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Codifying the Law of State Succession: A Futile Endeavour?

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Abstract

The succession of states is one of the most complex, challenging and politicized problems in international law. Attempts by the International Law Commission to codify it in the dying days of decolonization produced two treaties, neither of which has attracted broad participation or proved to be particularly influential on subsequent practice. As in the first great wave of succession practice in decolonization (1950–1974), the second great wave of 'desovietization' at the end of the Cold War (1990–1996) featured reactive solutions purporting to apply principles whose authority, content and theoretical underpinnings were unsettled. The purpose of this article is to examine whether recent practice supports the hypothesis that codification of a 'law of state succession' – whose very existence has long been contentious – is a futile endeavour. The article examines the 21st-century succession practice in a historiographical approach. It uses the South Sudan and Scotland cases against a historical backdrop of codification with reference to their key issues of succession.

The succession of states is one of the most complex, challenging and politicized fields of international law. Attempts by the International Law Commission (ILC) to codify it in the dying days of decolonization produced two treaties – the Vienna Conventions[1] – neither of which has attracted broad participation or been holistically impactful on subsequent practice.[2] As in the first wave of successions in decolonization (1950–1974), the second wave of desovietization (1990–1996) featured reactive solutions,

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1 Vienna Convention on the Succession of States in Respect of Treaties (VCSST) 1978, 1946 UNTS 3; Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts (VCSSP) 1983, UN Doc. A/CONF.117/14 (1983) (referred to together as the Vienna Conventions).

2 Eisemann, 'Rapport du directeur d'études de la section de langue française du Centre' and Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre', in P. Eisemann and M. Koskenniemi, *State Succession: Codification Tested against the Facts* (1997) 3 and 65, at 62–64, 125–126. For differing views on the authoritativeness of the Vienna Conventions, see, e.g., M. Shaw, *International Law* (2014), at 695; P. Dupuy and Y. Kerbrat, *Droit international public* (2014), at 72–73; J. Crawford, *Brownlie's Principles of Public International Law* (2012), at 438–439.

which were sometimes overtly improvisational and, at other times, purported to apply norms whose authority, content and rationales were unsettled. As Matthew Craven concludes in his *magnum opus* on succession to treaties:

> For most of those working on succession after 1989, the problem was how to square what they knew about the subject (for which the 1978 Convention was always a convenient starting point) with what appeared to be happening around them. For some, this was evidently a problem-solving exercise (for example, what might be the best posture to adopt in relation to participation in the NPT?), for others it was a question of principle (the consequences of unlawful annexation of the Baltic Republics), for others still it was simply a matter of mapping out what was taking shape by reference to existing tenets of State succession as they saw them. With certain rare exceptions, it was the dissimilarity between past and contemporary practice that seemed most marked.[3]

As occurred after decolonization, succession has largely dropped from the professional agenda since desovietization. While there has been no third wave, sporadic pieces of 21st-century practice have momentarily revived the hoary problems of the past, including South Sudan,[4] Kosovo[5] and the Crimea[6] alongside Scotland,[7] Catalonia,[8] Moldova[9] and Iraqi Kurdistan[10] as potential cases. The field is also gaining prominence in investment arbitration, including succession to membership of the International

[3] M. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (2007), at 256.

[4] E.g., A. Zimmerman and J.G. Devaney, 'Succession to Treaties and the Inherent Limits of International Law', in C. Tams, A. Tzanakopoulos and A. Zimmerman, *Research Handbook on the Law of Treaties* (2015) 505, at 540.

[5] E.g., M. Weller, *Contested Statehood: Kosovo's Struggle for Independence* (2009); M. Milanovic and M. Wood, *The Law and Politics of the Kosovo Advisory Opinion* (2015).

[6] E.g., García, 'De Kosovo a Crimea: la revancha rusa', 66(2) *Revista española de derecho internacional* (2014) 307. Despite the factual definition of succession espoused by the Vienna Conventions, they purport to exclude illegal occupations from their application. See VCSST, *supra* note 1, Art. 6; VCSSP, *supra* note 1, Art. 3.

[7] J. Crawford and A. Boyle, *Opinion: Referendum on the Independence of Scotland: International Law Aspects* (2012), available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf (last visited 28 October 2015). See also Tierney, 'Legal Issues Surrounding the Referendum on Independence for Scotland', 9(3) *European Constitutional Law Review* (2013) 359; Aikens, 'The Legal Consequences of Scottish Independence', 3(1) *Cambridge Journal of International and Comparative Law* (2014) 162; G. Pentassuglia, *Scotland Decides: An International Law Perspective* (2014), available at www.esil-sedi.eu/node/755 (last visited 28 October 2015); R. Hoyle, *Scottish Independence and EU Membership: Part I* (2014), available at www.ejiltalk.org/scottish-independence-and-eu-membership-part-i/ (last visited 28 October 2015).

[8] E.g., Weller, 'Settling Self-Determination Conflicts: Recent Developments', 20(1) *European Journal of International Law (EJIL)* (2009), 111; Borgen, 'From Kosovo to Catalonia: Separatism and Integration in Europe', 2(3) *Gottingen Journal of International Law* (2010), 997; Weiler, 'Catalonian Independence and the European Union', 23(4) *EJIL* (2012), 910.

[9] E.g., D. Brett and E. Knott, 'Victor Ponta's Surprise Defeat in Romania's Presidential Elections Could Add More Volatility to the Country's Turbulent Party System', *LSE Blog* (19 November 2014), available at http://bit.ly/1AhRr7g (last visited 1 April 2016).

[10] E.g., 'Kurdistan: Ever Closer to Independence', *The Economist* (21 February 2015); I. al-Marashi, 'The Kurdish Referendum and Barzani's Political Survival', *Al Jazeera English* (4 February 2016), available at www.aljazeera.com/indepth/opinion/2016/02/kurdish-referendum-barzani-political-survival-iraq-160204111835869.html (last visited 1 April 2016).

Centre for the Settlement of Investment Disputes (ICSID) and various bilateral investment treaties.[11]

The purpose of this article is to reflect upon this historical experience in order to test the thesis that codification of a 'law of state succession' is a futile endeavour. Building upon the work of Craven and others,[12] it points to the perils of formalism in a geopolitical environment in which political independence and territorial ownership are increasingly constrained by transnational economic pressures. It examines the 21st-century succession practice through a historiographical approach: its aim is not to conduct a minute, comprehensive analysis of putative rules but, rather, to illuminate the political dynamics underpinning the doctrinal debates. Considering the two areas of succession that have been the subject of codification treaties, the article tests the futility of codification with principal reference to succession to treaties and to property and debt. It focuses upon the South Sudan and Scotland cases against the historical backdrop of codification with reference to their key issues: title to land and debt (South Sudan) as well as membership in international organizations, maritime territory, and debt and property (Scotland).

1 Decolonization and Codification: The Vienna Conventions

Codification of international law is primarily associated with the unique institution of the ILC.[13] Its mission of 'the promotion of the progressive development of international law and its codification'[14] embodies the spirit of the codification movement of the turn of the 20th century, which was itself linked to the ideal of *conscience juridique du monde civilisé*.[15] Non-governmental associations and learned societies such as the International Law Association (ILA) and the Institut de Droit International (IDI) – both founded in 1873 – also play an important role as incubators for the identification of international law. The link with states that the ILC holds through its status as a United Nations (UN) organ, however, vests it with unique power to influence the legislation of international law.

The experience of the Vienna Conventions as relatively unsuccessful examples of 'codification treaties' produced by the ILC offer a useful vehicle for scrutiny of codification as an idea. Although the root codex (*caudex*) is of Roman lineage,[16] the noun 'codification' and verb 'to codify' in the English language are early modern. Coined by Jeremy Bentham in 1817, they were intended to express two, interrelated concepts: (i)

[11] Tams, 'State Succession to Investment Treaties: Mapping the Issues', 31(2) *ICSID Review* (2016) 314.

[12] Craven, *supra* note 3.

[13] For background, see A. Watts, *The International Law Commission 1949–1998* (1999), vol. 1, at 1–22.

[14] Statute of the International Law Commission 1947 as adopted by GA Res. 174 (II), 21 November 1947, Art. 1.

[15] See further, e.g., M. Koskenniemi, *The Gentle Civilizer of Nations* (2002), at 45–97. On the purported 'legal realism' or 'functional pragmatism' *zeitgeist* of today, see, e.g., the four articles published in volume 28, issue 2 (2015) of the *Leiden Journal of International Law*.

[16] See, e.g., 'Codes and Codification', in S. Katz, *The Oxford International Encyclopaedia of Legal History* (2009), available at www.oxfordreference.com/view/10.1093/acref/9780195134056.001.0001/acref-9780195134056-e-161 (last visited 28 October 2015).

the creation of a complete codex (book) of statutory law or 'pannomion' and (ii) the detailed inscription of each rule in applying Bentham's overarching principle of utility.[17] Bentham had earlier proposed the creation of a comprehensive, universal code of *ius gentium* (or, coining another enduring neologism, 'international law') for the 'common and equal utility of all nations'.[18] In propounding his brand of codification (which, in his lifetime, failed to achieve practical results), he thus purposed the elimination of the existent legal system in England, whose failure, as he saw it, to provide reason was attributable to its unwritten, evolutionary form.

At its root, codification entails the expression of law in written form. However, it took shape in different ways in the European legal traditions. In France, demand for what eventually became the Napoleonic Code was concomitant with the centralization of a national government and the unification of the diverse legal systems of the *ancien regime* (Frankish law, Roman law, canonical law and local custom).[19] Codification in the Holy Roman Empire, Prussia and (to a lesser extent) the Austro-Hungarian Empire – albeit sharing the 'centralization from above' overtones with France – was coloured by the search for legal commonality and rationalization for the diverse provinces of the respective realms.[20] In England and Wales, by contrast, codification – though intended by Bentham to supplant the existing order – was appropriated to recycle, not destroy, the common law. The politics of codification (at least, in the European sense), therefore, is tinctured by hues of centralization, unification and rationalization that reflect diverse political cultures.

In the law of nations, codification emerged in the late 19th century through the organization of the college of international lawyers into learned societies. Not by accident did the work of the ILA (originally the Association for the Reform and Codification of the Laws of Nations) and the IDI take the form of resolutions (albeit not initially accompanied by commentaries). The League of Nations Committee of Experts for the Progressive Codification of International Law (the forerunner to the ILC) was set up in 1924; as a process yielding legislative outcomes, codification properly began with the Codification Conferences of the League in 1930. However, these conferences were 'essentially episodic and limited. No comprehensive approach to the codification of international law as a whole was attempted nor was any standing mechanism for its achievement put in place'.[21]

The creation of the ILC in 1947 by the UN General Assembly (UNGA) was consequently the fulfilment of an objective of (some) jurists to create a permanent mechanism for codification to influence the legislation of international law by governmental officials.[22] It was Hersch Lauterpacht – perhaps the most famous proponent

17 J. Bentham, *Papers Relative to Codification and Public Instruction* (1817).

18 J. Bentham, *Principles of International Law* (1789).

19 E.g., P.A.J. van den Berg, *The Politics of European Codification* (2007), at 13–34, 125–206. See also B. Oppetit, *Essai sur la codification* (1998), at 7–23.

20 Van den Berg, *supra* note 19, at 41–124.

21 Watts, *supra* note 13, at 4.

22 On the merits and demerits of codification, see, e.g., Brown, 'The Codification of International Law', 29 *American Journal of International Law* (*AJIL*) (1935) 25, at 35–36; Brierly, 'The Future of Codification', 12 *British Year Book of International Law* (*BYBIL*) (1931) 1, at 5–6; Rosenne, 'Codification Revisited after 50 Years', in J. Frowein and R. Wölfrum (eds), *Max Planck Yearbook of United Nations Law* (1998), vol. 2, 1, at 1–3.

of the 'activist' international judicial function, whereby the judge plays the role of 'gap-filler' in an *a priori* 'complete system of law'[23] – who drafted the first long-term programme of the Commission in 1948.[24] From its inception, the ILC has identified itself as an independent body of experts dedicated to codification and progressive development without fear or favour of any one state but with courtesy and consideration towards all states. This delicate balance reflects, as an ideal, the altruism of disinterested communality tempered by the realism of self-interested power.[25] The ILC's authority depends upon the persuasiveness, rigour and objectivity of its proposals. The officials who eventually adopt them (or not) take into account their perceptions of the Commission's treatment of their views not only in the selection of topics but also during the drafting process.

While the ILC has moved towards producing reports or 'conclusions with commentaries' over the past five years,[26] the traditional structure of its 'outcomes' is the adoption of draft articles with commentaries to form the basis for adoption as a treaty by an intergovernmental conference. The reasons for this trend are obscure, yet the consequences of the reconfiguration of its target audience with its implicit weakening of states' control on the form and content of the final product are potentially profound. Instead of the classical two-step process, the ILC expands its power over the substance of its work while weakening the formal status of the final product.[27]

More broadly, codification of international law entails a winnowing process of doctrinal development through the continuous evaluation of state practice in judicial and academic discourse. The texts produced by the Commission are not the culmination of a linear process but, rather, a fulcrum in the continuous evolution of the law:

> True codification is a relatively simple process. It has a limited purpose and one which is always the same. It does not set out to reform the law in general, but only to reform it in a particular way, namely, by expressing it in a convenient form. It needs therefore no motive power other than the conviction that codified is better than uncodified law. The materials are given to the codifier and he has merely to clarify and rearrange them. Further, the process is a technical process. Not being concerned with substance, but merely with form, it calls for no decisions on the policy at which the law should aim.[28]

While the codifier cannot in practice completely distil policy from technicality, this statement is an expression of a technocratic ideal. In form, the ILC not only does not

[23] M. Koskenniemi, *The Gentle Civilizer of Nations* (2002), at 361–369.

[24] Survey of International Law in Relation to the Work of Codification of the International Law Commission, UN Doc. A/CN.4/1, 5 November 1948.

[25] For a sceptical view, see, e.g., P. Allott, *The Health of Nations: Society and Law beyond the State* (2002), at 310.

[26] E.g., Murphy, 'Codification, Progressive Development, or Scholarly Analysis? The Art of Packaging the ILC's Work Product' in M. Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (2013) 29.

[27] Yet, it is possible for the work of the International Law Commission (ILC) to be treated with excessive deference (e.g., citation by courts of ILC codification work as 'reflecting customary international law' without detailed analysis of the underlying state practice) as these subtleties are not obvious.

[28] Brierly, *supra* note 22, at 3.

distinguish between 'codification' and 'progressive development' in its work,[29] but it also typically acknowledges in the preambles of codification treaties that customary international law will continue to apply to matters not governed by the treaty.[30] Codification thus remains a slippery concept defying neat definition. It is, paradoxically, a depoliticized-yet-political art for the projection of power by the college of international lawyers as a technocratic elite.[31] Affecting the Commission's ability to discharge its mandate in accordance with the expectations of governmental officials are logistical factors such as the availability of members, timing, working methods and budget.[32]

State succession is an instructive lesson on the pitfalls of codification. Whereas Lauterpacht had included it in the ILC's long-term programme of work in 1948,[33] it was not a priority until the acceleration of decolonization in the 1960s, whereupon the ILC composed draft articles on succession to treaties (1950–1974)[34] and to property, archives and debt (1950–1981).[35] In 1981, Mohamed El Baradei, Thomas Franck and Robert Trachtenberg criticized the Commission for, *inter alia*, (i) excessive conservatism; (ii) failure to adapt to the post-decolonization priorities of the UNGA; (iii) poor attendance of certain members (for example, legal advisors); (iv) slow pace of work, averaging seven to ten years per project; and (v) failure to attract governmental interest in codification.[36] Shabtai Rosenne, however, observed in 1998 that all of the instruments concluded up to 1973 had entered into force since the Cold War political environment facilitated the selection of topics of pressing interest to states.[37] He attributed the post-1973 decline of codification treaties to, *inter alia*, weak oversight of the ILC by the Sixth Committee and the 'North-South divide'.[38]

Whereas state succession was not singled out by critics as a topic that was particularly peripheral to states' priorities, other doubts were expressed about its suitability for codification. Daniel O'Connell, the foremost academic authority on the subject and the special rapporteur of the ILA Committee on State Succession throughout the 1960s, was sceptical of the ILC project from the beginning.[39] As James Crawford wrote in 1980:

[29] See further Watts, *supra* note 13, at 7–10.

[30] E.g., Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, preamble. See further Rosenne, *supra* note 22, at 8.

[31] See further, e.g., Allott, *supra* note 25, at 8–16, 343–344, 380–422.

[32] Watts, *supra* note 13, at 10–13; Rosenne, *supra* note 22, at 4–8, 16–18.

[33] Professor de Visscher requested in vain for the topic to be included in the program of the League Committee of Experts in 1924. See Bedjaoui, 'Final Report on Succession of States', 2 *Yearbook of the International Law Commission* (*YBILC*) (1968) 95.

[34] 2(1) *YBILC* (1974).

[35] 2(2) *YBILC* (1983).

[36] E.g., M. El Baradei, T. Franck and R. Trachtenberg, *The International Law Commission: The Need for a New Direction*, UNITAR Research Department (1981). See also Franck and El Baradei, 'The Codification and Progressive Development of International Law: A UNITAR Study of the Role and Use of the International Law Commission', 76 *AJIL* (1982) 630.

[37] Rosenne, *supra* note 22, at 10.

[38] *Ibid.*, at 15–18.

[39] Craven, *supra* note 3, at 93.

> [s]uitable as it was for extended scholarly treatment of the sort O'Connell had given it, the topic of State succession was not self-evidently 'ripe for codification' at the end of the 1960s, either intrinsically or as a matter of relative priority of importance. In itself it is a rubric containing diverse, diffuse, and difficult issues, many of them solvable only by particular reference to the facts of individual cases. Codification was, at this time, likely to be influenced overwhelmingly by the recent experience of decolonization, an experience not necessarily typical of the cases of succession most likely to occur in future. Various administrative techniques had evolved for coping with discontinuities resulting from succession, and it was arguable that their evolution should be allowed to continue undisturbed by attempts at formulating general rules.[40]

O'Connell's warnings notwithstanding, the selection of succession as a topic on the agenda was ensured by the mounting pace of decolonization from 1945 onwards.[41]

A *The Context of Decolonization*

There can have been few phenomena to have affected the course of international law more profoundly than decolonization. The membership of the international community of states multiplied, the composition of international institutions changed concordantly and the newcomers' priorities often differed considerably from those of the established membership. The topic of succession – carrying important implications for the resources, obligations and very existence of successors – was a salient manifestation of these political tensions. The politics of decolonization affected the ILC's work in two, interrelated respects: (i) the treatment of the burgeoning and divergent practice concerning succession with respect to states only recently decolonized and (ii) the articulation of general principles (intended to be grounded in practice) for the handling of future successions.

Given the unfavourable circumstances that existed amid a peripety in the structure and orientation of international relations, the ILC might have postponed consideration of the topic to allow for the organic development of decolonization practice to run its course. Since the Commission had previously postponed it between 1949 and 1961 while it was occupied with other projects, further delay might have been natural.[42] Moreover, the ILA Committee on State Succession had only recently begun its own inquiry in 1961, producing its first report on the effect of independence on treaties in 1965 with a *Handbook of State Practice*.

The logistical conditions for the project were sub-optimal due to the acute political pressure for speedy production of authoritative guidance. Running somewhat counter to the aforementioned criticism made in 1981 of ILC unresponsiveness to the Third World, the importance of decolonization to the new UN (and ILC) membership[43] was the catalyst for the ILC's decision in 1961 to include succession in its 'priority list'.[44] Inexorably, the political divisions in the UNGA were to be replicated in the Commission during the drafting

[40] Crawford, 'The Contribution of Professor DP O'Connell to the Discipline of International Law', 51 *BYBIL* (1980) 2, at 31.

[41] Craven, *supra* note 3, at 96.

[42] ILC, 'First Report on Succession of States and Governments in Respect of Treaties', 2 *YBILC* (1968) 87 at 88, para. 7.

[43] GA Res. 1686 (XVI), 18 December 1961, at para. 3.

[44] Craven, *supra* note 3, at 96.

process.[45] Meanwhile, the complexity of the topic – exacerbated by the inconsistency of state practice – militated for slowness in order to untangle the Gordian knot of practice and theory. The unavailability of certain ILC members was also an important drag on the project. Nevertheless, the Commission's decision to take up the project is defensible in light of the political priorities, perhaps irresistible, of the day.

A secondary factor for the timing of the project was the ILC's composition and programme of work. The difficulty of defining the scope of the project prompted the Commission to create a sub-committee, chaired by Manfred Lachs, to examine the preliminary issues. In 1963, the Sub-Committee made four recommendations:

1. To confine the project to State succession, excluding governmental succession;
2. To prioritise empirical research of contemporary State practice over theory;
3. To divide the topic into the sub-categories of treaties, contracts (including debts and economic concessions[46]), torts and State property; and
4. To examine succession to treaties within the context of succession of States, rather than that of the law of treaties (then on the Commission's agenda).[47]

The Sub-Committee's decisions were taken in the relatively tight timeframe of nine formal meetings held over seven days.[48] Due to competing professional commitments, time pressures and illness, the chairman was prevented from attending. The complexity of the topic – amid fundamental disagreements among Sub-Committee members, as evidenced by their working papers – prompted the Sub-Committee to sidestep a general debate on the topic by approaching it as a set of specific questions. Thus, they pared down the topic, setting aside areas considered to be too difficult to codify rapidly (for example, nationality, responsibility and membership of international organizations).

While readily understandable in the circumstances, these decisions sowed the seeds for two problems. First, the decision to disregard theory placed what was to prove to be a supererogatory strain on empiricism to furnish definitive solutions to doctrinal dilemmas. Second, the decision to splice succession into separate sub-fields rather than to begin with a consideration of foundational principles (for example, a common Part I) upon which to base them was to compound the intrinsic difficulty of the topic.

B *The Drafting of the Vienna Conventions*

The most important personality for the development of the ILC Articles on State Succession with Respect to Treaties was the special rapporteur, Sir (Claud) Humphrey

[45] ILC, 'Report by Mr. Manfred Lachs, Chairman of the Sub-Committee on Succession of States and Governments', 2 *YBILC* (1963) 261, paras 6–7.

[46] O'Connell defines concessions as 'a licence granted by the State to a private individual or corporation to undertake works of a public character extending over a considerable period of time, and involving the investment of more or less large sums of capital'. O'Connell, *infra* note 52, vol. 1, at 304.

[47] Craven, *supra* note 3, at 96–105.

[48] This was at least partly due to competing professional commitments. Rosenne, *supra* note 22, at 263.

Meredick Waldock (1904–1981).[49] Waldock was a practitioner *par excellence*: he was uninterested in theory, his approach being broadly (yet not 'doctrinairily') positivist, doctrinal and empirical, and he preferred to forensically discover the views of states to determine the law. His preferred working methods – with their strong focus on the distilling of practice – thus accorded with the strategic decisions taken by the sub-committee.

Virtually in parallel, O'Connell worked on the topic through the ILA Committee. A devout Catholic with natural law and socially conservative instincts,[50] his legal approach was:

> deeply informed by history: every principle had a reason grounded in history, and was shaped by juridical, theological, political and practical considerations. He believed that international law should respond gradually to changing needs and circumstances through the classical process of customary law formation, and he regarded with misgiving the politically engineered majorities at international conferences who sought to make radical changes to the law through multilateral conventions. In his view, such proceedings threatened the integrity of the discipline. Indeed, he saw international law as increasingly falling into intellectual disarray.[51]

While O'Connell's work on succession – contemporaneous with the period of decolonization – underwent considerable evolution,[52] his general approach was grounded in empiricism – but an empiricism cloaked by historical context and philosophical inquiry into the ethical purposes of rules.

The role of moral philosophy in O'Connell's technique varies with the degree to which the practice on a given problem is capable of consolidation. For instance, his emphasis upon the role of compensation as a tool for the crafting of 'equitable'[53] solutions to problems arising out of the doctrine of acquired rights was based on the assertion that it was a 'well-established principle' whose contours are 'controversial'.[54] While he did not expound at length on his philosophical framework on 'equity', he appears to have instinctively regarded the private owner as being entitled to indemnification in the event of the successor exercising its prerogative of expropriation.[55]

[49] Brownlie, 'Waldock, Sir (Claud) Humphrey Meredith (1904–1981)', *Oxford Dictionary of National Biography* (2004), available at www.oxforddnb.com/index/101031793/Humphrey-Waldock (last visited 28 October 2015); Brownlie, 'The Calling of the International Lawyer: Sir Humphrey Waldock and His Work', 54(1) *BYBIL* (1983) 7; Craven, *supra* note 3, at 104–105.

[50] O'Connell, 'The Law of Nature and the Law of Nations', *Law and Justice* (1975), at 48.

[51] Shearer, 'O'Connell, Daniel Patrick (1924–1979)', *Australian Dictionary of Biography*, available at http://adb.anu.edu.au/biography/oconnell-daniel-patrick-11280/text20127 (last visited 6 April 2016). See further Shearer, 'Obituary: Professor D.P. O'Connell', 7 *Australian Year Book of International Law* (1977) xxiii.

[52] For an account of his work, see Crawford, *supra* note 40, at 2–47, especially 3–31. In the preface to his 1967 treatise, O'Connell warns the reader that the two-volume work is not to be regarded as the second edition to his 1956 monograph. D.P. O'Connell, *State Succession in Municipal Law and International Law* (1967), vol. 1, at vi.

[53] D.P. O'Connell, *The Law of State Succession* (1956), at 131–132; O'Connell, *supra* note 52, at 263–268, especially 267.

[54] O'Connell, *supra* note 52, at 263.

[55] *Ibid.*, at 266.

However, he rejected the notion that acquired rights automatically bind the successor as they did the predecessor, consonant with his consistent rejection of the 'universal succession' theory[56] with its appurtenant common law concept of 'subrogation' in the field of private rights.[57]

Working also in parallel was the ILC special rapporteur on state property, debt and archives, Mohammed Bedjaoui, an Algerian diplomat and scholar who 'brought a particular perspective to the issue that contrasted sharply with that of other international lawyers in the West'.[58] This perspective, imbued with the *nouvel ordre économique international* movement of the newly decolonized members of the non-aligned movement in the 1960s and 1970s,[59] was a rejection of the continuity of pre-existing arrangements (for example, concession agreements) in favour of the *tabula rasa* theory.[60] As he wrote during his tenure as special rapporteur in 1979:

> [w]hen they treat the claim for the permanent sovereignty of States and nations over their own natural wealth as mere logomachy, traditional lawyers are singularly failing to understand the real facts about how the Third World countries have been dispossessed of their sovereignty for the benefit of foreign economic coteries. They hide their eyes from this reality, invoking the fact that international law by its very nature knows nothing of such situations, which are alienating none the less … only the form of a legal concept is considered, while its content – the social reality it is supposed to express – is lost sight of … As a result, no attention at all is paid to the economic and political context which differs from one State to another according to their degree of development and which governs the application of a concept such as State sovereignty. Yet it is this context which is decisive in giving a concrete meaning to sovereignty – or in denying it any such meaning.[61]

Bedjaoui's policy-driven approach is also evident in his critique of traditional legal technique, particularly customary law, as '*status quo* law' that works for the most part against new states while purporting to bind them without their consent.[62] For instance, in contrast to O'Connell's conclusion that the doctrine of acquired rights

[56] This states that a successor receives *ipso iure* the rights and obligations of the predecessor, by analogy with the Roman law of inheritance. Acquired rights do not protect the owner from expropriation but provide a right to indemnity where the successor's right to expropriate is exercised.

[57] O'Connell, *supra* note 53, at 6–11, 129–132; O'Connell, *supra* note 52, at 9–14, 264–266.

[58] Craven, *supra* note 3, at 83. See further Boumedra, 'Il était une fois: A Charmed Life' and Pinto, 'The International Law Commission: Representative of Civilization, Agent of Change', in E. Yakpo and T. Boumeda (eds), *Liber Amicorum Mohammed Bedjaoui* (1999) 2, at 595.

[59] The movement was driven by the imbalance in the existing economic order between established and newly decolonized States. It propounded, *inter alia*, rights to economic development, sovereignty over natural resources and preferential treatment for developing countries. Bedjaoui's country, Algeria, was the leader of the Non-Aligned Movement in the push that resulted in the Declaration on the Establishment of a New Economic Order in GA Res 3201 (S-VI), 1 May 1974, and its accompanying Programme of Action in GA Res 3202 (S-VI), 1 May 1974.

[60] This states that a successor begins life without pre-existing rights and obligations, save for that which it elects to accept. For Bedjaoui's views, see Bedjaoui, *Towards a New International Economic Order* (1979), at 76–192, especially 97–109, 131–143.

[61] Bedjaoui, *supra* note 60, at 99. For examples of the manifestation of his approach in the ILC project, see, e.g., *supra* note 33, at 95–101 (especially paras 6, 12, 28, 31–32, 38, 43–44), 104–105 (paras 69, 72–73).

[62] Bedjaoui, *supra* note 59, at 134–135.

over economic concessions is 'perhaps one of the few principles firmly established in the law of state succession and the one which admits of least dispute',[63] Bedjaoui rejected its validity as a consequence of the creation through decolonization of the principle of sovereignty over natural resources so that private rights are not acquired but, rather, 'protected only if the new sovereign consents'.[64]

In comparing the radically different worldviews of the three men, it is not an exaggeration to describe them as ideological adversaries. Waldock was an empiricist with a highly forensic approach and a distaste for theory and normativity, O'Connell contextualized practice in theory and relied on ethics in default of consistent practice, whereas Bedjaoui was overtly revolutionary in terms of both policy aims and legal technique. Although Waldock and O'Connell (for different reasons) opposed Bedjaoui's attack (for example, through resolutions and multilateral treaties) upon the existing order, they disagreed on the balance between empiricism and normativity, particularly with respect to the weight to be attributed to states' views.

An example of these irreconcilable differences of worldview and technique is the question of 'unilateral declarations'. A novel practice originated by Tanganyika in 1961 and taken up by other newly decolonized states, it rejected the making of a 'devolution agreement' (a largely British practice for the transfer of rights and obligations to former colonies) in favour of a declaration tendered by the successor to the UN secretary-general to provisionally continue to apply treaties, subject to a right to terminate within a specified period varying from two to four years.[65] Their rationale was to buy time (a potential hook for compromise) for the successor – often lacking the administrative resources to take rapid decisions on treaties[66] – to review them in a transitional period while not renouncing any benefits potentially accruing to them under the *status quo ante*.

His de-emphasis on theory notwithstanding, Waldock's dilemma was that he had consciously elected to treat the succession of states to treaties as a sub-branch of the law of treaties rather than as one of a (general) 'law of succession', on the premise that neither the prevalent theories nor the existing practice offered a unified approach.[67] It was also convenient to Waldock to conceptualize the topic within the parameters of a field in which he had recently completed extensive work (that is, the 1969 Vienna Convention on the Law of Treaties [VCLT]).[68] This approach tracked the strategic decisions taken by the Sub-Committee, which were largely driven by logistical difficulties and the absence of agreement on basic principles.

Nevertheless, unilateral declarations presented Waldock with two methodological problems. First, as he acknowledged, it did not 'fall neatly into any of the established treaty procedures'.[69] Second, the weight of practice favoured recognition of some

[63] O'Connell, *supra* note 52, at 268.

[64] Bedjaoui, *supra* note 33, at 115 (paras 139–140). Bedjaoui's intent was for the VCSSP to establish sovereignty over natural resources as a prelude to the examination of private rights. *Ibid.*, at 105, para. 75.

[65] Draft Articles on Succession of States, *supra* note 34, at 191 (Burundi).

[66] Crawford, *supra* note 40, at 41–43.

[67] First Report on Succession of States, *supra* note 42, at 89, para. 9.

[68] Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

[69] ILC, 'Second Report on Succession in Respect of Treaties', 2 *YBILC* (1969) 45, at 66, para. 13.

form of unilateral declarations – an outcome with which he appears to have been instinctively uncomfortable.[70] He plumped for a compromise. While Article 9 of the ILC Articles on State Succession rejected unilateral declarations, Article 16 within the category of 'new States' provided for the tacit consent of other parties to the notification of succession to a multilateral treaty.[71] This struck a middling position between the 'continuity' and '*tabula rasa*' camps by rejecting an obligation to succeed while providing for a restricted right to succeed by notification, but only to multilateral treaties and subject to the terms of the treaty (which might be interpreted to require the consent of all parties).

True to his earlier work, O'Connell concluded that the inconsistency of available state practice militated, on policy grounds, in favour of a presumption of continuity – a thesis that Waldock expressly rejected.[72] In further contrast, Bedjaoui mirrored Waldock's approach in form by adopting the language of 'newly independent states' and distinguishing between categories of succession. However, Articles 14, 26 and 36 on property, archives and debts of the ILC Articles on State Succession took the substantively inconsistent position – foreshadowed by the revolutionary aims of the *nouvel ordre économique* movement to achieve economic redress for historical injustice – that newly independent states generally succeed automatically to ownership of immovable state property and archives, yet do not succeed to debt with respect to their territory, save by special agreement.

None of the three approaches provided a wholly consistent and equitable solution. Though ingenious, Waldock's formulations rejected a considerable body of state practice on unilateral declarations while drawing complex distinctions both on categories of succession and categories of treaty. O'Connell's approach, though more methodologically rigorous than Waldock's in that he openly grounded his principle of continuity in policy rather than in the empiricism from which Waldock was to inevitably depart, nevertheless rejected the desire of the decolonized states for the power to review treaties in their initial years of independence. Bedjaoui, meanwhile, prioritized the interests of decolonized states to a degree that broke the rigour of his draft – there is no evident rationale as a general principle for an automatic succession to state property contrasted by an automatic non-succession to state debt.

Exacerbating these inconsistencies was the initial decision taken by the Sub-Committee to pass over a theoretical debate concerning whether a general law of state succession could even be said to exist. There was no obvious reason why a general rule on succession with respect to seceding states ought not to exist.[73] Succession to treaties, on the one hand, and to property, archives and debt, on the other hand, do not

[70] *Ibid.*, at 67, paras 18–19.

[71] ILC, 'Third Report on Succession in Respect of Treaties', 2 *YBILC* (1970) 25, at 27, para. 9.

[72] Craven, *supra* note 3, at 140, n. 262. O'Connell, *supra* note 52, vol. 2, at 119, was, however, critical of Tanganyika's approach.

[73] Though bearing in mind Crawford's warning that '[a] common fault of writers is to classify issues primarily as "succession" and consequently to consider particular issues in isolation from the matrix of rules governing the subject-matter, which might involve, for example, the law of treaties, state responsibility, or the constitution of an international organization'. Crawford, *supra* note 2, at 438.

appear to raise different questions of principle: the shared problem is the method of determination of succession. The potential attractiveness of unilateral declarations is the balance struck between the parties by vesting the successor with a (time-limited) right to terminate and obligations while also providing the other parties with provisional continuity. The successor has a fixed time in which to review its legal arrangements, whereas the other parties have time to form contingency plans in case the successor opts to disturb the *status quo*.[74] Why this dynamic should differ from treaties to property, archives and debt is not obvious.

The problem with the polarized approaches embodied by the continuity and *tabula rasa* theories is not only that they fixate on normative abstraction and the political conflicts that they represent but also that they overlook the reality that successors are frequently in a weak position to assess the implications of these arrangements and so instinctively seek to maximize their prerogatives upon independence lest they unwittingly cede their rights. Born in oft-traumatic circumstances, there was a clear dissonance during decolonization between successors and predecessors in technical capacity; unilateral declarations offered a sensible transitional period in which to counteract this logistical disparity.

This example illustrates how the unpropitious logistics of the succession projects impaired the fundamental aims of codification. Taken as codices, the Vienna Conventions appear to the casual eye to be complicated and contradictory. While their commentaries are of considerable explanatory value to the practitioner, their provisions often appear in context to be driven, on the whole, more by politics than by law. The overweening influence of decolonization, both as a catalyst for the speedy completion of a highly challenging project and for the adoption of political compromises, is evident in the drafting record.

The re-opening of many of the politically charged debates about 'continuity versus clean slate' after the completion by the ILC of its drafts, both in the Sixth Committee and in the codification conferences,[75] was inevitable in light of the freshness of decolonization and yet also reflected the failure of the Commission to fulfil its technocratic role of producing articles that were both (to the extent possible) internally rigorous and politically even-handed. Efforts to harmonze them on format, notwithstanding the lack of substantive consistency across the texts and the absence of general principles, left them resembling a sum of their respective and quite different parts. As a cautionary tale on the perils and pitfalls of codification, the Vienna Conventions offer a good deal of valuable instruction.

[74] As Tams, *supra* note 11, at 331 observes: 'Czech and Serbian-Montenegrin practice illustrates the importance of explicit party agreements determining the fate of prior [bilateral investment] treaties. Such agreements may be difficult to trace and often are reached some time after the succession, leaving the law uncertain during the interim ("twilight") period'. Unilateral statements were also relied upon by the tribunal in UNCITRAL, *World Wide Minerals v. Kazakhstan*, Final Award, 28 January 2016, as evidence of affirmation of treaty obligations. Tams, *supra* note 11, at 333.

[75] E.g., UN Conference on Succession of States in Respect of Treaties, Doc. A/CONF.80/16, 4 April–6 May 1977, at 24–34.

2 Desovietization and Divergence: Between Law and Practice

That in the wake of their troubled drafting histories the Vienna Conventions have failed to attract much state participation[76] and have often been dismissed as largely irrelevant[77] is understandable. In the aftermath of the difficult and prolonged Vienna Conferences on State Succession of 1978 and 1983, the Vienna Conventions sunk in the 1980s into a period of apathy marked by a slow process of ratifications.[78] Although the reasons for states' lack of participation have not been conclusively determined, it has been speculated that the perceived failure to construct depoliticized texts is a critical factor.[79]

The hiatus in the aftermath of the Vienna Conferences was broken by the second wave of desovietization, beginning with the mass protests of 1989 in Warsaw Pact members and rapidly morphing into the collapse of the Second World in the early 1990s. From the unique problems raised by the reunification of the 'three Germanies' to the tortuous difficulties arising from the successions to the Socialist Federal Republic of Yugoslavia (SFRY),[80] desovietization raised a host of problems (many of them unwelcome) for politicians and civil servants to tackle. Unlike decolonization, which had been somewhat planned (at least, in broad strokes) from the mid-1940s, desovietization was a spontaneous juggernaut. Policy had to be made on the hop – largely by the First World in the ensuing power vacuum.[81] In the frenzy, what eventuated was the devising of ad hoc solutions to the problems at hand and the renewed debate in the professional literature on the basics and specifics of succession.

A *Cry Havoc: Confused State Practice*

In light of the largely unexpected and unplanned collapse of the Second World, the ILC's decision to expedite its succession projects in the midst of decolonization may have been regarded as fortuitous, if not prescient. The availability of expertly drafted codices as swords for a slew of Gordian knots might have been welcomed by the diplomats and jurists whose unenviable task it was to cut them. Yet the record features poor participation, indecisive normativity and infrequent application in practice.[82]

For example, the solution adopted for German reunification – most importantly, the question of German membership in the European Community – of an absorption of

[76] As of 24 April 2016, there are 22 parties and 19 signatories to the VCSST and seven parties and seven signatories to the VCSSP.

[77] E.g., ILA, Committee on Aspects of the Law of State Succession, Final Report, Rio de Janeiro Conference (2008), at 27, 54, available at www.ila-hq.org/en/committees/index.cfm/cid/11 (last visited 28 October 2015).

[78] Craven, *supra* note 3, at 207–208.

[79] E.g., de Richemont, 'Decolonization and the International Law of Succession: Between Regime Exhaustion and Paradigmatic Inconclusiveness', 12 *Chinese Journal of International Law* (2013), 321, at 327–328, 334–337.

[80] Eisemann and Koskenniemi, *supra* note 2.

[81] E.g., Ortega Torol, 'The Bursting of Yugoslavia: An Approach to Practice Regarding State Succession', in Eisemann and Koskenniemi, *supra* note 2, 889, at 925.

[82] Eisemann, 'Rapport du directeur' and Koskenniemi, 'Report of the Director of Studies', in Eisemann and Koskenniemi, *supra* note 2, at 54–55, para. 94; 55, para. 95; 56–57, para. 98; 62–63, para. 107; 89, 95, 129–131.

the German Democratic Republic by the Federal Republic of Germany as an essentially 'internal' process did not accord with either Article 31 of the VCSST or with the approach taken in the unification of Yemen later that year.[83] The Baltic states' policy of rejecting the Soviet legacy in favour of a 'revival of prior personality' theory had no basis in the Vienna Conventions and led to inconsistent outcomes on a variety of matters.[84] Although Czechoslovakia was comparatively straightforward, and the influence of Article 34 of the VCSST was discernible,[85] the lack of consistency in the body of practice was evident. In the *Gabčíkovo-Nagymaros* case – featuring extensive debate on Articles 12 and 34 of the VCSST – the International Court of Justice did not affirm them as customary international law.[86]

However, the Vienna Conventions have arguably achieved a measure of success in two respects. First, practice has coalesced around a clutch of their provisions.[87] For example, their common definition of succession as 'the replacement of one State by another in the responsibility for the international relations of territory' appears to be widely accepted.[88] Article 12 of the VCSST on the preservation of boundaries concluded by treaty (so-called 'real treaties') seemingly commands general support,[89] as does Article 4 on the succession to membership of international organizations as determined by the presence or absence of organizational rules on accession.[90]

Although the Convention on the Succession of States in Respect of State Property, Archives and Debts (VCSSP) has arguably been less successful than the VCSST, Articles 12 and 24 preserving the rights of third states to their property and archives are seemingly uncontroversial, as are Articles 13 and 26 on the duties of the predecessor to take measures to prevent damage and destruction to state property and archives. Nonetheless, the VCSSP has been infrequently applied with ad hoc political agreement being the default mode of dispute settlement in relation to state property, archives and debt.[91]

[83] Craven, *supra* note 3, at 222–223.

[84] *Ibid.*, at 224–225.

[85] *Ibid.*, at 236–237.

[86] *Application of the Genocide Convention (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, 11 July 1996, ICJ Reports (1996) 595, at 611–612; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Merits, 25 September 1997, ICJ Reports (1997) 7, at 71.

[87] But see ILC, Third Report on the Identification of Customary International Law, UN Doc. A/CN4/682, 27 March 2015, at 21–22.

[88] ILA, *supra* note 77, at 70, para. 1.

[89] *Ibid.*, at 27–31, 71, para. 9.

[90] *Ibid.*, at 34–46, 71, para. 12.

[91] Judicial and arbitral decisions have been sporadic and inconsistent. See, e.g., *Yemen v. Compagnie d'Enterprises CFE SA*, Supreme Court of Cyprus, 28 June 2002, ILDC 630 (CY 2002) (on the relationship between acquired rights and state debt); *Re Russian Embassy*, Supreme Court of Austria, 9 November 2004, ILDC 4 (AT 2004) (rejecting the Russian claim to ownership of Soviet property due to customary international law on state succession being insufficiently 'obvious' per the domestic law test); *Pensions – Eritrea's Claims 15, 19, and 23, Eritrea and Ethiopia*, Permanent Court of Arbitration, 19 December 2005, ICGJ 363 (PCA 2005) (rejecting the applicability of customary international law on succession to debt to pensions on the grounds of indeterminacy); *Italia Nostra v. Ministry of Cultural Heritage and Libyan Arab Jamahiriya (intervening)*, Italy Council of State, 23 June 2008, ILDC 1138 (IT 2008) (rejecting the VCSSP as the basis for a customary international law obligation of restitution of cultural artefacts); *Odyssey Marine Exploration Inc v. Unidentified Shipwrecked Vessel and Ors*, District Court for the Middle District of Florida, 22 December 2009, ILDC 1437 (US 2009) (rejecting on jurisdictional grounds Peru's claim to the specie of a Spanish frigate, based on a customary international law rule of succession).

In general, whereas the successors to the SFRY were at loggerheads (over state property, in particular), the successors to the Soviet Union were able to reach agreement on these areas.[92]

Second, the Vienna Conventions have, by their very existence, served as a wellspring for the professional debates during and after desovietization. Whatever their shortcomings, they have been the starting points – and, at times, the end points – for the articulation of the problems. In a field whose basic structure and nature remains tenuous and contentious, they have provided a conceptual framework through which diplomats and lawyers have grappled with the problems of the day – even if they have not necessarily applied the solutions that the Vienna Conventions proffer. The existence of some vocabulary for international legal argumentation can be counted as a dole of progress in the codification of the law. It is even arguable that the utility of the Vienna Conventions is shown by the rejection in practice of certain provisions in that they have provided a yardstick against which to test potential solutions. An example of this might be Article 34 of the VCSST, stipulating the conditional continuity of treaties in force in cases of secession. There has been a diverse diet of decisions on this issue by domestic and international courts, only some of which have cited the provision.[93]

Despite these gains, the Vienna Conventions evidently occupy a peripheral role in terms of applicability. For example, whereas it has been suggested that Article 4 of the VCSST (providing for no automatic succession to the membership of international organizations) enjoys customary status, James Crawford and Alan Boyle reached the following conclusion in their opinion on the international law aspects of the Referendum on Independence for Scotland: '[I]nsofar as any claim by the [Scottish National Party] or Scottish Government that Scotland would remain a member of international organisations is based on the *Vienna Convention on Succession of States in Respect of Treaties* of 1978, it can be dismissed as, at best, inconclusive.'[94] This inconclusiveness reflects more the intrinsic feebleness of Article 4, which does no more than outsource the problem to the rules of organizations, rather than its lack of acceptance in practice.

[92] Dronova, 'The Division of State Property in the Case of State Succession in the Former Soviet Union', in Eisemann and Koskenniemi, *supra* note 2, 781, at 822, 923–926.

[93] E.g., *Arambasic (Mitar) v. Ashcroft (John) and Others*, South Dakota, 18 November 2005, ILDC 709 (US 2005); *BA, Final Ruling upon Request for Extradition*, Supreme Court of Kosovo (disputed), ILDC 1964 (KO 2010); *Article 155(4) of the Constitution and Articles 3 and 9 of the 1964 Administration of Justice (Miscellaneous Provisions) Act, Re, Botrov (Alexander Valentinovich) v. Cyprus*, Supreme Court of Cyprus, 9 August 1996, ILDC 919 (CY 1996) (on succession to a bilateral extradition treaty); *CJSC 'LUCH' v. Ministry of Transportation and Others*, Supreme Court of the Russian Federation, 18 September 2009, ILDC 721 (RU 2009) (on succession to the Customs Convention on International Transport of Goods under Cover of TIR Carnets 1975, 1079 UNTS 89); *S v. Austria*, Supreme Court of Justice, 30 September 2002, ILDC 1618 (AT 2002); *VJ v. Czech Social Security Administration*, Supreme Administrative Court, 28 November 2008, ILDC 1405 (CZ 2008); *Azov Shipping Company v. Werf-en Vlasnatie NV*, Court of Appeal, 19 March 2001, ILDC 43 (BE 2001); *X and Y v. Government of the Canton of Zurich and Administrative Tribunal of the Canton of Zurich*, Federal Supreme Court of Switzerland, 22 November 2005, ILDC 340 (Ch 2005).

[94] Crawford and Boyle, *supra* note 7, para. 19.

B *There and Back Again: Renewed Professional Debate*

The volume and dynamism of the scholarship produced in the ILA,[95] the IDI[96] and academic literature during desovietization suggests that the Vienna Conventions have dammed, not channelled, the streams of succession problems. The efforts in the nineties to thread a path through the labyrinth of the Yugoslavian minotaur was, for the international law profession, an intense challenge to its mission of a depoliticized system of enforceable rules offering consistency, clarity and conscience. The legal messiness of the improvized solutions mirrored the image of a field as essentially lawless; scholarship was thus primarily concerned with striving in vain to locate doctrinal consistency amidst the dissonant state practice.

Although the ILC drafted articles on succession with respect to nationality,[97] there was no appetite for revisiting the Vienna Conventions. There was an initial preference for a set of guidelines,[98] but the project ultimately adopted the traditional articles/commentaries format while omitting a recommendation to convene a codification conference.[99] As with the Vienna Conventions, the drafting of the text took place amid the unfolding events of desovietization and was seemingly aimed at preventing certain states (for example, concerning Russian minorities in the Baltics) from denying nationality at the point of succession to 'transplanted' inhabitants of their territory of differing ethnic origin to the 'indigenous' population.[100] States' lack of interest prompted the ILC's recommendation to the UNGA to conclude the project with the adoption of its articles.[101]

Work on succession was also done in the learned societies. An ILA Committee on Aspects of State Succession operated between 1994 and 2008 with a mandate to evaluate the contribution of the Vienna Conventions to international law, particularly their influence on state practice and to articulate applicable principles of succession to nationality.[102] However, the Committee decided not to deal with the latter issue since – possibly in conscious contrast to the Vienna Conventions – it 'was of the view

[95] ILA, *supra* note 77.

[96] Institut de droit international, State Succession in Matters of Property and Debts, Vancouver Session (2001).

[97] ILC, 'Nationality of Natural Persons in Relation to the Succession of States with Commentaries', 2(2) *YBILC* (1999). See also, e.g., Zimmerman, 'State Succession and the Nationality of Natural Persons: Facts and Possible Codification', in Eisemann and Koskenniemi, *supra* note 2, 611.

[98] ILC, Report on the Work of Forty-fifth Session, UN Doc. A.CN.4/457, 15 February 1994, at 98, para. 437.

[99] In an apparent compromise, the ILC made preambular reference to the 'need for codification and progressive development' but did not call upon the UN General Assembly (UNGA) to convene a conference. ILC, *supra* note 97, at 24–25, para. 8. The UNGA took note of the articles, invited governments to take them into account, as appropriate, and recommended that all efforts be made for the wide dissemination of the text of the articles. GA Res. 55/153, 12 December 2000. It later invited governments to submit comments concerning the advisability of elaborating a legal instrument on the topic. GA Res. 59/34, 2 December 2004.

[100] ILC, *supra* note 98, at 97, paras 435–436.

[101] 2 *YBILC* (1999) 20, para. 45. See further Pronto and Wood, *The International Law Commission 1999–2009* (2010), vol. 4, at 75–126.

[102] The officers changed during the project with Gerhard Hafner (Austria) chair and Wladyslaw Czaplinski (Poland) and Marcelo Kohen (Argentina) co-rapporteurs at its conclusion. ILA, *supra* note 77, at 1.

that any further research would only duplicate the work of the ILC'.[103] The Committee concluded that, whereas there is general acceptance of the Vienna Conventions' definition of succession, their classification of various types of succession do not fully correspond with practice. Moreover, recent practice had shown the difficulties of adopting clear-cut criteria for the distinction between the secession and dissolution of states in cases in which there is no agreement among the directly concerned states.[104]

The IDI has investigated succession to property and debt[105] and, very recently, succession to responsibility.[106] Its former project concluded, *inter alia*, that there is a 'utility of reaffirming the rules and principles … which have been confirmed by recent State practice' and 'equally, of the need to identify *de lege ferenda* the trends in developments and criteria of the regime in this domain in order better to guarantee legal certainty in international relations'.[107] The principles set out in its resolution differ from the VCSSP in their attempt to provide detailed elaboration according to equity,[108] apportionment through mutual consent[109] and categories of succession.[110] The distinction drawn in the VCSSP between dissolution (equitable apportionment among successors) and secession (property kept by predecessor) has been discontinued.[111] Its project on responsibility has broken new ground on succession, which is the first of its kind, in which it proposed general principles of succession based upon the theory of identity and engaging with recent practice.

3 Points and Counterpoints: Codification and State Succession

Following desovietization, which was mostly completed with the admission of the Federal Republic of Yugoslavia (FRY) to the UN in 2000, the topic of succession again entered a clock-calm. Although problems connected to desovietization remained unresolved, the suspension of these disputes kept succession off the agenda.[112] In the

[103] *Ibid.*, at 2.

[104] *Ibid.*, at 70.

[105] Institut de droit international (IDI), 7ème Commission, Session de Vancouver, Resolution, La succession d'Etats en matière de responabilité internationale (2001) available at www.justitiaetpace.org/idiF/resolutionsF/2001_van_01_fr.PDF (last visited 28 October 2015). English translation at www.justitiaetpace.org/idiE/resolutionsE/2001_van_01_en.PDF (last visited 28 October 2015).

[106] IDI, 14ème Commission, Session de Talinn, Resolution, La succession d'Etats en matière de responabilité internationale, 28 August 2015, available at www.justitiaetpace.org/idiF/resolutionsF/2015_Tallinn_14_fr.pdf (last visited 28 October 2015). See also the final report, available at www.justitiaetpace.org/idiE/annuaireE/2015/IDI_14_2015-06-30.pdf (last visited 28 October 2015). See further, e.g., P. Dumberry, *State Succession to International Responsibility* (2007); Mukulka, 'State Succession and Responsibility', in J. Crawford *et al.* (eds), *The Law of International Responsibility* (2010) 291.

[107] IDI, *supra* note 105.

[108] E.g., VCSSP, *supra* note 1, Arts 7–9, 11.

[109] E.g., *ibid.*, Art. 10.

[110] *Ibid.*, Arts 2–4.

[111] *Ibid.*, Arts 4, 10.

[112] E.g., the 'frozen conflicts' in relation to Abkhazia, Transnistria, Nagorno-Karabakh and South Ossetia, latterly joined by those of Kosovo and the Crimea. E.g., Costelloe, 'Treaty Succession in Annexed Territory', 65(2) *International and Comparative Law Quarterly* (2016) 343.

new century, there has yet to be a third wave of successions to once again trouble politicians, diplomats and lawyers, and there is no immediate prospect of one on the scale of decolonization or desovietization. There has, nevertheless, been an intermittent stream of practice in the past quindecennial that has ensured that succession has remained relevant, though peripheral.

A *The Challenges of Recent Succession Practice*

The secession of South Sudan from the Sudan following a referendum on independence held between 9 and 15 January 2011 prompted the first admission of a Member State to the UN in the 21st century that was not connected to either decolonization or desovietization. The backdrop was the second Sudanese Civil War (1983–2005), which was brought to an end through negotiations between the Sudanese government and the Sudan People's Liberation Army/Movement. These negotiations, covering a wide range of topics, culminated in the signing of the Comprehensive Peace Agreement of 2005.[113] This provided for a phased, transitional process towards secession in which a government of national unity would be formed in addition to a proto-government in South Sudan.

Since independence, South Sudan has been grappling with multiple internal armed conflicts, ongoing disputes with the Sudan and the need to create governmental and economic infrastructure. In this context, the principal mode for the handling of succession issues appears to have been the negotiation of bilateral agreements. There are three interlinked sets of pending disputes: (i) 'wealth sharing' (principally petroleum generated); (ii) territorial disputes in the Abyei[114] (with mediation from the African Union[115]), Heglig and other areas and (iii) the apportionment of the relatively high level of state debt.[116] While the proprietary asset and territorial disputes have been bilateral, the dynamic on the division of debt has featured both states lobbying creditors for relief.[117] The paucity of accessible source material renders the drawing of

[113] Comprehensive Peace Agreement between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army', available at https://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf (last visited 28 October 2015).

[114] For background on the Abyei Boundaries Commission, see *In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 5 of the Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Army/Movement on Delimiting Abyei Area*, Permanent Court of Arbitration, Final Award, 22 July 2009, available at www.pca-cpa.org/Abyei%20Final%20Award2e06.pdf?fil_id=1240 (last visited 28 October 2015).

[115] Documents available at www.peaceau.org/en/resource/118-theme-auhip (last visited 28 October 2015).

[116] Succession of South Sudan to bilateral investment treaties also 'remains largely uncertain', though succession to membership of ICSID was straightforward. Tams, *supra* note 11, at 323, 332.

[117] See, e.g., 'South Sudan, Sudan to Jointly Lobby Creditors for Debt Relief', *Sudan Tribune* (29 September 2014), available at www.sudantribune.com/spip.php?article52573 (last visited 28 October 2015). According to the World Bank, '[a]t the end of 2013, Sudan's external debt stock stood at $45.1 billion in nominal terms, about 85% of which was in arrears. While the country is eligible for debt relief under the Highly-Indebted Poor Countries Initiative, it must come to an amicable understanding with its main creditors in partnership with South Sudan'. Sudan Overview, available at www.worldbank.org/en/country/sudan/overview (last visited 28 October 2015). See also Center for Global Development, *Sudan Debt Dynamics: Status Quo, Southern Secession, Debt Division, and Oil – A Financial Framework for the Future*, Working Paper 233 (December 2010), available at www.cgdev.org/files/1424644_file_Leo_Sudan_Debt_FINAL.pdf (last visited 28 October 2015).

definitive conclusions difficult, yet the appearance is that the influence of the Vienna Conventions on the succession issues pertaining to South Sudan has been negligible. Whereas succession to the membership of international organizations was straightforward (South Sudan acceded in the normal way), the parties have followed a course of negotiation on the sensitive issues that does not feature reference to general principles of law.

Whereas the South Sudan succession case has mainly centred on debt, territory and assets, the putative secession of Scotland features a broader range of issues: membership of international organizations, currency, debt, property, foreign investments, fisheries and navigation.[118] Membership in the European Union (EU) and the related issue of the participation of an independent Scotland in the pound sterling have been the two issues to have penetrated into the pre-referendum public debate on independence. The remainder have been addressed in a terse manner in the Scottish government's White Paper on Independence[119] and in parliamentary committee reports,[120] which essentially have concluded that 'they would be determined by negotiation in good faith' during the transitional process of secession.

The professional guidance that was publicly available to the protagonists reinforced this approach. While Crawford and Boyle had not been retained to advise on matters related to property and debt,[121] the thrust of their advice on international personality (the 'continuation versus succession' problem) and membership of international organizations centred on the role of 'negotiation in good faith' and rejected ordained legal outcomes.[122] Consequently, the impression was that international law had little incisive to say about the myriad problems arising out of succession. By emphasizing negotiation in good faith, international law was rather concerned with 'gently civilizing' the political process by channelling it into some orderliness.[123]

While Crawford and Boyle's opinion denied a role for the Vienna Conventions on the key question of succession to the membership of international organizations and the ILC shunted aside the topic at the outset of its codification project, the negative approach of Article 4(a) of the VCSST has ironically acquired a modicum of authority.[124]

[118] E.g., Tierney, 'Legal Issues Surrounding the Referendum on Independence for Scotland', 9 *European Constitutional Law Review* (2013) 359, at 378–389.

[119] Scottish Government, Scotland's Future: Your Guide to an Independent Scotland (November 2013), at 211, 215, 220–230, 234, 250–251. See also Generalitat de Catalunya, The National Transition of Catalonia: Synthesis (September 2014), at 53–58, 125–132, available at http://presidencia.gencat.cat/web/.content/ambits_actuacio/consells_assessors/catn/informes_publicats/llibre_blanc_angles.pdf (last visited 28 October 2015).

[120] E.g., Scottish Parliament EU and External Relations Committee, The Scottish Government's Proposals for an Independent Scotland: Membership of the European Union, SP Paper 530, 2nd Report, 23 May 2014, at 74, para. 268.

[121] Crawford and Boyle, *supra* note 7, para. 10.

[122] *Ibid.*, paras 47, 71, 78, 144, 150, 156, 164, 183.

[123] Koskenniemi, *supra* note 15.

[124] Bühler, 'State Succession, Identity/Continuity and Membership in the United Nations', in Eisemann and Koskenniemi, *supra* note 2, 187, at 321; K. Bühler, *State Succession and Membership in International Organizations: Legal Theories Versus Political Pragmatism* (2001), at 290–291.

It precludes automatic succession to membership save where it is (expressly) provided for in the rules of the organization, largely following a consistent (the SFRY/FRY controversy aside) body of UN practice requiring a successor to accede to membership. With the notable exceptions of the International Monetary Fund (IMF) and the World Bank,[125] this practice has become the orthodoxy, which is not surprising since the rule is relative rather than prescriptive and, thus, insofar as the 'law of succession' is concerned, not a rule at all.

Yet the negative outcome of the Scottish independence referendum, in which polarised positions were adopted by the Scottish government and the British government concerning the key issues of EU membership and the currency, has not ended secessionist ambitions in Scotland. Following the sweep by the secessionist Scottish National Party of nearly all of the Scottish seats of the House of Commons in the 2015 United Kingdom general election and the renewed debate concerning secession in response to the outcome of the June 2016 referendum in favour of British withdrawal from the EU, it is likely that a second referendum on secession is only a matter of time. There still exists no legal machinery for the resolution of succession problems insofar as they affect the EU: these include not only secession by Scotland or Catalonia but also the potential (re)unification of Romania and Moldova, on the one hand, and Northern Ireland and the Republic of Ireland, on the other, to say nothing of more unlikely-yet-plausible scenarios, such as the disintegration of Belgium.

B *To Codify or Not to Codify*

The failure of the Vienna Conventions to gain authority and the subsequent caution of the ILC on the topic of nationality offer a number of useful lessons not only for the field of state succession but also, more widely, for the codification of international law. First, timing is everything. Codification in the teeth of epoch-changing crises such as decolonization or desovietization – however much there may be demand for normativity – considerably hampers efforts to codify in a technocratic, depoliticized fashion. In particular, efforts to influence the very practice that is materializing at the time of codification inevitably shifts the focus away from the systemic generality that codification embodies.

Second, if it is to be attempted, codification requires resources. Foremost is a realistic timeframe for completion of a highly complex project. At one extreme, the ILC articles on the topic of state responsibility – which appeared alongside succession on Lauterpacht's original list of topics and are not yet a treaty – lasted some 45 years, compared to the 10–12 years for the Vienna Conventions. Whereas technical expertise is always a *sine qua non*, the availability of commissioners to devote time and energy to projects and their access to financial and research resources are also key.

Third, the success of codification rests on the ability of the experts to arrive at a sufficient degree of consensus concerning substance, flowing from generally accepted

[125] *Ibid.* These organizations have automaticity due to the absence of formal admission rules.

first principles. While the division of succession into sub-topics entrusted to different rapporteurs was a rational one to organize and expedite the project, with hindsight the omission of a common foundation was deleterious to both projects. The radically different outlooks of Waldock and Bedjaoui, coupled with the parallel ILA project under the leadership of the foremost expert on the field (O'Connell), added an element of self-contradiction that precluded professional consensus. Notwithstanding their efforts to ameliorate these differences, the more fruitful avenue, in retrospect, would have been to allow adequate time for the gestation of the topic as an integral field of law – rather than a sum of the respective parts of the laws of treaties, international organizations, property and nationality – so as to provide for a cohesive basis for the articulation of rules.

Although it has been observed that the ILC appears to be moving into new fields and formats for potential projects,[126] there is no evident appetite for a review of succession amid the current quiescence of practice. Moreover, even if the dust can be said to have settled after the difficult periods of decolonization and desovietization, the fact that succession has quietly dropped off the professional agenda provides no indication as to whether international lawyers would be more successful than they were before at attaining consensus. Counter-intuitively, the argument for the professional community to review state succession is precisely that the topic is not today a prominent one in international politics today. Since the topic has been an especially polarizing one, the availability of space and time in which to investigate the scope for objective solutions to historically knotty problems is an invaluable resource. Seemingly intractable problems engaging conflicting theories would need to be approached in a dispassionate spirit in the search for creative and viable solutions.

For example, one of the basic problems that dogged the concept of a codification convention in this subject area was the fact that a successor would, by definition, succeed without being party to the rules that govern its own succession. It was argued that this was both iniquitous and impractical, in that the successor would not have consented to those rules and could reject the application of some or all of the rules governing its own succession. Although this problem could be metaphysically approached by inquiring into the nature of consent or investigating the consequences of various scenarios, procedural or administrative avenues could also be considered. For example, the Sixth Committee could recommend that the UNGA amend its rules of procedure[127] on the admission of UN members to require ratification of the treaties governing succession as a precondition for admission.[128] If a mechanism for the immediate ratification of the rules governing succession could be constructed, then the orderliness of the process of succession would be improved.

[126] Cogan, The Changing Form of the International Law Commission's Work, 27 March 2014, available at www.asil.org/blogs/changing-form-international-law-commission%E2%80%99s-work (last visited 28 October 2015); Daugirdas, The International Law Commission Reinvents Itself?, 14 May 2014, available at www.asil.org/blogs/international-law-commission-reinvents-itself (last visited 28 October 2015).

[127] Rules of Procedure of the General Assembly, UN Doc. A/520/Rev.17 (September 2007), Rules 134–138.

[128] Of course, this assumes that treaties governing succession are to command broad support, which is not the case at present.

Central to academic inquiry on the field of succession must be the attitudes of states. In this respect, there is scant data to indicate either the motives for the lack of participation of states in the Vienna Conventions or their views concerning a prospective revision of them. It may be hypothesized from historical convergences of the geopolitical environment that the charged political debates of decolonization and desovietization have narrowed, if not disappeared entirely. If this be the case, it would presumably be attributable to the phenomenon of (economic) globalization, particularly free trade, protection of foreign investment capital and an integral system of public finance, which are embodied by the World Trade Organization, ICSID and IMF. The prospective benefits of independence (for example, nationalization of assets held by foreign companies, cancellation of public debt and exploitation of natural resources for local benefit) are moderated by the prospective successors' perceived need to participate in the globalized system in order to win access to capital, markets for goods and services and other resources.

The uniform eagerness of prospective successors such as Scotland, Catalonia and Kosovo to participate in these organizations (most importantly, the EU) indicates that, whereas the drivers of nationalism and localism for secession have tended to manifest themselves in decolonization as challenges to the existent economic order, they are now represented as vehicles for deriving greater local benefit from that order (for example, through supranational institutions). With the stakes seemingly narrowing, space may have opened for the articulation of general rules offering the consistent and orderly management of succession. While central governments may, understandably, remain reluctant to adopt a coherent system of succession for fear of encouraging secessionism (the principal modern form of succession), the two do not necessarily run together. Indeed, the enactment of rules for succession and the resultant clarification of process may well have a chilling effect (for example, by requiring an independent Scotland to relinquish the pound sterling in favour of the euro and the common travel area for the Schengen area, as conditions of accession to the EU). Regardless of the effect of successful codification on irredentist movements, the orderliness that it offers would serve to reduce the costs of succession where it does eventuate.

4 Conclusions

This article has posed the question whether contemporary practice supports the hypothesis that codifying the law of state succession is a futile endeavour. It has considered the question against the rationale of codification in the tradition of the ILC as the projection of the power of law to influence international relations through the expression of authoritative principles. It has reflected on the historical factors that have influenced the authority of these principles against the drafting history of the Vienna Conventions as an instructive experience, focusing on the roles of time, personality and resources in the achievement of an internally rigorous and externally depoliticized codex.

Although the causes for the expedited drafting of the Vienna Conventions, particularly the role of decolonization, are understandable, their subsequent failure to attract

broad participation or generate influence upon subsequent practice is also attributable to the unfavourable political and logistical circumstances. The contemporaneous pattern of the prominence of the topic of state succession in professional debate, ebbing and flowing with the great waves of practice, ensured that debate largely focused on seeking solutions to the immediate problems of the day. The irrelevance of the Vienna Conventions to the succession of South Sudan and the debate on independence for Scotland exemplified this failure to attain an authoritative status, as compared to the 'gold standard' of the VCLT. Where the Vienna Conventions have attained a measure of success has been in the acceptance of a handful of provisions (albeit substantively weak) in defining the parameters of professional debate.

In examining the changes in historical circumstance since decolonization and desovietization, codification of a law of state succession would not necessarily be futile. In examining the continuous absence of professional consensus concerning first principles, it is arguable that there is no 'law of State succession' as an integral field but, rather, a clutch of idiosyncratic and rather feeble rules that serve to define problems rather than provide solutions. It is also contestable that a primitive law of succession exists and that the failure of the Vienna Conventions as codification projects is attributable to their adverse logistical and political circumstances rather than to intrinsic indeterminacy. Whereas the fiendish complexity of the field is evocative of the Augean stables, the historical importance of logistics is equally suggestive of the Apples of the Hespiredes.

In a time of relative tranquillity, yet continuing relevance, for succession, debate in academia and the learned societies is essential in order to prepare for future crises. The committees in the ILA and the IDI have done useful work in evaluating the degree of convergence between theory and practice. As polities in Scotland, Catalonia, Iraqi Kurdistan and elsewhere grapple with the politics of putative secession, the forging of professional consensus on the fundamentals of succession would be of considerable value not only to assist the process of transition but also to inform polities of their limits and consequences. The ability to regulate successions consistently and fluidly would be a major milestone in the evolution of international law in an area of considerable need and importance.