stating that the law of state succession functions within a larger complex of the law of treaties); Oscar Schachter, *State Succession: The Once and Future Law*, 33 VA. J. INT'L L. 253, 253 (1993) (suggesting that the notion of succession, as a legal premise, is a "somewhat imprecise term that deals with the transmission or extinction of rights and obligations of a state that no longer exists or has lost part of its territory").

14. See generally UKON UDOKANG, SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES 108-09 (1972) (discussing state "succession in law"); DANIEL P. O'CONNELL, THE LAW OF STATE SUCCESSION 3 (1956) [hereinafter O'CONNELL, SUCCESSION] (examining state succession); DANIEL P. O'CONNELL, 1 STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 3-35 (1967) [hereinafter O'CONNELL 1] (reviewing various theories of state succession); DANIEL P. O'CONNELL, 2 STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 5 (1967) [hereinafter O'CONNELL 2] (analyzing state succession in cases of annexation, cession and grants of independence); ARNOLD D. MCNAIR, THE LAW OF TREATIES 589-90 (1961) (discussing state succession); P.K. MENON, THE SUCCESSION OF STATES IN RESPECT TO TREATIES, STATE PROPERTY, ARCHIVES AND DEBTS 2-4 (1991) (noting that under the 1978 Vienna Convention definition, state succession means that a new state replaces a predecessor state as the entity responsible for conducting international relations over a given territory).

15. See DANIEL P. O'CONNELL, INTERNATIONAL LAW 365 (1970) (stating that the rules of state succession are designed to minimize the disruption to the international legal community caused by changes in state sovereignty).

16. The term "new" state is synonymous with "successor" state. See Vienna Convention, *supra* note 11, art. 2(d), at 1490 (stating that a successor state replaces another state in the control of a particular territory); see also RESTATEMENT, *supra* note

agreements of a predecessor state.<sup>17</sup> Accordingly, conventional international law has developed relatively clear rules to address whether treaties continue to be in effect in the event that two states merge into a new state,<sup>18</sup> or in the event that a part of one state's territory is absorbed by another state.<sup>19</sup>

A more complicated situation is presented in cases of either newly independent<sup>20</sup> or separating<sup>21</sup> states. Distinguishing between these two types of new states may prove to be a matter of form over substance.<sup>22</sup> Conventional international law heightens the confusion by espousing a

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13, § 208 cmt. b (defining successor state to include wholly absorbed, dismembered, and newly independent states).

17. See Vienna Convention, *supra* note 11, art. 2(c), at 1490 (defining predecessor state as one that has been replaced by another distinct state).

18. See Vienna Convention, *supra* note 11, art. 31, at 1506 (providing that when two states unite or merge to create one successor state, pre-existing treaties remain operative). Article 31 notes that a treaty may be invalidated if all concerned parties agree or if continued application would distort its purpose or meaning. *Id.* But see RESTATEMENT, *supra* note 13, § 210(1) (stating that territory absorbed by another state does not carry with it the treaties of its predecessor state, but instead takes on the treaties of the incorporating state).

19. See Vienna Convention, *supra* note 11, art. 15, at 1496 (holding that in cases of territory absorbed by another state, the treaties of the predecessor state cease to have effect and those of the successor state become operative); see also *Report of the International Law Commission to the General Assembly*, [1984] 2 Y.B. Int'l L. Comm'n 208-10 (1984) (discussing a draft of the "moving frontiers" treaty rule); RESTATEMENT, *supra* note 13, § 210(2) (noting that if a state is absorbed, its international obligations cease and those of the absorbing entity become operative).

20. See Vienna Convention, *supra* note 11, art. 2(f), at 1490 (defining newly independent state as "a successor State the territory of which immediately before the date of succession of States was a dependent territory for the international relations of which the predecessor State was responsible").

21. See Vienna Convention, *supra* note 11, art. 34, at 1509 (noting that state separation occurs when the territory of a state divides creating one or more new entities, regardless of whether the predecessor state continues to exist).

22. See Richard D. Kearney, *The Twenty-Sixth Session of the International Law Commission*, 69 AM. J. INT'L L. 591, 599 (1975) (discussing the International Law Commission's (ILC) commentary addressing whether a sufficient distinction exists between newly independent and separated states); *Hearings*, *supra* note 12, at 311 (explaining that U.S. representatives to the Vienna Convention raised concerns about the practical ability of distinguishing between the separation of a unified state and seceding former colonies); Bunn & Rhineland, *supra* note 5, at 328 (recognizing the difficulty of "determin[ing] whether a seceding state has been previously in the dependent status of a colony"); RESTATEMENT, *supra* note 13, § 210 reporter's note 4 (rejecting the distinction between newly independent and separated states in the Vienna Convention).

bright-line test to determine whether an emerging territory will be treated as either a separating or a newly independent state. This test focuses on the degree to which a successor state was formerly dependent on a predecessor state for its international relations.<sup>23</sup> While seemingly simple in its formulation of the problem, the determination becomes mired in ambiguity.

Thus, under conventional international law, whether a former Soviet republic is legally obligated to succeed to Soviet treaties hinges upon that particular republic's characterization as either a newly independent or a separating state. As this Comment will demonstrate, by employing a strictly theoretical formulation and ignoring some practical realities, conventional international law fails to resolve the very issue it poses. Fortuitously, the CIS has pledged voluntary compliance with the pre-existing treaty obligations of the Soviet state, thus circumventing conflict over the issue of whether conventional law would legally mandate such continued adherence.<sup>24</sup> But in an era burgeoning with new states, the

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23. See *infra* notes 30-38 and accompanying text (discussing the dependent territory test). Ambiguity in state succession arises as a result of conventional law's failure to acknowledge gradations of dependency in distinguishing between newly independent or separating state status. See, e.g., RESTATEMENT, *supra* note 13, § 210 reporter's note 4 (rejecting the distinction between newly independent and separating states, because many separating states exhibit defining characteristics similar to those exhibited by newly independent countries).

24. See Bunn & Rhineland, *supra* note 5, at 324-25 (quoting diplomatic note circulated by the Russian Foreign Ministry on January 13, 1992, in which the Russian Federation requested to "be considered as the Party in all international treaties in force in place of the Union of Soviet Socialist Republics"). Soviet-American treaties will remain bilateral since the Russian Federation has agreed to be the principal obligor in the sphere of international relations. *Id.* (providing January 29, 1992 statement of Boris Yeltsin in which the Russian President asserted that "Russia regards itself as the legal successor to the USSR in the field of responsibility for fulfilling international obligations"). To alleviate U.S. fears over the control of nuclear weapons not located on Russian soil, the CIS has issued two declarations. *Hearings, supra* note 12, at 309. The first statement, the Alma-Ata Declaration on Nuclear Arms, was issued on December 22, 1991. *Id.* It purported to withdraw tactical nuclear weapons located in Belarus, Kazakhstan and Ukraine to facilities located in Russia by July 1, 1992 with the object of dismantling. *Id.* In the Minsk Agreement on Strategic Forces of December 31, 1991, each of the eleven former Soviet republics currently comprising the CIS agreed to:

[O]bserve the international treaties of the U.S.S.R. and to pursue a coordinated policy in the area of international security, disarmament and arms control . . . [and to enter] into negotiations with one another and also with other states which were formerly part of the U.S.S.R. but which have not joined the Commonwealth, with the aim of ensuring guarantees

fact that fortuity resolved this issue underscores the urgency of the need to evaluate and revise the law.

This Comment examines the law of state succession to treaties as applied to newly independent and separating states, and inquires into whether the former Soviet republics are legally obligated to succeed to the treaties of the dissolved Soviet Union. Part I reviews the conventional international law of state succession to treaties by newly independent and separating states. Part II explores by example the practice of these two categories of states in cases of treaty succession. Part III argues that the conventional law's approach to state succession is based on a litmus test which can only be satisfied in a traditional colonial context. Consequently, the law categorically negates hybrid cases. This creates anomalies whereby so-called separating states inherit preexisting treaty rights and obligations, despite the fact that they may have exercised comparatively less sovereign control over their international relations than some newly independent nations. Part IV asserts that under existing law, the former republics are better characterized as separating states obligated to succeed to Soviet treaties, rather than newly independent states not so obligated. Part IV makes this assertion through the application of the conventional law to the states that emerged from the dissolution of the Soviet Union. Part V proposes to expand the conventional law on state succession to account for hybrid situations of separated but dependent territories—though not in a classically colonial framework. The Comment concludes that, in its current form, conventional state succession law is incapable of adequately addressing the peculiar phenomena of separated but dependent nations.

## I. THE LAW OF STATE SUCCESSION TO TREATIES

Much of the difficulty associated with changes in state sovereignty and the resulting implications on treaty obligations results from the complexity of state succession. As a term of art, state succession refers to what occurs to the international legal obligations of a state with sovereign control over a specific territory upon the surrender, either consensual or nonconsensual, of that control to another state.<sup>25</sup>

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and developing mechanisms for implementing existing arms control treaties.

*Id.* at 310.

25. See UDOKANG, *supra* note 14, at 106 (stating that the difficulty of state succession issues arises when a state "ceases to exist or to rule in a given territory and its place is taken by another"); YILMA MAKONNEN, INTERNATIONAL LAW AND



Upon a succession of states, there is agreement that a new state cannot escape compliance with customary legal practices.<sup>26</sup> There is less agreement, however, as to when a new state is obligated to adhere to the conventional treaties of its predecessor state.<sup>27</sup> This disparity is partially attributable to the numerous ways in which sovereignty is reformulated as a state undergoes basic changes in its legal identity.<sup>28</sup> The law

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THE NEW STATES OF AFRICA: A STUDY OF THE INTERNATIONAL LEGAL PROBLEMS OF STATE SUCCESSION IN THE NEWLY INDEPENDENT STATES OF EAST AFRICA 121-22 (1983) (reviewing several definitions of the term "state succession," and asserting that the most appropriate definition is "a change in sovereignty with regard to a given territory"). The key to understanding state succession is investigating the personality of the newly created state. *Id.* If the legal personality of the predecessor state is extinguished, then total state succession is said to have occurred. *Id.* at 123 (citation omitted). If, however, the predecessor state's legal personality or identity continues in the territory of the new state, then partial state succession is said to have occurred. *Id.* (citation omitted). See also I INTERNATIONAL LAW: A TREATISE 157-58 (Lassa Oppenheim ed., 8th ed. 1967) (noting that partial state succession occurs when part of a state breaks off to form a separate sovereign entity without diminishing the international identity of the predecessor state); O'CONNELL, *supra* note 15, at 405 (noting five principle ways in which territory can be acquired by another state including cession, annexation, occupation, prescription, and accretion).

26. See International Law Association, *Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of Their Predecessors*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-THIRD CONFERENCE 619 (L.C. Green ed., 1968) [hereinafter FIFTY-THIRD CONFERENCE] (providing that certain international obligations automatically vest by the operation of customary international law); RESTATEMENT, *supra* note 13, § 210 cmt. i (stating that a new state inherits the obligations and rights under customary international law). See also SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 55 (1984) (commenting on the origin and application of customary international law); KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 162 (1993) (offering arguments supporting presumed acceptance of customary law); UDOKANG, *supra* note 14, at 121 (noting "established principle" that new states must uphold customary international regulations).

27. See UDOKANG, *supra* note 14, at 121-22 (asserting that little practical or theoretical agreement exists on the extent to which a predecessor state's international obligations devolve to new, successor countries); see also O'CONNELL, *supra* note 15, at 368 (suggesting that some treaties, such as personal accords of a predecessor state, are essentially contractual manifestations which do not automatically vest in a new state) (footnote omitted).

28. See KRISTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW 5 (1954) (defining the legal identity or personality of a state as the "sum total of its rights and obligations under both customary and conventional international law"); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 25-26 (1979) (holding that the term international legal identity implicates a rec-

of state succession, as a result, seeks to assess the effects that changes in sovereignty over a specific territory have upon both a state's legal identity and treaty obligations.<sup>29</sup> Implicit in this assessment is the notion that fundamental changes to a state's identity will have repercussions upon treaty responsibilities.

#### A. NEWLY INDEPENDENT STATES AND THE CLEAN SLATE THEORY

One major classification of successor states under international law is the newly independent nation. Conventional law broadly defines a newly independent state as a territory that, prior to securing independence, was "dependent" upon another state for the conduct of international relations.<sup>30</sup> According to the representative for the United States to the International Law Commission (ILC),<sup>31</sup> a successor state will be deemed

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ognized capacity to undertake international obligations and rights) (footnote omitted). See also WOLFGANG G. FRIEDMAN ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 201 (1969) (providing that the traditional view that only fully sovereign states could maintain an international legal personality has been widened to include non-State entities); but see MAREK, *supra* at 127-29 (rejecting the notion that a state's legal identity can attach to tangible concepts such as names, resident population, type of government, or geographic location).

29. See MAKONNEN, *supra* note 25, at 124-26 (reviewing changes in state identity as it relates to state succession).

30. See Vienna Convention, *supra* note 11, art. 2(f), at 1490 (presenting the term "newly independent states" to mean "a successor State the territory of which immediately before the date of succession of States was a dependent territory for the international relations of which the predecessor State was responsible"). See also Kearney, *supra* note 22, at 592 (noting commentary made during the 26th Session of the ILC regarding the general presumption that colonial populations cannot participate in the government of the colonizing power). Absent participation in treaty ratification or adoption, a new state cannot be held bound by these international agreements. *Id.* See also Williamson & Osborn, *supra* note 12, at 262-63 (stating that under the Vienna Convention, former colonies, along with "territories dependent upon a dominant state for the conduct of their foreign policy," compose the category of newly independent states); Bunn & Rhineland, *supra* note 5, at 328 (suggesting that newly independent states are territories in which a predecessor state formerly controlled the course and conduct of their international affairs).

31. See IAN MCTAGGART SINCLAIR, *THE INTERNATIONAL LAW COMMISSION* 120 (1987) (discussing the creation of the ILC by the United Nations in 1947 in an effort to catalog and develop international law). The individual members of the ILC are elected by the United Nations General Assembly. *Id.* at 14. The determination as to which issues the ILC will investigate is made at the ILC's discretion from those issues referred to it by the General Assembly. *Id.* at 21-27. Although few states actually became signatories to the draft conventions, the ILC's work continues to function

to have been a "dependent territory" if it previously had the status of a colony, as demonstrated by protectorate,<sup>32</sup> colonial,<sup>33</sup> trust,<sup>34</sup> or mandate<sup>35</sup> status.

Having been dependent upon a predecessor state, such a territory was without sovereign, autonomous control over the conduct of foreign af-

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as a declaration of customary international law. *Id.* at 75-76. While the Vienna Convention has not entered into legal effect, it is generally recognized as an affirmation of customary international law. See Mullerson, *supra* note 12, at 300. The United States has not elected to join the Vienna Convention. See Williamson & Osborn, *supra* note 12, at 262. *But see* Legal Regulation of Use of Force, 1980 Digest § 7, at 1041 n.43 (memorandum of Department of State Legal Advisor Roberts Owen) (asserting that, in the opinion of the United States Government, the Vienna Convention is "declarative of customary international law").

32. See CRAWFORD, *supra* note 28, at 187-201 (defining protectorates including protected states, international protectorates, and colonial protectorates). The protectorate relationship involves:

[A] consensual transaction—most usually a treaty—between two or more subjects of international law, whereby the dependent entity surrenders to the protecting State or States at the least the conduct of its foreign relations, and in other cases responsibility for such relations together with various rights of internal intervention, without being annexed by or formally incorporated into the territory of the latter.

*Id.* at 187.

33. See YASSIN EL-AYOUTY, THE UNITED NATIONS AND DECOLONIZATION: THE ROLE OF AFRO-ASIA 3 (1971) (defining colonialism as "the political control of an under-developed people whose social and economic life is directed by the dominant power") (footnote omitted).

34. See H. DUNCAN HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIP 336 (1948) (investigating the international trusteeship system established by Article 75 of the U.N. Charter); R. N. CHOWDHURI, INTERNATIONAL MANDATES AND TRUSTEESHIP SYSTEMS: A COMPARATIVE STUDY 13-35 (1955) (discussing the development of the trust system); O'CONNELL, *supra* note 15, at 330-32 (reviewing the establishment of the trust system).

35. See HALL, *supra* note 34, at 30-32 (elaborating on the mandate system); O'CONNELL, *supra* note 15, at 330-32 (observing the establishment of the mandate system). See also Kearney, *supra* note 22, at 601 (stating that the ILC commentary has found previous colonial, trust or protected status as satisfying dependent territory requirements) (footnote omitted); *Report of the International Law Commission on the Work of its Twenty-Sixth Session*, U.N. GAOR, 29th Sess., Supp. No. 10, at 52, U.N. Doc. A/9610/Rev.1 (1974) [hereinafter *ILC 26th Report*] (noting that one method of creating a newly independent state is from the liberation of former colonies such as the United States); Schachter, *supra* note 13, at 256-57 (discussing newly independent states and decolonization); Bunn & Rhinelander, *supra* note 5, at 329 (quote of Richard D. Kearney, United States Member of the ILC) (holding that prior "colonial, trust, or protected territories emerged as accepted examples of dependencies").

fairs during its colonial experience.<sup>36</sup> Subsequent to independence, the newly independent state acquires sovereign authority over its territory and international relations, which previously was the responsibility of a predecessor power.<sup>37</sup> As a result, a case of state succession involving the release of a dependent territory creates a new international identity.<sup>38</sup>

Conventional international law provides that a dependent successor state, as a newly independent entity, is not legally required to inherit a predecessor state's treaties because independence transforms its identity.<sup>39</sup> To provide the newly independent state latitude in developing foreign relations, international law affords a clean slate regarding preexisting treaties. Under the "clean slate theory," the ex-colonial dependent territory may renounce any or all treaties entered into under colonial domination.<sup>40</sup> The clean slate theory gives a newly independent state

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36. See Kearney, *supra* note 22, at 592 (quoting the statement of Endre Ustor, the President of the ILC, made during the 26th session of the ILC). According to Ustor,

[I]t can be presumed, as a general rule, that the population of a territory in a colonial status is normally not in a position to play a part in the actual government of the metropolitan power and cannot, therefore, be regarded as responsible for the conclusion of treaties, and therefore, it cannot be bound by treaties to which it has not consented.

*Id.* (footnote omitted).

37. See O'CONNELL, *supra* note 15, at 365-66 (examining transfers of sovereign power and territory attendant upon a succession of states and various permutations of such transfers such as partial or total succession).

38. See MAREK, *supra* note 28, at 187 (stating that independent and dependent states do not maintain the same factual or legal identity upon gaining independence). See also McNAIR, *supra* note 14, at 117 (declaring that none of the colonial possessions of the United Kingdom maintained an international identity separate and distinct from Great Britain). McNair reasoned that since Britain's colonial possessions never contracted for any of the treaties applied to their territory nor participated in complete self-government to this end, they did not maintain a separate international personality distinct from the United Kingdom. *Id.*

39. See Vienna Convention, *supra* note 11, art. 16, at 1496 (discussing obligations of newly independent states). The Convention provides:

A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.

*Id.*

40. See Vienna Convention, *supra* note 11, at 1496 (asserting that newly independent states are not required to uphold predecessor states' treaties); Kearney, *supra* note 22, at 592 (explaining that a newly independent state may choose which preex-

the option to join selectively bilateral<sup>41</sup> and multilateral<sup>42</sup> treaties of colonial origin, provided that they expressly, or impliedly by their conduct, consent to be bound.<sup>43</sup>

#### B. SEPARATING STATES AND THE CONTINUITY THEORY

The clean slate doctrine will not be applied to a successor nation that is deemed a separating state, one that divides into one or more distinct entities. Unlike the newly independent state, the separating state is not a "dependent" territory, and thus, upon separation, its international legal identity remains relatively constant.<sup>44</sup> Moreover, the separating state does not seize sovereign control over the conduct of its international

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isting treaties to which they wish to adhere); RESTATEMENT, *supra* note 13, § 210 cmt. f (advocating the clean slate theory in which a new state is not obligated to inherit the treaty rights and duties of its predecessor state unless specifically indicated); P.K. MENON, THE SUCCESSION OF STATES IN RESPECT TO TREATIES, STATE PROPERTY, ARCHIVES, AND DEBTS 23-25 (1991) (discussing newly independent states and clean slate theory); ILC 26th Report, *supra* note 35, at 52 (noting that most commentators adopt the traditional view that a "newly independent state begins its life with a clean slate, except in regard to 'local' or 'real' obligations"). See also McNAIR, *supra*, note 14, at 601 (advancing the concept of a "clean slate" for newly independent nations). According to McNair,

[N]ewly established States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor, start with a clean slate . . . except as regards the purely local or 'real' obligations of the State formerly exercising sovereignty over the territory of the new State.

*Id.*

41. See Vienna Convention, *supra* note 11, art. 24, at 1501 (holding that bilateral treaties of a newly independent state and another state party continue in force only when the parties expressly agree or, by reason of their conduct, are considered to have assented).

42. See Vienna Convention, *supra* note 11, art. 17, at 1497 (asserting the right of a newly independent state to join their predecessor state's multilateral treaties in force at the time of state succession, as applied to their territory, provided there is notification of succession). Notification of succession refers to the expressed intent of the successor state to be bound by the treaty. *Id.*, art. 2(g), at 1490.

43. See RESTATEMENT, *supra* note 13, § 210 cmt. g (noting that a successor state can adopt a pre-existing agreement by declaring its intent to be bound); see generally MENON, *supra* note 40, at 25-39 (discussing the operation of various permutations of pre-existing multilateral and bilateral treaties).

44. See A.P. Lester, *State Succession to Treaties in the Commonwealth*, 12 INT'L & COMP. L.Q. 475, 481 (1963) (suggesting that a state must uphold its treaties provided that it maintains its international legal identity). See *supra* notes 28-29 and accompanying text (discussing the international legal identity of a state).

relations. Rather, such control is apportioned between the predecessor state and the separating successor state.

Under a theory of continuity, conventional international law prescribes that when a state separates into one or more parts, each part inherits all pre-separation treaties whether or not the predecessor state continues to exist.<sup>45</sup> Under this theory, the treaties of a predecessor state automatically devolve to the separating state if they apply either to the territory of the successor state or to the entire predecessor state.<sup>46</sup> Continuity is not required if adherence to a particular treaty would drastically alter the conditions of the treaty's operation or would be incompatible with the treaty's overall purpose or object.<sup>47</sup>

The rationale behind the continuity theory is one of international responsibility and stability.<sup>48</sup> Because the separating state participated in pre-separation international relations, it is considered accountable for its treaty commitments.<sup>49</sup> Moreover, proponents of the theory contend that

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45. The Vienna Convention provides:

When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

- (a) any treaty in force at the date of succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;
- (b) any treaty in force at the date of the succession of States in respect only of that territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

Vienna Convention, *supra* note 11, art. 34, at 1509.

However, continuity theory does not apply if:

- (a) the States concerned otherwise agree; or
- (b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

*Id.* But see RESTATEMENT, *supra* note 13, § 210(3) (rejecting the application of the continuity theory to separated states, and instead, advocating the clean slate theory for both newly independent and separated nations).

46. Vienna Convention, *supra* note 11, art. 34(1), at 1509.

47. Vienna Convention, *supra* note 11, art. 34(2), at 1509.

48. See MAKONNEN, *supra* note 25, at 137-39 (presenting the continuity theory as originally based upon the interest of maintaining stability in international relations by preventing the disruption of the legal relations between states occasioned by changes in sovereignty); Mullerson, *supra* note 12, at 315 (stating that the text of Article 34 of the Vienna Convention "is based on the premise of continuity and stability of treaty relations in cases of state succession").

49. See MAKONNEN, *supra* note 25, at 129-32 (offering various justifications be-

the threat posed to international relations if separating states could renounce treaty obligations justifies maintaining the often tenuous but manageable existing legal order by requiring treaty continuity.<sup>50</sup> Thus, when applied to separating states, the influence of self-determination on the clean slate theory is eclipsed by the need to promote stable international relations.<sup>51</sup>

For conventional law, the dependent territory test determines whether a successor state is deemed newly independent or separating.<sup>52</sup> This litmus test defines whether a successor state will be legally required to inherit preexisting treaties by examining whether the predecessor state was responsible for the international relations of the successor state. If the successor state was previously a dependent territory, it is considered newly independent and the clean slate rule applies.<sup>53</sup> If the successor

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hind the continuity theory). For instance, under the organic substitution theory of continuity, the new state possessing essentially the same population and territory simply steps into the shoes of the predecessor state. *Id.* at 131-32. Under the more radical universal succession theory of continuity, the new state automatically inherits all the pre-existing treaties of the predecessor state, regardless of whether the state participated in the formulation or consented to the application of the agreement. *Id.* at 129-30. See also O'CONNELL, *supra* note 15, at 367-68 (critiquing the universal succession theory of continuity and arguing that neither the universal nor the negative theory 'under which the successor state inherits none of the duties of the predecessor state' is correct, but that "cogent necessity" and "actual practice" should determine whether the successor state inherits the duties of the predecessor state).

50. See generally International Law Association, *Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of Their Predecessors*, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-SECOND CONFERENCE 584 (L.C. Green ed., 1967) [hereinafter FIFTY-SECOND REPORT] (declaring that an unequivocal denunciation of pre-existing treaties would create an international legal void in which states would "find it difficult or impossible to continue many mutually advantageous economic and administrative and technical relations with other nations"); DANIEL P. O'CONNELL, 1 INDEPENDENCE AND THE PROBLEM OF STATE SUCCESSION: THE NEW NATIONS IN INTERNATIONAL LAW AND DIPLOMACY 25 (W.V. O'Brien ed., 1965) (advancing that the maintenance of the international social structure may depend on the inheritance of rights and duties by successor states).

51. See *Hearings*, *supra* note 12, at 311; Bunn & Rhinelander, *supra* note 5, at 329 (suggesting that separated states have a greater need to maintain stability in treaty relations than to appeal to principles of self-determination embodied in the clean slate theory). See also Schachter, *supra* note 13, at 256 (asserting that self-determination has frequently been offered as justification for the clean slate theory).

52. See *supra* notes 30-38 and accompanying text (explaining the role of the dependent territories as determining newly independent statehood and the ability to apply the clean slate doctrine).

53. See *supra* notes 39-43 and accompanying text (providing the Vienna Conven-

state was not a dependent territory, it is deemed a separated state and the continuity theory applies.<sup>54</sup>

## II. STATE PRACTICE AND THE LAW OF STATE SUCCESSION

Understanding continuity and the clean slate theory requires selective consideration of state practice in cases of succession.<sup>55</sup> Such an examination demonstrates how the various approaches employed by individual countries have both departed from and conformed to conventional international law. State practice, moreover, exposes the flawed, reductionist tendency of both continuity and clean slate theory.

### A. STATE PRACTICE AND NEWLY INDEPENDENT STATES

The creation of Israel and Burkina Faso (formerly Upper Volta) represents two examples of the application of the clean slate theory. Upon declaring independence, Israel announced that it was a new international actor unconstrained by the treaties of the Palestinian nation.<sup>56</sup> Similarly, Burkina Faso argued for its right to renounce preexisting French treaties based on its sovereign independence from the French Government.<sup>57</sup>

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tion's rule regarding newly independent states).

54. *See supra* notes 44-51 and accompanying text (presenting the Vienna Convention's rule regarding separating states and the principle of treaty continuity). *See supra* notes 18-19 and accompanying text (discussing the Vienna Convention's treatment of merged or absorbed states).

55. *See generally* O'CONNELL 2, *supra* note 14 (detailing state succession in Commonwealth countries); MAKONNEN, *supra* note 25, (discussing state succession in the aftermath of East African decolonialization); UDOKANG, *supra* note 14, at 202-03 (describing state succession during the breakup of the French colonial system); Detlev F. Vagts, *State Succession: The Codifiers' View*, 33 VA. J. INT'L L. 275 (1993) (reviewing various state succession examples).

56. *See* Succession in Fact, 2 Whiteman Digest § 2, at 807 (quoting statement of Israel Appeal Tribunal that "[t]he State of Israel which was established on May 14, 1948, is not the successor of the Palestine Government"); Laws of State Succession, 2 Whiteman Digest § 10, at 972-73 (reproducing U.S. Department of State memorandum transmitted to the American Mission in Tel Aviv in 1949 which stated "[i]t is the view of the Government of Israel that, generally speaking, treaties to which Palestine was a party . . . are not in force in relation to the Government of Israel"). *See also* UDOKANG, *supra* note 14, at 160 (declaring that Israel appealed to "generally recognized principles of international law" in declaring that it was a new legal personality free from Palestinian treaties); *ILC 26th Report*, *supra* note 35, at 52 (stating that a "special manifestation" of the clean slate doctrine was employed by Israel with respect to treaties formerly applied to Palestine).

57. *See* UDOKANG, *supra* note 14, at 161 (noting the renunciation of French



While the histories of Israel's and Burkina Faso's state succession are distinct, they have in common the declaration of newly independent nationhood and the assertion of the right to repudiate all treaties formerly applied to them as dependent territories. Both of these newly independent states, moreover, share the fact that in practice they maintained some continuity of the treaty obligations of their respective predecessor states.<sup>58</sup>

The experiences of Israel and Burkina Faso are consistent with the current trend in the succession practices of newly independent states. This trend is perhaps best exemplified by the decolonization of East Africa.<sup>59</sup> The newly independent states of this region rejected the categorical application of clean slate principles to pre-independence treaties, and, instead, employed various mixtures of treaty continuity and discontinuity.<sup>60</sup> Thus, in practice, many newly independent states have found it counter-productive to reject all treaties previously applied to their territories.<sup>61</sup>

This result is traceable to the conflicting forces confronted by newly independent states which require a delicate balancing of interests. On the one hand, the right of self-determination vests in a new state upon seizing sovereign control over its foreign relations.<sup>62</sup> Inherent in the princi-

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treaties by Burkina Faso).

58. See UDOKANG, *supra* note 14, at 161-62 (maintaining that while Israel and Burkina Faso professed adoption of the clean slate rule, Israel assumed succession in areas of municipal law, and Burkina Faso assumed succession to certain multinational agreements).

59. See MAKONNEN, *supra* note 25, at 261-78 (describing the post-independence state practice of East African nations on issues of treaty succession); UDOKANG, *supra* note 14, at 162 (asserting that new states often succeed to the treaties of their predecessor state).

60. See O'CONNELL, *supra* note 15, at 370 (arguing that East African states have generally continued their predecessor treaties for a fixed period after independence in order to selectively consent to specific agreements); see generally MAKONNEN, *supra* note 25, at 213-37 (reviewing various theories of state succession utilized by decolonized East African nations).

61. See UDOKANG, *supra* note 14, at 160 (asserting that of those states gaining independence, only three, Algeria, Burkina Faso, and Israel, have specifically claimed the right to utilize the categorical clean slate policy). See also MAKONNEN, *supra* note 25, at 146-47 (suggesting that the formation of the United States was an early example of adherence to the clean slate theory since the former American colonies refused to abide by British treaties after independence).

62. See MENON, *supra* note 40, at 23 (evaluating the role of self-determination in the clean slate theory). The theory states:

The clean slate principle is consistent with the principle of right to self-

ple of self-determination is the notion that a state should not be held answerable to treaties that it neither helped create nor ratified, but that nevertheless were imposed on its territory.<sup>63</sup> On the other hand, the new state must consider the importance of fostering stability in international relations by maintaining some continuity of treaties.<sup>64</sup>

State practice reveals two primary resolutions to these divergent interests. Many newly independent states enter into devolution agreements<sup>65</sup> with the predecessor states under which they agree to succeed to some or all treaty obligations.<sup>66</sup> Other newly independent states have developed flexible policies that stand as an alternative to the clean slate doctrine.

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determination and sovereign equality of States and is only complementary to the general rule of consent: that is, a new State is born free of all treaty obligations unless it accepts such obligations.

*Id.*

63. See, e.g., Kearney, *supra* note 22, at 592 (providing statement of ILC President Endre Ustor who asserts that a newly independent state cannot be bound to treaties concluded by a metropolitan predecessor and non-consensually applied to its territory); MENON, *supra* note 40, at 23-24 (discussing lack of consent in dependent territories). See also INGRID DELUPIS, *INTERNATIONAL LAW AND THE INDEPENDENT STATE* 187-88 (1974) (suggesting that an integral aspect of self-determination is that a new state should maintain the right to demur against the legal obligations of its predecessor); Mullerson, *supra* note 13, at 256 (noting general belief by the ILC and a majority of states that "new states should not be bound by agreements made by former colonial rulers").

64. See MAKONNEN, *supra* note 25, at 138-39 (reproducing 1970 statement of Daniel P. O'Connell given at the Hague Academy of International law). The statement reads:

Therefore the central principle in state succession doctrine must be one of minimal disturbance of existing legal situations, consistent with the state of actual affairs resulting from a succession of States. This gives a spectrum of solutions. The solution in the case of decolonization may well be in favor of greater continuity of the existing legal situation than in the case of annexation.

*Id.* (footnote omitted).

65. See INTERNATIONAL LAW ASSOCIATION, *THE EFFECT OF INDEPENDENCE ON TREATIES* 191 (1965) (defining devolution agreements as agreements in which a successor state assumes responsibility for specified treaties and other international accords applied to their territory and contracted for by a predecessor state). See also O'CONNELL 2, *supra* note 14, at 358-65 (reviewing the use of devolution agreements by various colonial powers); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 653 (1979) (noting problems associated with the use of devolution agreements).

66. See generally O'CONNELL 2, *supra* note 14, at 365-66 (examining the implications of devolution agreements for successor states).

One such alternative theory is the optional doctrine of state succession.<sup>67</sup> The optional doctrine shares with the clean slate theory the conviction that a new state does not automatically assume the obligations of its predecessor.<sup>68</sup> The doctrine departs from clean slate precepts, however, by rejecting a categorical discontinuity of treaties once sovereignty is attained.<sup>69</sup> Instead, as originally proposed,<sup>70</sup> the doctrine gives a newly independent state the ability to "opt in" or selectively consent to treaties over a designated period of time.<sup>71</sup> At the end of the period, all treaties may be terminated unless otherwise agreed.<sup>72</sup> The development of the optional doctrine and resort to devolution agreements suggest that the tendency of newly independent states is to reject the rigidity of absolute treaty discontinuity in an effort to minimize disruptions in

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67. See MAKONNEN, *supra* note 25, at 210-13 (explaining the optional doctrine to state succession as an alternative to the clean slate theory). The optional doctrine was developed out of the experience of the newly independent states of Africa. *Id.* at 210. The major import of the doctrine is to temper the categorical nature of clean slate by rejecting complete discontinuity of treaties once independence is attained. *Id.* at 210-11.

68. See BROWNLIE, *supra* note 65, at 669 (noting that the general presumption that unspecified treaties do not survive state succession may be tempered by the establishment of a grace period during which such treaties remain in effect so that the successor state may consider which agreements it wishes to assume); MAKONNEN, *supra* note 25, at 211-12.

69. MAKONNEN, *supra* note 25, at 211-12.

70. See MAKONNEN, *supra* note 25, at 210 (noting that the creation of the optional doctrine to state succession is credited to President Julius Nyerere of Tanganyika). Nyerere wanted to liberate his country from colonial encumbrances, but sought to minimize the disruption to existing international obligations. *Id.* Nyerere's response, the optional formula, became a commonly practiced theory of state succession to treaties among African states. *Id.* Other states have developed variations to Nyerere's optional doctrine. *Id.* at 220 (discussing the "opting out," "general declaration," and "non-committal" formulas to state succession). See also FIFTY-SECOND REPORT, *supra* note 50, at 574-85 (reviewing the operation, advantages and disadvantages of continuity arrangements such as the general declaration formula).

71. See BROWNLIE, *supra* note 65, at 668-69 (providing the text of a statement by the Tanganyika Government proclaiming that bilateral treaties made by its predecessor state would continue in effect for two years unless extended or modified by mutual consent). At the end of this period, customary international law would operate to terminate all bilateral treaties to which there has been no express consent. *Id.* Multilateral treaties would continue in effect until there was either termination, confirmation, accession, or succession. *Id.*

72. See BROWNLIE, *supra* note 65, at 669 (asserting that at the end of the stated period any treaty that is not binding under customary international law, and not affirmed by mutual consent, would be terminated).

international relations.<sup>73</sup> Newly independent states have justified their deviation from the clean slate theory by developing alternative and less absolute theories of state succession.

#### B. STATE PRACTICE AND SEPARATING STATES

A state can separate to form one or more states in a variety of ways.<sup>74</sup> The dissolution of the union of the United Kingdom of Sweden and Norway in 1905 is illustrative of state practice in cases of separation.<sup>75</sup> The separation of the predecessor state into the autonomous countries of Sweden and Norway occasioned each separated state to reaffirm its commitment to all treaties entered into during the period of union.<sup>76</sup>

The continuity of preexisting treaties was premised on the grounds that both Sweden and Norway had acted independently and sovereignly in consenting to the preexisting treaties.<sup>77</sup> Thus, determining whether the pre-separation treaties would have continued effect proceeded on the basis that the predecessor state was not a colonially dependent territory.<sup>78</sup> Since Sweden and Norway exercised sovereign control over for-

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73. See UDOKANG, *supra* note 14, at 166 (commenting that in practice, few states apply either strict continuity or clean slate theories, but tend to adopt a more pragmatic approach when affirming or rejecting treaties entered into by the predecessor state).

74. See O'CONNELL 2, *supra* note 14, at 164-65 (advancing that state separation may occur by dissolving a union or a federation, breaking apart a composite state into constituent elements, or breaking a centralized entity into geographic areas from which it was formed).

75. See O'CONNELL 2, *supra* note 14, at 164 (suggesting that the separation of Norway and Sweden represents the dissolution of several administratively autonomous states). Alternatively, O'Connell notes that the breaking apart of a centralized entity into pre-combination territories represents a median point between the division of a composite state and the dissolution of a union. *Id.* While the separation of the United Kingdom of Norway and Sweden predates the development of conventional law on state succession to treaties, it closely tracked the result that the Vienna Convention would require today.

76. See O'CONNELL 2, *supra* note 14, at 168 (stating that both Norway and Sweden notified foreign powers that, with some exceptions, both states considered themselves bound to previous treaties entered into by the Union).

77. See Effect of Changes in Government of Sovereignty, 5 Hackworth Digest § 512, at 362 (providing a statement from the U.S. Department of State declaring that the United States would hold Norway and Sweden to their pre-separation treaties because they "acted independently in execution of their treaty engagements").

78. See O'CONNELL 2, *supra* note 14, at 168 (implying that one factor in the United States' decision to request continued adherence to pre-separation treaties was

eign relations, they were considered separating states.<sup>79</sup> As such, each was bound to inherit the treaty obligations of the predecessor state.<sup>80</sup>

Two main points emerge from the study of state practice in treaty succession. First, when a state is either newly independent or separating, conventional law applies the appropriate clean slate or continuity standard. Second, contrary to conventional law's clean slate doctrine, relatively few newly independent states renounce all of their predecessor state's treaties. Instead, new states tend to adopt a pragmatic approach which balances issues of self-determination and sovereignty in foreign affairs against the need to foster stability in international relations.<sup>81</sup>

### III. THE RESTRICTIVE CHARACTER OF THE DEPENDENT TERRITORY TEST: FAILURE TO RECOGNIZE A HYBRID DEPENDENCY

Reliance on the dependent territory test<sup>82</sup> to determine whether a new state qualifies for newly independent state status, and thus does not inherit the treaty obligations of the predecessor state, is overly restrictive. As currently formulated, the test is only satisfied in the narrow context of traditional colonial relationships.<sup>83</sup> Consequently, conventional law fails to address hybrid cases where a separating state exercised comparatively less sovereign control over its international relations than some newly independent states. An example of such a hybrid case is the

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that Norway and Sweden were not dependencies, but acted independently and autonomously in signing pre-separation treaties).

79. See O'CONNELL 2, *supra* note 14, at 168 (noting that both France and the United States interpreted the dissolution of the union between Norway and Sweden as a case of state separation directing continued application of pre-existing treaties).

80. O'CONNELL 2, *supra* note 14, at 168. It should be noted, however, that the continuity of the international engagements of the United Kingdom of Norway and Sweden was not contested because both separated states agreed to assume pre-separation obligations. *Id.*

81. See *supra* notes 62-73 and accompanying text (presenting the dilemma for newly independent states of weighing their right to self-determination and sovereignty versus the desire not to create disturbances in international relations).

82. See *supra* notes 30-38 and accompanying text (discussing the dependent territory test).

83. See *supra* notes 31-35 and accompanying text (stating that only the limited cases of colonial, trust, mandate, or protectorate status satisfy the criteria of the dependent territory test). But see RESTATEMENT, *supra* note 13, § 210(3) (concluding that the dependent territory test is arbitrary in determining whether a successor state is newly independent or separating, and suggesting that both newly independent and separating states are entitled to a clean slate upon the succession of states).

state separation of East and West Pakistan in 1971.

#### A. THE SEPARATION OF EAST AND WEST PAKISTAN

The creation of Bangladesh illustrates the confining nature and the inadequacy of the dependent territory test.<sup>84</sup> In 1947, British India was dissolved and replaced by the separate nations of Pakistan and India.<sup>85</sup> Pakistan subsequently was subdivided into Eastern and Western sections.<sup>86</sup> West Pakistan centralized both political and administrative control<sup>87</sup> and quickly came to dominate the foreign and domestic policies of East Pakistan.<sup>88</sup> Between 1947 and 1971, West Pakistan's monopolization of control intensified until it had subjugated politically and exploited economically East Pakistan.<sup>89</sup> The relationship between West and East Pakistan in this period can be characterized as internal or intra-state colonialism.<sup>90</sup>

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84. See generally SUBRATA R. CHOWDHURY, *THE GENESIS OF BANGLADESH* 197 (1972) (questioning whether Bangladesh could be considered an independent territory under international law). Chowdhury suggests that existing international law applied to the origination of Bangladesh might produce the perverted conclusion that "only the dependent people in a dependent territory, but not the dependent people in a technically independent territory, are entitled to the benefit of equal rights and self-determination." *Id.*; CRAIG BAXTER & SYEDUR RAHMAN, *HISTORICAL DICTIONARY OF BANGLADESH* 16-26 (1989) (reviewing events leading up to the creation of Bangladesh); Bunn & Rhineland, *supra* note 5, at 331-33 (discussing the independence of Pakistan and India from Great Britain in 1947).

85. CHOWDHURY, *supra* note 84, at 1.

86. CHOWDHURY, *supra* note 84, at 1.

87. CHOWDHURY, *supra* note 84, at 6-19 (asserting that West Pakistan denied East Pakistan its autonomy through the political, economic, social, and administrative exploitation of East Pakistan).

88. MOHAMMED AYOUB ET AL., *BANGLA DESH: A STRUGGLE FOR NATIONHOOD* 1 (1971).

89. See *id.* at 14-23 (offering various reasons to support the contention that East Pakistan was a quasi-colonial appendage of West Pakistan). See also CRAWFORD, *supra* note 28, at 116 (stating that economic and administrative relations between West and East Pakistan "arbitrarily place[d] the latter in a position or status of subordination").

90. See MOHAMMED AYOUB, *INDIA, PAKISTAN & BANGLADESH: SEARCH FOR A NEW RELATIONSHIP* 5-6 (1975) (noting that as in colonialism, the primary purpose of East Pakistan's domination was for the economic and political betterment of West Pakistan). See also AYOUB ET AL., *supra* note 88, at 14-23 (discussing the inter-wing disparities between East and West Pakistan as typically colonial manifestations); CHOWDHURY, *supra* note 84, at 6-20 (stating that the relationship between East and West Pakistan was essentially colonial in which East Pakistan was subjected to an

In 1971, East Pakistan broke away from West Pakistan, forming the autonomous state of Bangladesh.<sup>91</sup> Although it had been dependent on West Pakistan for the conduct of its international affairs, the successor state of Bangladesh nonetheless was classified as separating.<sup>92</sup> Consequently, Bangladesh was required to uphold preexisting treaties of its predecessor state.<sup>93</sup> Failure to categorize Bangladesh as newly independent is due, in part, to the fact that East Pakistan was not deemed dependent upon a predecessor state for international relations because it was not a traditional colonial possession.<sup>94</sup> Though subjected to internal domination by West Pakistan and unable to influence the course of its foreign relations, Bangladesh did not qualify for newly independent state status due to the restrictive character of the dependent territory test.

The international community's failure to endorse newly independent state status for Bangladesh is anomalous. Underscoring this anomaly is the fact that, during their colonial history, some recognized newly independent states exercised comparatively greater sovereign control over their international relations than did Bangladesh.<sup>95</sup> For instance, as a

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organized policy of discrimination); *Id.*, at 198 (suggesting that under the test set forth in the U.N. Charter, Universal Declarations 1514 (XV) and 1541 (XV), East Pakistan was colonized by West Pakistan); CRAWFORD, *supra* note 28, at 100 (noting that Bangladesh was governed in such a way as to make it a non-self-governing territory).

91. CHOWDHURY, *supra* note 84, at 149.

92. See Kearney, *supra* note 22, at 601 (contending that a recent example of state separation was that of Bangladesh from Pakistan); RESTATEMENT, *supra* note 13, at § 210 rep. note 4 (declaring that Bangladesh was classified as a separated state).

93. See Vagts, *supra* note 55, at 287-88 (discussing the differences between the American Law Institute's Restatement of Foreign Relations Law and the Vienna Convention defining newly independent statehood). A principal distinction between the two legal authorities turns on the Vienna Convention's application of a "selective clean slate rule" to only new states which were previously colonially dominated. *Id.* Thus, under the Vienna Convention, "Bangladesh would be subject to Pakistan's antecedent agreements" since it was not formerly a traditional colonial territory. *Id.* at 288. The Restatement rejected this distinction as arbitrary. *Id.* Instead, the Restatement would have interpreted the independence of Bangladesh as creating a newly independent entity. *Id.*

94. See generally CRAWFORD, *supra* note 28, at 116 (noting that East Pakistan was not formally designated a non-self-governing territory prior to separation). Had it not been so designated after separation, East Pakistan would have been categorized as a non-colonial metropolitan power. *Id.*

95. See RESTATEMENT, *supra* note 13, § 210 reporter's note 4 (explaining that "some 'dependent territories,' such as the British dominions, had greater voice in making international agreements applicable to their territory than some 'separated

beneficiary of the United Kingdom's efforts<sup>96</sup> to promote provisional autonomy in British colonies,<sup>97</sup> British India enjoyed considerable sovereign control over its domestic and foreign affairs. When Great Britain decolonialized British India in 1947,<sup>98</sup> the issue arose as to whether the Indian and Pakistani successor states would inherit the treaty obligations of the British predecessor state.<sup>99</sup> Unlike India, Pakistan was deemed to

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states,' such as Bangladesh"). Such an anomaly under the Vienna Convention is revealed in how the Convention would have comparatively treated the independence of both Tanzania and Bangladesh:

It was noted that the people of Bangladesh had as little influence on the commitments of Pakistan as the people of Tanzania had upon decision-making in London. Yet, under the Vienna Convention, Bangladesh would be subject to Pakistan's antecedent agreements, but Tanzania would be free of all prior agreements.

Vagts, *supra* note 55, at 288. See also Kearney, *supra* note 22, at 601 (questioning whether East Pakistan in reality was a dependent territory, and whether the ILC's dependent territory test should be expanded to include hybrid, traditionally non-colonial situations).

96. CHOWDHURY, *supra* note 84, at 2-7. The United Kingdom initiatives were designed to infuse the colonial possession with greater autonomy and sovereignty. *Id.* One example can be found in the British Indian request for Home Rule which led to the adoption of the Government of India Act in 1919. *Id.* This act was designed to develop self-governing institutions in India. *Id.* Other laws were also enacted that provided the British territory with substantial sovereign discretion in internal and some external affairs. *Id.*

97. See CHOWDHURY, *supra* note 84, at 3 (advancing that under the Government of India Act of 1935, British India was separated into various provinces in a federated governmental structure with each province maintaining direct power). Ultimately, the goal of provincial autonomy was to ensure that each province was as independent as possible from the British Government. *Id.*

98. See CHOWDHURY, *supra* note 84, at 6 (asserting that India and Pakistan were created when Great Britain renounced possession of British India in 1947 with the signing of the India Independence Act).

99. See *Hearings*, *supra* note 12, at 312. See also Succession in Fact, 2 Whiteman Digest § 2, at 800 (reproducing legal opinion of the Assistant Secretary General of the United Nations on whether United Nations membership of British India devolved to both India and Pakistan after the India Independence Act of 1947).

From the viewpoint of international law, the situation is one in which a part of an existing State breaks off and becomes a new State. On this analysis, there is no change in the international status of India; it continues as a State with all treaty rights and obligations, and consequently with all rights and obligations of membership in the UN. The territory which breaks off, Pakistan, will be a new State, it will not have the treaty rights and obligations of the old State, and will not, of course, have membership in the UN.



be a newly independent state, and thus not compelled to inherit pre-existing treaty obligations.<sup>100</sup>

The classification of Bangladesh as a separating state and Pakistan as newly independent demonstrates the inadequacy of the dependent territory test. The test often dictates treaty continuity in hybrid cases, such as Bangladesh, where the successor state is deemed "separated" despite having been internally subjugated. At the same time, the test affords a clean slate for a successor state such as Pakistan that is deemed "newly independent" despite having enjoyed comparatively more sovereign control over its foreign relations.

#### IV. STATE SUCCESSION LAW AND THE DISSOLUTION OF THE SOVIET UNION

Whether the former Soviet republics maintain a legal obligation, directed by conventional law, to succeed to Soviet treaties depends upon their classification as either newly independent or separating states.<sup>101</sup> To qualify as a newly independent state, any given republic must be deemed previously to have been a dependent territory.<sup>102</sup> Moreover, the Soviet Union, as the predecessor state, must have been responsible for the republic's international relations.<sup>103</sup>

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*Id.*; Williamson & Osborn, *supra* note 12, at 263-64 (noting that Pakistan's secession from India generally was regarded as creating a newly independent state). Ultimately, Pakistan was held to specific treaties by operation of a devolution agreement. *Id.* at 264.

100. *Hearings*, *supra* note 12, at 312.

101. *See* Schachter, *supra* note 13, at 257 (concluding that the former republics are separated states with a "general presumption of treaty continuity" except for membership in international organizations); Williamson & Osborn, *supra* note 12, at 264-70 (advocating separating statehood and treaty continuity for the former republics with specific exceptions such as those traceable to article 34, paragraph 2 of the Vienna Convention); Mullerson, *supra* note 12, at 303-22 (finding the Russian Federation to be a continuation of the international legal identity of the former Soviet Union). Thus, the Federation is required to succeed to Soviet treaties. *Id.* The other republics, according to Mullerson, appear to be separating states, although such a conclusion does not clearly follow from the Vienna Convention. *Id.* at 315-21. Finally, Mullerson interprets the Baltic nations to be newly independent. *Id.* at 308-15. *See also* Bunn & Rhinelander, *supra* note 5, at 329-31 (arguing that the Russian Federation is the continuing state of the Soviet Union while the remaining republics are separating as a result of their non-colonial history). Bunn and Rhinelander further argue that the Baltic nations are newly independent. *Id.* at 331.

102. *See supra* notes 30-38 and accompanying text (discussing the dependent territory test and its satisfaction in cases of colonial relationships).

103. *See supra* note 30-38 and accompanying text (noting that, as provided by the

## A. THE SPECIAL SIGNIFICANCE OF THE BALTICS

The former Baltic Republics of Estonia, Latvia and Lithuania are unique in that they are the only cases of post-formation incorporation by the Union of Soviet Socialist Republics (U.S.S.R. or Soviet Union).<sup>104</sup> When the Soviet Union was formed in 1917, the Baltic States remained independent of its empire.<sup>105</sup> Only as a result of the German-Soviet Non-Aggression Pact of 1939, the Soviet Union forcibly annexed the Baltic countries.<sup>106</sup> The United States and other Western nations re-

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Vienna Convention, a newly independent state does not inherit the treaties of its predecessor state). Under the dependent territory test, however, the key consideration is whether the territory was dependent upon a predecessor state that was responsible for its international relations. *Id.*

104. See GREGORY GLEASON, *FEDERALISM AND NATIONALISM: THE STRUGGLE FOR REPUBLICAN RIGHTS IN THE U.S.S.R.* 42-45 (1990) (discussing the Baltic states' absorption into the Soviet Union). Although Lenin saw the Baltics as significant to the expansion of the Soviet Union due to the territory's geopolitical and commercial importance, he forfeited previous Russian claims to Baltic territory in the 1918 Treaty of Brest-Litovsk with Germany. *Id.* at 43-44. With the defeat of Germany and the Axis powers in November 1919, the Treaty of Brest-Litovsk was abrogated. *Id.* at 43. Even before the treaty's abrogation, the all-Russian Central Executive Committee in June 1919 unilaterally decreed the unification of Belarus, Crimea, Latvia, Lithuania, Russia, and the Ukraine. *Id.* This remains the official Soviet date of inception, even though all three Baltic Republics had declared independence already and the political unification had ended due to lack of support. *Id.*

105. See *id.* at 46 (stating that on December 30, 1922 the First Congress of Soviet adopted the Treaty of Union). The U.S.S.R. was thereby declared to incorporate the Byelorussian Soviet Socialist Republic (Belarus), the Russian Soviet Federated Socialist Republic, the Ukrainian Soviet Socialist Republic, and territories which now comprise the Republics of Georgia, Armenia and Azerbaijan. *Id.* See also WALTER C. CLEMENS JR., *BALTIC INDEPENDENCE AND RUSSIAN EMPIRE* 31-32 (1991) (contending that on November 28, 1917, Estonia declared itself an independent republic "within its historical and ethnogeographic borders"). On February 16, 1918, while still under the occupation of the German military, the Republic of Lithuania declared its independence. *Id.* at 32. Similarly, Latvia declared independence on November 18, 1918. *Id.* While all three Baltic nations experienced Bolshevik military attack after Germany's capitulation in World War I, Soviet Russia retreated and formally acknowledged each Baltic states' independence in 1920. *Id.* at 40-43.

106. See CLEMENS, *supra* note 105, at 51-55 (reviewing the annexation of the Baltic states as the result of the Treaty of Non-Aggression (or German-Soviet Non-Aggression Pact) of August 23, 1939). The Secret Additional Protocol contained in the treaty specified the incorporation of Estonia, Latvia, and Lithuania into the U.S.S.R. *Id.* Although the Soviet Union had already formally recognized each Baltic states' independence, the Red Army invaded these states in September 1938. *Id.* By August 1940, the three countries were declared Soviet Republics. *Id.*

fused to grant legal recognition to the hostile, nonconsensual incorporation of the Baltic states.<sup>107</sup> Because of this history, the international community has regarded the Baltic states as having a "special legal status."<sup>108</sup> Consequently, after the breakup of the Soviet Union, the Baltic countries have been widely recognized as newly independent states, not legally obligated to inherit the treaty obligations of the Soviet Union.<sup>109</sup>

## B. ASSESSMENT OF THE REMAINING SOVIET REPUBLICS

Determining whether the remaining republics<sup>110</sup> satisfy the dependent territory test and are thus entitled to newly independent state status depends on their relationship within the greater Soviet State. In theory, the Soviet Union was a constitutional federation in which each republic was considered an equal partner in the communist experiment.<sup>111</sup> Under the Soviet Constitution of 1936 (the Stalin Constitution),<sup>112</sup> the repub-

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107. See ALBERT N. TAURULIS, *AMERICAN-BALTIC RELATIONS 1918-1922: THE STRUGGLE OVER RECOGNITION* 364-70 (1965) (asserting that the United States, along with other Western European nations, strongly denounced the Soviet attempts to incorporate the Baltics as republics). On July 20, 1940, the U.S. Department of State issued a bulletin presenting the U.S. policy to treat the annexation of the Baltic States as a "devious process whereunder the political independence and territorial integrity of the three small Baltic republics were to be deliberately annihilated by one of their more powerful neighbors." *Id.* at 364. (footnote omitted).

108. William J.H. Hough III, *The Annexation of the Baltic States and its Effect on the Development of Law Prohibiting Forcible Seizure of Territory*, 6 N.Y.L. SCH. J. INT'L & COMP. L. 303 (1985).

109. See Bunn & Rhinelander, *supra* note 5, at 331 (quoting an unpublished memorandum filed with the Senate Foreign Relations Committee which states that as a consequence of the non-consensual annexation of the Baltic states into the former Soviet Union, the United States Government viewed them as newly independent states).

110. See *Focus on the Emerging Democracies: A Periodic Update*, *supra* note 5 (noting the eleven former republics which have officially joined the Commonwealth). While the Republic of Georgia has declined to join the CIS at the time of this writing, the question of its legal obligation is within the scope of this argument.

111. See GLEASON, *supra* note 104, at 47 (explaining that in Article 13 of the 1936 Soviet Constitution, the U.S.S.R. is defined as a "federal state formed on the basis of voluntary association of equal Soviet Socialist republics"). See also FERDINAND J.M. FELDBRUGGE, *THE CONSTITUTIONS OF THE USSR AND THE UNION REPUBLICS: ANALYSIS, TEXTS, REPORTS* 108-09 (1979) (providing text of Article 13 in the 1936 Constitution and its corresponding provision, Article 70, in the 1977 Brezhnev Constitution).

112. See GLEASON, *supra* note 104, at 44-49 (discussing the 1936 Stalin Consti-

lics were extended fundamental political rights such as the ability to secede freely from the Union and the right to formulate their own constitutions.<sup>113</sup> Amendments to the Stalin Constitution subsequently granted the individual republics the right to conduct foreign relations.<sup>114</sup>

To some extent, the republics' meaningful participation in international relations is represented by the fact that both Ukraine and Belarus individually have maintained seats in the United Nations since 1945 and are members of various other international bodies.<sup>115</sup> While each republic reserved the right to engage in autonomous international relations, its participation in a greater federated Union assured that significant foreign policy decisions were made by the supra-national Central Committee in

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tution). To some extent, the Stalin Constitution seemed to expand the rights of the individual republics. *Id.*

113. See FELDBRUGGE, *supra* note 111, at 70-169 (producing the text of the 1936 Constitution with comparative analysis to the 1977 Constitution). Article 16 of the 1936 Constitution, corresponding with Article 76 of the 1977 Constitution, granted to each republic the right to its own constitution to be developed in full accordance with that of the U.S.S.R. *Id.* at 112. Article 17 of the 1936 and Article 72 of the 1977 Constitutions guaranteed the right to secede to the republics. *Id.* at 108-09. *But see* JOSEPH STALIN, *Report on the Constitution*, in *LENINISM* 399-400 (1942) (qualifying the constitutional rights extended to the republics by restrictively defining a republic as a border territory where there is one dominant national group maintaining a substantial population).

114. See GLEASON, *supra* note 104, at 48 (asserting that on February 1, 1944, each republic was granted the right to conduct its own foreign affairs) (footnote omitted); FELDBRUGGE, *supra* note 111, at 114-15 (assessing that Article 18a in the 1936 Constitution gave the republics the right to engage in foreign relations, conclude agreements, and exchange representatives with other nations). Article 80 of the 1977 Constitution specifically reaffirmed Article 18a, and expanded it to give the republics the right to enter into treaties with other nations. *Id.* See also STEPHAN KUX, *SOVIET FEDERALISM: A COMPARATIVE PERSPECTIVE* 69-73 (1990) (detailing the international capacity of the republics under the 1944 Soviet Constitution, and suggesting that these "paper" powers existed only in theory). Nonetheless, in addition to treaty capabilities, each republic constitutionally had the potential "to exchange diplomatic and consular missions, and take part in the work of international organizations . . . [E]ach republic has its own ministry of foreign affairs." *Id.* at 69.

115. See POLITICS, SOCIETY, AND NATIONALITY: INSIDE GORBACHEV'S RUSSIA 150 (Seweryn Bialer ed., 1989) [hereinafter Bialer] (noting that both the Ukraine and Belarus maintained seats in the United Nations and other international organizations such as UNESCO and the International Labor Organization) (citing Alexander J. Motyl, *The Foreign Relations of the Ukrainian SSR*, HARV. UKRAINIAN STUD. 62-78 (Mar. 1982)). See also Bunn & Rhineland, *supra* note 5, at 330 (contending that in addition to being original members of the United Nations, both Ukraine and Belarus joined specific treaties as separate states between 1945 and 1991) (footnote omitted).

which each republic was represented.<sup>116</sup>

Within this context, the former republics fall short of satisfying a traditional understanding of the dependent territory test. By the nature of their federal government and representation in Soviet foreign policy decisions, the republics were not dependent upon a predecessor state for international relations. As such, the republics are not the type of traditional dependent territories envisioned by conventional international law, as illustrated by East African newly independent states.<sup>117</sup> Consequently, except for the Baltic nations, the republics are not newly independent states as they were not dependent, in a colonial context, upon the Soviet State for international relations.<sup>118</sup>

Instead, conventional law perceives the dissolution of the Soviet Union as transforming the former republics into separating states. Each of the republics, in asserting their independence from the Soviet State, separated to form distinct sovereign nations upon the disintegration of the U.S.S.R. The result is the legal obligation, as separating states, to

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116. See RICHARD F. STAAR, *USSR FOREIGN POLICIES AFTER DETENTE* 21 (1985) (discussing decision making in Soviet foreign policy and suggesting that the "locus of power" rested with the Communist Party); I.D. OVSYANY ET AL., *A STUDY OF SOVIET FOREIGN POLICY* 16 (V.I. Popov et al. eds. & David Skvirsky trans., 1975) (finding that foreign policy decisions in the Soviet Union were guided by Communist Party leadership); LEONHARD, *THE KREMLIN AND THE WEST* 24 (1986) (asserting that the Central Committee of the Communist Party of the Soviet Union was a federal government body responsible in theory for representing the Soviet Union in foreign relations through various Central Committee departments). The Central Committee was comprised of both full and non-voting members that represent all segments of Soviet society. *Id.* at 24-27. Leaders of the Union foreign service, such as the foreign minister, were members of this body. *Id.* Each of the Republics' First Party Secretaries were full members of the Central Committee. *Id.* See also GLEASON, *supra* note 104, at 88 (reviewing the Union Republics' representation in the Central Committee, where republican party leaders addressed the problems and duties of the party). The ability of republic leaders to regularly participate in Central Committee meetings created "channels for the exchange of information . . . between the center and the periphery." *Id.*

117. See MAKONNEN, *supra* note 25 (elaborating on East African states' colonial domination by Continental powers resulting in the complete forfeiture of their sovereign control over both domestic and international relations).

118. *Accord* Schachter, *supra* note 13, at 257 (interpreting the republics to be separating states); Williamson & Osborn, *supra* note 12, at 264-70 (advocating separating statehood for the republics with specific exceptions); Mullerson, *supra* note 12, at 303-22 (finding the Russian Federation as the continuing identity of the Soviet Union and the remaining republics, absent the Baltic nations, as separating states); Bunn & Rhinelander, *supra* note 5, at 329-31 (concluding that all the republics are separating states except for the Baltic countries).

abide by treaties signed by the now defunct Soviet State.<sup>119</sup>

C. REVISITING HYBRID DEPENDENCY: PRACTICAL CONSIDERATIONS  
OF RESPONSIBILITY OVER THE FORMER REPUBLICS'  
INTERNATIONAL RELATIONS

The treatment of the former republics as separating states, however, ignores evidence that they were in fact dependent on Moscow in the international realm.<sup>120</sup> Notwithstanding the Soviet Union's claims and documentation,<sup>121</sup> the notion of a federated, autonomous and sovereign

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119. See generally Bunn & Rhineland, *supra* note 5, at 329-31 (concluding that the former republics, except for the Baltic nations, are separating states and not newly independent). Bunn and Rhineland find separating statehood status particularly compelling for Belarus, the Russian Federation, and the Ukraine. *Id.* They contend that the Russian Federation "appears to be the continuing state to both the former Soviet Union and its predecessor, the Russian Empire of the Csars." *Id.* at 330. Similarly, Ukraine and Belarus both independently signed treaties and maintained United Nations membership up to the point of independence. *Id.* Consequently, by operation of the Vienna Convention's rule of continuity for separating states, the former republics would be obligated to assume Soviet treaties. *Id.* at 333-34. See also *supra* notes 45-51 and accompanying text (explaining the continuity rule for separating states). Since the former republics fall under conventional law's "separating" state status, they would be legally obligated to succeed to all treaties entered into by the Soviet Union which either applied to their territory directly, or to the general territory of the Soviet state. *Id.*

120. See INSIDE THE APPARAT: PERSPECTIVES ON THE SOVIET SYSTEM FROM FORMER FUNCTIONARIES 157-81 (Uri Ra'anani & Igor Lukes eds., 1990) (examining the pervasive role of the Soviet Secretariat, Politburo and Foreign Relations Commission in making international decisions); RONALD J. HILL & PETER FRANK, THE SOVIET COMMUNIST PARTY 138 (3d ed. 1986) (noting the influence of the communist party in Soviet foreign relations); STAAR, *supra* note 116, at 21 (stating that the center of power in Soviet international relations decisions is the Communist Party); GORDON B. SMITH, SOVIET POLITICS: CONTINUITY AND CONTRADICTION 54 (1988) (suggesting that the "nucleus of all political activity" in the U.S.S.R. is the Communist Party). See also Vagts, *supra* note 55, at 288.

One could make the argument, with considerable force, that some of the Soviet republics were in fact colonial states. This argument would apply with particular force to such "republics" as Georgia, Armenia, Tazikistan and others which had been conquered by the armies of the Tsars during the nineteenth century, at much the same time as the armies of France and Britain were spreading their colors around the globe. The mere fact that the Tsars' armies could march overland while the other armies had to travel by sea does not seem to be a relevant distinction.

*Id.* (footnote omitted).

121. Richard Pipes, *The Soviet Union Adrift*, FOREIGN AFF., Vol. 70, No. 1, at 70,

republic was a more symbolic than viable right.<sup>122</sup> Despite the pretense of an equally represented federated Union, foreign policy decisions of the Soviet State and that of the individual republics were actually determined by a small, elite group of Central Communist Party officials.<sup>123</sup> While each republic theoretically was given the inviolable right to assert

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76 (1991).

Although nominally a federation of free and equal nations, it was all along a unitary state governed by the Moscow-based and Russian-dominated Communist Party through its bureaucracy, army and security police. The national aspirations of minorities who make up nearly half the Soviet population were assuaged by powerless institutions and meaningless rituals, while any genuine nationalistic expressions were suppressed and silenced.

*Id.* See generally Bialer, *supra* note 115, at 150 (suggesting that Lenin's promises of a federation of equal and sovereign nations was a pragmatic strategy to win the support of non-Russians in the Bolshevik Revolution and accompanying Civil War between 1917 and 1921). Bialer states that "[t]he Bolsheviks eventually won, to a large extent because of their ability to win non-Russian allies by promising them the 'right to self-determination up to separation' . . . [a]lthough separation . . . was declared counter-revolutionary . . . ." *Id.* See also GLEASON, *supra* note 104, at 29-30 (asserting that Lenin narrowly defined national self-determination as the right for national groups to become Bolsheviks).

122. See GLEASON, *supra* note 104, at 82-83 (indicating that the symbolic nature of constitutional promises of autonomy and sovereignty for the republics was reaffirmed in the re-writing of the Soviet Constitution in 1977). The 1977 Constitution included the same rights theoretically guaranteed in the 1936 Constitution. *Id.* at 82. The right to secede was affirmed in Article 72, and the Union Republics were described as sovereign states in Article 76. *Id.* While Article 80 reaffirmed the right of each republic to enter into relations with other states, this right "was restricted in practice by Article 73, which gave the U.S.S.R. Supreme Soviet the authority to 'establish the general procedures' and 'coordinate' the activities of the [U]nion [R]epublics with respect to other states." *Id.* at 83. See also KUX, *supra* note 114, at 69 (suggesting that guarantees in Article 80 of the Soviet Constitution, including the right of the republics to conclude treaties with other nations and enter into continuing relations with other states, were symbolic). Kux states:

Accordingly, each republic has its own ministry of foreign affairs . . . . Relations between republics and foreign states were almost always established through Moscow . . . . Thus, despite an increasing number of city partnerships and contacts with foreign provinces and regions, the role of the republics' foreign ministries has remained marginal.

*Id.* at 69-70.

123. See generally HILL & FRANK, *supra* note 120, at 138 (advancing that, while foreign policy decisions were considered by state organs such as the Ministry of Foreign Affairs, all foreign policy was determined by the central party authorities of the Politburo and the Central Committee Secretariat).

sovereignty in foreign relations,<sup>124</sup> in practice the Communist Party suppressed this right, just as it suppressed the potentially disparate interests of the republics.<sup>125</sup> Ultimately, some republics lacked the practical ability to dissent against the decisions of the Communist Party and central government, which strictly controlled the international relations of the greater Soviet State.<sup>126</sup>

As currently formulated, conventional law fails to consider the subtle indicators of dependency in the experience of the former republics, and the absence of meaningful participation in Soviet foreign policy. Determining whether treaty succession is the legal consequence upon a succession of states turns solely upon a new state's satisfaction of the dependent territory test for newly independent status.<sup>127</sup> Since the former republics were not dependent territories in a traditional colonial framework, they are not newly independent and cannot legally adopt a clean slate approach.<sup>128</sup> As a hybrid example of the internal dependence of a "separated" state, the case of the former republics underscores the overly restrictive nature of the dependent territory standard.

## V. RECOMMENDATIONS

The fundamental premise supporting the development of newly independent statehood is that new states should not be held accountable for

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124. See *supra* note 114 and accompanying text (addressing the republics' control of foreign relations).

125. See *supra* note 123 and accompanying text (discussing the role of the Secretariat and the Politburo in foreign relations decisions).

126. See George Kennan, *Communism in Russian History*, FOREIGN AFF., Vol. 69, No. 5, at 168-86 (1990) (providing a historical survey and analysis of the oppressive nature of centralism in Soviet Communism). Kennan refers to the actual relationship of the republics to the greater party as the "straightjacket of Communist dictatorship" in which the republics have been subjected consistently to "the same tired litanies of the propaganda machine . . . and the same exactions of a police regime . . ." *Id.* at 175. The overall degree of participation in foreign policy matters varied between individual republics. For instance, Belarus, the Russian Republic, and the Ukraine exercised considerable influence over the decisions of the Soviet State. Bunn & Rhinelander, *supra* note 5, at 329-30. Consequently, this argument carries less weight for these republics than for others such as Armenia, Georgia, and Tazikistan. See Vagts, *supra* note 55, at 288 (noting persuasive argument that Georgia, Armenia and Tazikistan may actually be characterized as colonial entities).

127. See *supra* note 30 and accompanying text (providing definition for newly independent state status).

128. See *supra* notes 30-43 and accompanying text (defining the clean slate theory in relation to newly independent states).



treaties that were nonconsensually applied to their territory.<sup>129</sup> International law should recognize that the substantive lack of sovereign control over foreign relations can occur in a non-traditionally colonial context. Currently, the dependent territory test presupposes the legal requirement of a state to assume responsibility for the international relations of a dependent territory.<sup>130</sup> This test, however, overlooks hybrid cases of dependency occurring exclusively within a separated state, as Bangladesh<sup>131</sup> and the former Soviet republics demonstrate.<sup>132</sup>

Correction of this problem requires an expansion of the dependent territory test. International law can accomplish this objective by deferring to existing norms. The reach of the dependent territory test should extend not just to colonial relationships, but also to the practical absence of decisionmaking rights despite the pretense of such rights in domestic law. For instance, Article 73 of Chapter XI of the United Nations Charter, entitled "Declaration Regarding Non-Self-Governing Territories,"<sup>133</sup> charges the member states with special obligations towards people who do not exercise the "full measure of self-government."<sup>134</sup>

The breadth of application of Chapter XI's non-self-governing territory

129. See generally Kearney, *supra* note 22, at 592 (statement of ILC President Endre Ustor) (noting that under the clean slate theory, a colonial territory who does not participate in the governing or administration of its state is not bound by treaties imposed upon it).

130. See *supra* notes 30-38 (discussing the dependent territory test).

131. See *supra* notes 84-100 and accompanying text (providing a historical explanation of the hybrid case of East Pakistan).

132. See *supra* notes 120-126 and accompanying text (explaining the hybrid dependency of the former Soviet republics).

133. See U.N. CHARTER art. 73 [hereinafter U.N. CHARTER] (assessing obligations of member states to peoples within the territory of member states who have not yet attained self-government). According to Article 73:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust, the obligations to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories . . . .

*Id.* See also EMIL J. SADY, THE UNITED NATIONS AND DEPENDENT PEOPLES 65-121 (1965) (explaining the development of Chapter XI of the U.N. Charter).

134. See U.N. CHARTER, *supra* note 133 (noting the responsibilities of member states towards non-self-governing territories). See YASSIN EL-AYOUTY, THE UNITED NATIONS AND DECOLONIALIZATION: THE ROLE OF AFRO-ASIA 182-84 (1971) (discussing state obligations towards non-self-governing territories).

provision historically has engendered spirited debate.<sup>135</sup> Restrictive readings suggest that Chapter XI was intended to apply only to "territories" in the sense of traditional colonial entities separate and distinct from a metropolitan state.<sup>136</sup> Just as plausible is a more expansive reading of the term "non-self-governing" territory to include territorial entities within the state proper that have no effective representation in state policymaking.<sup>137</sup> This interpretation would bring territories that are physically part of a metropolitan state within the ambit of Chapter XI.<sup>138</sup>

Making Chapter XI applicable to non-traditionally colonial entities would set a useful precedent for addressing hybrid cases of state succession, where the separating state is not fully independent in the conduct of international relations.<sup>139</sup> The international community might then adopt a less categorical orientation to state succession, while incorporating within existing law a more realistic approach to cases that involve deviations from the traditional concept of dependency.<sup>140</sup> This

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135. See generally CRAWFORD, *supra* note 28, at 359-60 (suggesting that the major problem of Article 73 rests with the imprecision of distinguishing between "territories" which are, and those which are not, part of the metropolitan State, although both may be equally 'non-self-governing' in fact").

136. See CRAWFORD, *supra* note 28, at 359-60 (noting that "a territory falls outside the ambit of Chapter XI if it is 'metropolitan'").

137. See CRAWFORD, *supra* note 28, at 359 (indicating the possibility that "metropolitan areas" could also be "non-self-governing" areas).

138. See generally CRAWFORD, *supra* note 28, at 358-60 (suggesting the potential of an expansive reading of Chapter XI to apply to domestic situations). Contemporary U.N. practice may cut against such a wider application of Chapter XI. *Id.* at 362. Nonetheless, the U.N. response over Rhodesia suggests that Chapter XI, and specifically Article 73, may apply to non-traditionally colonial territories. *Id.* In the case of Rhodesia,

[T]he Assembly was not prepared to accept that the degree of internal autonomy possessed by Southern Rhodesia in British constitutional law before 1965, or thereafter in fact, prevented it from being non-self-governing. Substantially, the reason[ing] was . . . 'based upon a systematic denial in its territory of certain civil and political rights, including in particular the right of every citizen to participate in the government of his country, directly or through representatives elected by regular, equal and secret suffrage.'

*Id.* (footnote omitted).

139. See generally *supra* notes 84-100 and accompanying text (providing an example of a hybrid case).

140. See generally *supra* notes 30-36 and accompanying text (presenting background information on dependent territories).

approach would cure the anomalous experiences of the former Soviet republics<sup>141</sup> and Bangladesh,<sup>142</sup> where separating states inherited treaty obligations despite the fact that they enjoyed less influence over pre-succession international relations than some newly independent states.

### CONCLUSION

Conventional international law<sup>143</sup> dictates the legal obligation of former Soviet republics to inherit the pre-existing treaties of the dismantled Soviet Union.<sup>144</sup> Nonetheless, the assumptions underlying this determination, and the current conceptions of newly independent and separating states, are archaic. The dependent territory test's newly independent-separating state distinction fails to address hybrid situations of "separate" but dependent states. The omission of such hybrid cases may foster friction in international relations, as well as inequity. Had the former republics not voluntarily assumed the preexisting international obligations of the Soviet Union,<sup>145</sup> existing international law would not have easily resolved the question of the former republic's treaty succession. Given the magnitude of the former Soviet Union's nuclear arsenal, and the climate of economic turmoil and political instability which each former republic is currently confronting, the issue retains the potential to develop into an international crisis. International law should be revised to acknowledge that "dependency" is best understood as a fluid rather than a static concept, one that defies the restrictive and limited meaning now attributed to it.

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141. See generally *supra* notes 110-119 and accompanying text (describing dependent territory test in conjunction with the former republics).

142. See generally *supra* notes 84-100 and accompanying text (explaining the separation of East and West Pakistan and the creation of Bangladesh).

143. See generally *supra* notes 25-43 and accompanying text (reviewing the law of state succession to treaties).

144. See generally *supra* notes 101-119 and accompanying text (assessing treaty succession in light of the dissolution of the Soviet Union).

145. See *supra* note 24 and accompanying text (commenting on the Russian Federation's assumption of the Soviet Union treaty obligations).