Articles

Theories and Practice of State Succession to Bilateral Treaties: The Recent Experience of Kosovo

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A. Introduction

This article explores the most recent practice, as exemplified by the case of Kosovo, concerning succession to treaties in international law. In doing so, it examines the precise meaning and legal effects under international law of relevant provisions of the Declaration of Independence (DoI) of Kosovo with respect to international treaties concluded by the United Nations Interim Administration Mission in Kosovo (UNMIK) and the former Socialist Federal Republic of Yugoslavia (SFRY) or, as applicable, any other predecessor entity. More specifically, the aim is to identify and comprehend the fundamental principles underlying the existing or developing practice of treaty succession, and to situate it within a broader framework of succession in international law. Kosovo's absence from key multilateral regimes, in particular the United Nations, dictates a focus on succession to bilateral treaties. Kosovo is in the process of establishing with its partners the status of its bilateral treaties undertaken by way of succession.

The Ministry of Foreign Affairs of Kosovo addressed a Note Verbal to all Embassies, Liaison and Diplomatic Offices accredited in Kosovo, and to the Foreign Ministries of all states that recognize Kosovo but do not have a representation within the State, asking for a list and the texts of concerned treaties.[1] The Ministry has received lists from a number of states,

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[1] To date, the Note Verbal has been addressed to the following States: Albania, Austria, Bahrain, Belgium, Belize, Bulgaria, Colombia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Island, Italy, Japan, Latvia, Lithuania, Luxembourg, Monaco, the Netherlands, Norway, Panama, Peru, Poland, Portugal, Saudi Arabia, Sweden, Switzerland, Turkey, the United Kingdom, the United Arab Emirates, and the United States.

and most include the texts of the treaties.[2] After studying the replies, the Ministry proposed several *Exchange of Notes* on treaty succession. To date, the treaty succession agreements with Austria,[3] Belgium,[4] Czech Republic,[5] Finland,[6] Germany,[7] and the United Kingdom[8] have been concluded.

Before addressing key matters of substance, this article first offers some background on Kosovo, its independence and the legality thereto (Part B). The analysis continues with the legal significance for international law of the commitments undertaken under the DoI of Kosovo (Part C); the legal character of this unilateral undertaking *vis-à-vis* states that recognize the Republic of Kosovo and the extent to which this undertaking can produce internationally legally-binding effects (Part D); and the identification of entities whose obligations have been undertaken or not undertaken, and the specific international obligations covered by the DoI (Part E).

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[2] To date, replies have been received from the following States: Austria, Belgium, Bulgaria, Colombia, Czech Republic, Germany, Ireland, Italy, Japan, Lithuania, Luxembourg, Monaco, the Netherlands, Norway, Panama, Peru, Switzerland, the United Kingdom, the United Arab Emirates, and the United States.

[3] *See* Decree for Ratification of the International Agreements, Exchange of Notes, Republic of Kosovo—Republic of Austria, June 9, 2011, *available at* http://gazetazyrtare.rks-gov.net/Documents/Marr.Ks-Austri%20(shkembimi%20i%20notave)(anglisht).pdf [hereinafter Succession to Treaties with Austria].

[4] *See* Decree for Ratification of the Agreements, Exchange of Notes, Republic of Kosovo—Kingdom of Belgium, Feb. 23, 2010, *available at* http://gazetazyrtare.rks-gov.net/Documents/Marrveshja%20Ks-Bg%20(anglisht)%20(009).pdf [hereinafter Succession to Treaties with Belgium].

[5] *See* Decree for Ratification of the Agreements, Exchange of Notes, Republic of Kosovo—Czech Republic, Mar. 30, 2011, *available at* http://gazetazyrtare.rks-gov.net/Documents/Marreveshja%20Ks-Ceki%20(anglisht).pdf [hereinafter Succession to Treaties with the Czech Republic].

[6] *See* Decree for Ratification of the Agreements, Exchange of Notes, Republic of Kosovo—Republic of Finland, Sept. 2, 2011, *available at* http://gazetazyrtare.rks-gov.net/Documents/Marr.%20Ks-Finland%20(shkembimi%20i%20notave)%20DMN-19%20(anglisht).pdf [hereinafter Succession to Treaties with Finland].

[7] *See* Decree for Ratification of the Agreements, Exchange of Notes, Republic of Kosovo—Federal Republic of Germany, Sept. 2, 2011, *available at* http://gazetazyrtare.rks-gov.net/Documents/Marr.%20Ks-Gjermani%20(shkembimi%20i%20notave)%20DMN-18%20(anglisht).pdf [hereinafter Succession to Treaties with Germany].

[8] *See* Decree for Ratification of the Agreements listed in the Exchange of Notes between the Republic of Kosovo and the United Kingdom, *available at* http://gazetazyrtare.rks-gov.net/Documents/Marrveshja%20Ks-Mbretrine%20e%20Bashkuar%20(028)%20(anglisht).pdf [hereinafter Succession to Treaties with the UK].

B. Pertinent Background

Kosovo declared its independence on February 17, 2008.[9] Citing "the call of the people to build a society that honors human dignity and affirms pride and purpose of its citizens,"[10] observing that "Kosovo is a special case arising from Yugoslavia's non-consensual breakup,"[11] which as such "is not a precedent for any other situation,"[12] as well as recalling "the years of strife and violence in Kosovo, that disturbed the conscience of all civilised people,"[13] and in this connection, grateful "that in 1999 the world intervened, thereby removing Belgrade's governance over Kosovo,"[14] the democratically-elected leaders of Kosovo declared "Kosovo to be an independent and sovereign state."[15] Also recalling the "years of internationally-sponsored negotiations between Belgrade and Pristina"[16] over Kosovo's political status, and regretting that "no mutually-acceptable outcome was possible, in spite of the good-faith engagement" of Kosovo's leaders,[17] the Declaration points that it "reflects the will of [the] people and it is in full accordance with the recommendations of UN [*sic*] Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement."[18]

Prior to its independence, Kosovo was an entity under the U.N. interim administration. The U.N. Security Council, acting under its Chapter VII powers, mandated this administration on June 10, 1999.[19] The principal responsibilities of UNMIK included, *inter alia*, performing basic civilian administrative functions where and as long as required; organizing and overseeing the development of provisional institutions for democratic self-government, including the holding of elections; and facilitating a political process designed to determine Kosovo's future status, which had to take into account the Rambouillet accords.[20]

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[9] *See* Kosovo Declaration of Independence, Feb. 17, 2008, *available at* http://www.assembly-kosova.org/?cid=2,128,1635 [hereinafter Declaration of Independence, DoI].

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See* S.C. Res. 1244, U.N. SCOR, 4011th Mtg., U.N. Doc. S/RES/1244 (June 10, 1999).

[20] *Id.*

After nearly nine years of international administration and a series of internationally-mediated talks failed to produce a mutually-agreed outcome, the U.N. Special Envoy on Kosovo's Status, Martti Ahtisaari, recommended that "the only viable option for Kosovo is independence . . . supervised by the international community."[21] The Special Envoy came to this conclusion based upon consideration of Kosovo's recent history, the realities of Kosovo at the time, and taking into account the negotiations of the parties.[22] He also referred to his mandate, which "explicitly provides that [he] determines the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground,"[23] that "[i]t is [his] firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted."[24] A Troika comprising representatives of the European Union, the Russian Federation, and the United States, who undertook an additional, three-month period of negotiations with the goal of

[21] U.N. Secretary-General, *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, ¶ 5, U.N. Doc. S/2007/168 (Mar. 27, 2007) [hereinafter Report of the Special Envoy]. For an extensive description of the process that led to Kosovo's declaration of independence, *see* HENRY H. PERRITT, JR., THE ROAD TO INDEPENDENCE FOR KOSOVO: A CHRONICLE OF THE AHTISAARI PLAN (2010); MARC WELLER, CONTESTED STATEHOOD: KOSOVO'S STRUGGLE FOR INDEPENDENCE (2009). This background was also outlined in some detail in the Advisory Opinion of the International Court of Justice on Kosovo's Declaration of Independence, *see infra* note 28.

[22] Report of the Special Envoy, *id*. On recent history, the Special Envoy noted "A history of enmity and mistrust has long antagonized the relationship between Kosovo Albanians and Serbs. This difficult relationship was exacerbated by the actions of the Milosevic regime in the 1990s. After years of peaceful resistance to Milosevic's policies of oppression—the revocation of Kosovo's autonomy, the systematic discrimination against the vast Albanian majority in Kosovo and their effective elimination from public life—Kosovo Albanians eventually responded with armed resistance. Belgrade's reinforced and brutal repression followed, involving the tragic loss of civilian lives and the displacement and expulsion on a massive scale of Kosovo Albanians from their homes, and from Kosovo. The dramatic deterioration of the situation on the ground prompted the intervention of . . . NATO, culminating in the adoption of resolution 1244 (1999) on 10 June 1999.". *Id.* ¶ 6. Concerning realities on the ground, the Envoy stated "For the past eight years, Kosovo and Serbia have been governed in complete separation. The establishment of . . . UNMIK . . . and its assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo. This is a reality one cannot deny; it is irreversible," and that "Kosovo's current state of limbo cannot continue. Uncertainty over its future status has become a major obstacle to Kosovo's democratic development, accountability, economic recovery and inter-ethnic reconciliation. Such uncertainty only leads to further stagnation, polarizing its communities and resulting in social and political unrest. Pretending otherwise and denying or delaying resolution of Kosovo's status risks challenging not only its own stability but the peace and stability of the region as a whole." *Id.* ¶¶ 4 & 6. With regard to negotiations between the parties, the Special Envoy reported "Throughout the process and on numerous occasions, both parties have reaffirmed their categorical, diametrically opposed positions: Belgrade demands Kosovo's autonomy within Serbia, while Pristina will accept nothing short of independence. Even on practical issues such as decentralization, community rights, the protection of cultural and religious heritage and economic matters, conceptual differences — almost always related to the question of status — persist, and only modest progress could be achieved." *Id.* ¶ 2.

[23] *Id.* ¶ 3.

[24] *Id.*

achieving a negotiated agreement confirmed his conclusion. In its report submitted to the U.N. Secretary-General, the Troika concluded that, despite intensive negotiations, "the parties were unable to reach an agreement on Kosovo's status"[25] and that "[n]either side was willing to yield on the basic question of sovereignty."[26]

Subsequent to the Special Envoy's recommendation, in a letter dated March 26, 2007, the U.N. Secretary-General addressed the President of the Security Council as follows: "Having taken into account the developments in the process designed to determine Kosovo's future status, I fully support both the recommendation made by my Special Envoy in his report on Kosovo's future status and the Comprehensive Proposal for the Kosovo Status Settlement."[27] A vote in the Security Council was, however, not possible due to Russia's expected use of its veto power. Therefore, a draft resolution sponsored by Belgium, France, Germany, Italy, the United Kingdom, and the United States, which was circulated among the Council's members, was later withdrawn.[28]

Against this backdrop, confirming that the Special Envoy's recommendations provide Kosovo with a comprehensive framework for its future development,[29] and acting "in full accordance" with such recommendations and the Comprehensive Proposal for the Kosovo Status Settlement[30]—known also as Ahtisaari Plan or Ahtisaari Settlement—the Declaration of Independence affirmed that "Kosovo shall be legally bound to comply with . . . the obligations for it under the Ahtisaari Plan."[31] The Ahtisaari Plan contained not only the basic legal principles for the functioning of the new State,[32] but also its constitutional or institutional framework.[33] Moreover, it prescribed a number of principles pertaining to the rights of non-majority communities and their members,[34] including the

[25] Report of the European Union/United States/Russian Federation Troika on Kosovo, ¶ 11, 4 December 2007, annexed to S/2007/723.

[26] *Id.*

[27] Report of the Special Envoy, *supra* note 21, ¶ 5.

[28] *See* Accordance with international law of the unilateral declaration of independence with respect to Kosovo, Advisory Opinion, 2010 ICJ REP. 141, ¶ 71 (July 22), *available at* http://www.icj-cij.org/docket/files/141/15987.pdf [hereinafter Kosovo Advisory Opinion].

[29] Declaration of Independence, *supra* note 9, pmbl.

[30] *Id.* art. 1.

[31] *Id.* art. 12.

[32] Comprehensive Proposal for the Kosovo Status Settlement, arts. 1-15, U.N. Doc. S/2007/168/Add.1 (Mar. 26, 2007) [hereinafter CSP].

[33] *Id.* annex I.

[34] *Id.* annex II.

decentralization of government and the preservation of Serbian religious and cultural sites in Kosovo. [35]

A key moment that unfolded after Kosovo's Declaration of Independence was the DoI's referral in October 2008 to the International Court of Justice (hereinafter ICJ) by the U.N. General Assembly.[36] The Assembly acted upon a request submitted by the Republic of Serbia. Serbia's resolution—requesting an ICJ ruling on the legality of Kosovo's Declaration of Independence—was adopted by seventy-seven votes in favor, with six states voting against, seventy-four abstaining, and twenty-eight absent.[37] On July 22, 2010, the ICJ rendered its Advisory Opinion, in which it concluded that "the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework."[38] Consequently, the Court arrived at the conclusion that the adoption of Kosovo's declaration of independence did not violate any applicable rule of international law.[39]

Subsequent to the Court's Advisory Opinion, the General Assembly, the requesting organ, on September 9, 2010, adopted by acclamation its resolution 64/298.[40] The resolution acknowledged the Advisory Opinion of the ICJ,[41] and welcomed the readiness of the European Union to facilitate a process of dialogue between Kosovo and Serbia.[42] The dialogue was aimed at solving practical issues of common interest, including in particular the improvement of bilateral relations and enhanced progress on the path to the EU.[43] The

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[35] *Id.* annex III, annex V.

[36] *See* G.A. Res. 63/3, U.N. Doc. A/RES/63/3 (Oct. 8, 2008).

[37] *See* U.N. GAOR, 63rd Sess., 22nd mtg. at 10–11, U.N. Doc. A/63/PV.22 (Oct. 8, 2008), *available at* http://www.un.org/News/Press/docs/2008/ga10764.doc.htm.

[38] Kosovo Advisory Opinion, *supra* note 28, ¶ 122.

[39] *Id.* For further discussion on the ICJ's Kosovo Advisory Opinion and its wider implications, *see* Qerim Qerimi, *What the Kosovo Advisory Opinion Means for the Rest of the World*, 105 AM. SOC'Y INT'L L. PROC. 259, 262 (2011); *Recent Advisory Opinion, International Court of Justice Concludes that Kosovo's Unilateral Declaration of Independence Did Not Violate International Law*, 124 HARV. L. REV. 1098 (2011); Richard Falk, *The Kosovo Advisory Opinion: Conflict Resolution and Precedent*, 105 AM. J. INT'L L. 50 (2011); Roland Tricot & Barrie Sander, *Recent Developments: The Broader Consequences of the International Court of Justice's Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo*, 49 COLUM. J. TRANSNAT'L L. 321 (2011).

[40] *See* G.A. Res. 64/298, U.N. Doc. A/RES/64/298 (Sept. 9, 2010).

[41] *Id.* art. 1.

[42] *Id.* art. 2.

[43] *Id.*

end result of this EU-facilitated dialogue was the first agreement of principles governing the normalization of relations between Kosovo and Serbia of April 19, 2013.[44]

As of the date of completion of this article, ninety-seven sovereign and independent states recognize the independence of Kosovo.[45] With regard to international law and international treaties, the Republic of Kosovo's Constitution provides that the Republic shall respect international law and holds the authority to enter into international agreements and become a member of international organizations.[46] International agreements relating to certain subjects must be ratified by a two-thirds vote of all 120 members of Kosovo's Assembly.[47] These subjects include: (a) territory, peace, alliances, and political and military issues; (b) fundamental rights and freedoms; (c) membership of Kosovo in international organizations; and (d) the undertaking by Kosovo of financial obligations.[48] The President ratifies other international agreements upon signature.[49] International agreements become part of the internal legal system upon publication in the Official Gazette.[50] They are directly applied except where application requires the promulgation of a law—i.e., when they are not self-executing.[51]

Besides entering into new international treaty relations,[52] Kosovo has undertaken to honor all international obligations deriving out of treaties concluded by the predecessor entities to which it was a constituent part of—i.e., SFRY—or it was administered by—i.e., UNMIK. Kosovo's lack of membership with the U.N. and other multilateral forums implies that, although Kosovo has undertaken to honor and respect the obligations from multilateral treaties concluded by the former SFRY, and it does and should do so domestically and internationally, it is not considered a State Party to such treaties, except those of the

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[44] *See*, *e.g.*, European Union External Action, *Serbia and Kosovo reach landmark deal*, *available at* http://eeas.europa.eu/top_stories/2013/190413__eu-facilitated_dialogue_en.htm.

[45] *See* Ministry of Foreign Affairs, *Countries that have recognized the Republic of Kosova*, *available at* http://www.mfa-ks.net/?page=2,33.

[46] KOS. CONST. art. 17(1).

[47] *Id.* art. 18(1).

[48] *Id.*

[49] *Id.* 18(2).

[50] *Id.* art. 19(1).

[51] *Id.*

[52] Kosovo concluded around 100 treaties—mostly bilateral—since the declaration of independence. *See* Official Gazette of the Republic of Kosovo, International Agreements, *available at* http://gazetazyrtare.rks-gov.net/MN.aspx. *See also* Ministry of Foreign Affairs, International Agreements, *available at* http://www.mfa-ks.net/?page=2,72.

organizations to which it is a member, such as the International Monetary Fund (hereinafter IMF) or World Bank.[53] In the context of lacking membership in the U.N., it is significant to note how the goal of achieving full membership in the international community relates to that of pursuing the path of expanding and consolidating treaty relations. The practice so far has revealed at least a tendency of utilizing and, in that connection, an invaluable function of treaty activities for processes of international consolidation of statehood. Therefore, processes of completing treaty succession, hence consolidating treaty relations and attaining statehood can reinforce each other.[54]

[53] On Kosovo's membership to the IMF and World Bank, *see* Press Release, International Monetary Fund, Kosovo Becomes the International Monetary Fund's 186th Member, Press Release No. 09/240 (June 29, 2009), *available at* http://www.imf.org/external/np/sec/pr/2009/pr09240.htm; Press Release, World Bank, Kosovo Joins World Bank Group Institutions, Press Release No. 2009/448/ECA (June 29, 2009), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22230081~menuPK:34463~pagePK:34370~piPK:34424~theSitePK:4607,00.html.

[54] For instance, when quoting from Kosovo's DoI, the ICJ has also selected, if not highlighted, paragraphs 9 and 12 that refer to Kosovo's undertaking of its international obligations and its affirmation that it shall be legally bound to comply with the DoI's provisions. *See* Kosovo Advisory Opinion, *supra* note 28, ¶ 75. In its written arguments presented to the Court, Kosovo has consistently described the progress achieved in treaty relations. *See* Written Contribution of the Republic of Kosovo, 17 April 2009, ¶ 2.40, *available at* http://www.icj-cij.org/docket/files/141/15678.pdf; Further Written Contribution of the Republic of Kosovo, 17 July 2009, ¶ 2.17, *available at* http://www.icj-cij.org/docket/files/141/15708.pdf. This is the case also with a number of participating states that argued in favor of the legality of Kosovo's Declaration of Independence. *See* Written Statements, *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=1; and Oral Statements, *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=2. In the Security Council sessions on Kosovo—when reporting on the progress made by Kosovo or international consolidation of its statehood—the Foreign Minister of Kosovo has also referred to the succession or conclusion of new treaties. *See* U.N. Security Council, 6367th meeting, S/PV.6367 (Aug. 3, 2010) at 8, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/PRO/N10/471/34/PDF/N1047134.pdf?OpenElement ("I am very proud of the progress my country and my Government have made since the declaration of independence on 17 February 2008 . . . We have signed numerous treaties and agreements with many countries."); U.N. Security Council, 6264th meeting, S/PV.6264 (Jan. 22, 2010) at 10, *available at* http://daccess-dds-ny.un.org/doc/UNDOC/PRO/N10/216/17/PDF/N1021617.pdf?OpenElement ("[w]e have also entered into numerous bilateral treaties and agreements with many countries around the world—such as those on investment incentives, law enforcement, cooperation in the field of health, mutual travel of citizens, readmission of persons, economic cooperation, police cooperation, mutual assistance in customs matters, development cooperation, mutual abolition of visas . . . —including with Albania, Austria, Denmark, France, Luxembourg, Macedonia, Slovenia, Turkey and the United States. We recently concluded our first treaty succession agreement, with Belgium.").

C. The Legal Significance for International Law of Commitments Undertaken by the Declaration of Independence

I. The Content of Relevant Provisions of Kosovo's Declaration of Independence

As indicated above, Kosovo formally declared its independence by way of adoption and issuance of the Declaration of Independence. Among the other statements made and commitments undertaken in its twelve operative provisions, the Declaration of Independence also addresses the question of obligations, treaty or otherwise, that were undertaken by Kosovo's predecessor entities. Specifically, according to Paragraph 9 of the Declaration of Independence, the democratically-elected representatives of the people of Kosovo have:

> *[U]ndertake[n] the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part, including the Vienna conventions on diplomatic and consular relations.*[55]

Paragraph 12 reinforces the commitment made in Paragraph 9 of the Declaration. It expresses Kosovo's will and intent to be bound by the Declaration of Independence in general, and Paragraph 9 in particular. Paragraph 12 reads:

> *We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999). We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship.*[56]

Through these provisions, Kosovo undertook to respect and honor international obligations or rights under treaties in force in respect of its territory at the date of the

[55] *See* Kosovo Declaration of Independence, *supra* note 9, at ¶ 9.

[56] *Id.* art. 12.

Declaration of Independence—i.e., February 17, 2008—validly concluded either by the former SFRY or the UNMIK in the name of Kosovo. It can hardly be argued that this international undertaking can function independent of rules and principles that govern international law. Therefore, with regard to those treaties, the relevant provisions of international law govern the effects of the succession of the Republic of Kosovo to the SFRY and UNMIK.

II. Succession to Treaties: Custom, Doctrine, and the Vienna Convention on Succession of States in Respect of Treaties (1978)

Succession of States is the replacement of one State's responsibility for international relations by a new State's.[57] According to a widely shared doctrinal description, "[s]uccession occurs when a state fundamentally changes its structure of power and authority, and an authoritative international response is needed to manage disruptions to international arrangements that may result from that change."[58]

The Vienna Convention on Succession of States in Respect of Treaties is the comprehensive international legal instrument that regulates treaty succession obligations. It prescribes rules governing the continuity or termination of a predecessor State's treaties upon the succession of a territory of that State.[59] Although some commentators suggest that the 1978 Vienna Convention codifies customary international law in the field, it is broadly accepted that the Convention does not in fact reflect customary international law.[60]

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[57] *See* Vienna Convention on Succession of States in respect of Treaties 1978, art. 2(b), 1946 U.N.T.S 3 [hereinafter 1978 Vienna Convention]. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 208 (1987) (conceiving the succession of states to include the termination of "the capacities, rights, and duties of the predecessor state," which are then "assumed by the successor state."); Oscar Schachter, *State Succession: The Once and Future Law*, 33 VA. J. INT'L L. 253, 253 (1993) (stating that the legal category of State succession 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 . . . [it] is one of the oldest subjects of international law. Even Aristotle speculated in his Politics on the problem of continuity when 'the state is no longer the same'.").

[58] TAI-HENG CHENG, STATE SUCCESSION AND COMMERCIAL OBLIGATIONS 3 (2006). *See also* DANIEL P. O'CONNELL, INTERNATIONAL LAW 365 (1970) (maintaining that the rules of state succession are aimed at minimizing any disruption to the international legal community as the result of changes in state sovereignty).

[59] *See* 1978 Vienna Convention, *supra* note 58. *See also* TAI-HENG CHENG, *id.* at 80.

[60] *See* Paul R. Williams, *The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue In Force?*, 23 DENV. J. INT'L L. & POL'Y 1, 8 (1994) (observing that "it is generally considered that the Convention does not reflect customary international law but rather embodies a number of customary legal rules useful for the determination of treaty continuity."). *See also* Roda Mushkat, *Hong Kong and Succession of Treaties*, 46 INT'L & COMP. L.Q. 181 (1997) (observing that the limited international attempts at "codification," represented in the 1987 Convention, cannot be "regarded as expressing established customary norms or articulating laws grounded in consistent State practice, judicial precedent or juristic opinion"); TAI-HENG CHENG, *supra* note 59, at 23 ("In light of the lack of uniform state practice and *opinio juris*, any positivistic rule of state succession is likely to be so broad or vague that it can be easily reinterpreted and manipulated by participants in state succession to advance their interests."); Robert D. Sloane, *The Policies of State Succession:*

Rather, it embodies a number of customary legal rules useful for the determination of treaty continuity; or more specifically, it reflects the customary trend to continue treaty rights and obligations, but it does not reflect or reconcile the divergent policies and practices regarding the question of whether treaties automatically continue or whether the successor states must consent to their continuation.[61]

The 1978 Vienna Convention essentially creates two regimes that apply to (1) cases of decolonization and (2) newly independent states. Part III of the Convention contains the provisions that deal with newly independent states.

The Convention ratifies what is known in the doctrine as "the clean slate rule," a reference to the legal conception or prescription that the successor State is not bound by any treaties entered into by the predecessor State.[62] The exception to this general rule concerns treaties that pertain to boundary regimes or other territorial regimes.[63] Yet, a newly

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harmonizing Self-Determination and Global Order in the Twenty-First Century, 30 FORDHAM INT'L L.J. 1288, 1290 (2007) (stating that "[i]n the realm of custom, State practice as to what may broadly be denominated 'succession issues' is so diverse as to render efforts to discern customary rules artificial or futile."); Tai-Heng Cheng, *State Succession and Commercial Obligations: Lessons from Kosovo*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 675, 682 (Mahnoush H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane & Siegfried Wiessner, eds., 2010); Tai-Heng Cheng, *Why New States Accept Old Obligations?*, 2011 U. ILL. L. REV. 1, 12 (2011) (noting that the 1978 Convention, which at the moment has twenty-two State Parties, has not "acquired the status of customary law through widespread acceptance of its provisions, which states would have indicated by acceding to the convention."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 58 (stating under the *Reporters' Notes* that, "the [1978] Convention has not been ratified by the United States and, while purporting to be a codification of pre-existing customary law, it is not in all respects in accord with the understanding and the practice of the United States and of some other states.").

[61] *See, e.g.,* Paul R. Williams, *id.*

[62] Article 16 of the 1978 Vienna Convention, *supra* note 58, which sets forth the general rule with respect to newly independent states, provides that "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.". *See also* Matthew Craven, *The Problems of State Succession and the Identity of State under International Law*, 9 EUR. J. INT'L L. 142, 148 (1998); Yilma Makonnen, *Namibia: Its International Status and the Issue of Succession of States*, 3 LESOTHO L.J. 183, 198-203 (1987); YILMA MAKONNEN, THE NYERERE DOCTRINE 57-73 (1984); ARTHUR B. KEITH, THE THEORY OF STATE SUCCESSION: WITH SPECIAL REFERENCE TO ENGLISH AND COLONIAL LAW 58-77 (1907).

[63] *See* 1978 Vienna Convention, *supra* note 58, arts. 11-12. The ICJ has dealt in the past with a treaty that involved rights and obligations relating to the use of territory, which according to Article 12 of the 1978 Vienna Convention, are not as such affected by a succession of States. In the context of a Treaty concluded between Hungary and Czechoslovakia in 1977, the ICJ considered that "Article 12 [of 1978 Vienna Convention] reflects a rule of customary international law." *See Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), 1997 I.C.J. 7, at 72. Ultimately, the Court found that "[T]he content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of Article 12 of the 1978 Vienna Convention. It created rights and obligations 'attaching to' the parts of the Danube to which it relates: thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.".*Id.*

independent State may accept, expressly or by implication, an agreement entered into by its predecessor State so long as the other contracting party acquiesces.[64] In contrast, the doctrine of "universal succession"—also known as the doctrine of continuity—holds that the rights and obligations of the predecessor State are transmitted to the new State upon its independence.[65] In other words, the successor State ensures the continuation of the rights and obligations of the predecessor State relating to the territory transferred to the new State. Both conceptions have been applied to various historical events or epochs,[66] a diverging tradition that defines contemporary State practice, which "does not fully support the universal theories or the clean slate theories."[67] The emergence of the universal succession theory is traced to the formative years of international law—inspired by the concepts of Roman law related to inheritance in civil law—that were rediscovered during the Renaissance by some of international law's founding fathers, such as Hugo Grotius, Samuel von Pufendorf, and Alberico Gentili.[68] On the other hand, the clean slate theory

[64] *See* 1978 Vienna Convention, *id.* art. 17. *See also* Sari T. Korman, *The 1978 Vienna Convention on Succession of States in Respect of Treaties: An Inadequate Response to the Issue of State Succession*, 16 SUFFOLK TRANSN'L L. REV. 185 (1992).

[65] *See*, *e.g.*, C. Emanuelli, *State Succession, Then and Now, With Special Reference to the Louisiana Purchase (1803)*, 63 LA. L. REV. 1277, 1279 (2003).

[66] For example, the universal succession of states with respect to treaties was followed in these cases: the break-ups of the Greater Columbian Union in 1929; of Norway and Sweden in 1905; of the Austro-Hungarian Empire in 1918; the USSR in 1991 and continuation by Russia; of Yugoslavia in 1991-92; of Czechoslovakia in 1993; the independence of the British dominions referred to by the Statute of Westminster in 1931; and the dissolution of the United Arab Republic and separation of Egypt and Syria in 1961. *Id*. at 1282. Other cases, which have followed the clean slate doctrine, include: the separation of Belgium and the Netherlands in 1831 (though local treaties concerning Belgium remained binding); the succession of Finland from the USSR from 1917-1920; the separation of Poland and Czechoslovakia from the Austro-Hungarian Empire in 1918; the independence of Ireland from 1921-1949; the succession of Pakistan from India in 1947 (though Pakistan remained bound by some British and British-Indian treaties in view of a devolution treaty between them); the creation of Israel from 1947-1948; the succession of Bangladesh from Pakistan in 1971; absorption of the German Democratic Republic by the Federal Republic of Germany in 1990; the independence of the Baltic States in 1991; and the emergence of several newly independent states through decolonization, such as Algeria and Upper Volta. *Id*. at 1283.

[67] Tai-Heng Cheng, *State Succession and Commercial Obligations*, *supra* note 61, at 679. *See also* Emanuelli, *id.* at 1281-1282 (noting that "State practice relating . . . [to treaty succession] is inconsistent," or "rarely reflects either the 'universal succession' doctrine or the 'clean slate' doctrine in their entirety. In most cases of State succession, some rights and obligations relating to the territory transferred are transmitted from the predecessor State to the successor State, while others are not. Thus, following the absorption of the German Democratic Republic (GDR), the Federal Republic of Germany took over the property and debts of the GDR but refused to be bound by its treaties.").

[68] Emanuelli, *id.* at 1280. *See* HUGO GROTIUS, DE JURE BELLI AC PACIS II, ch. IX, §§ 8-9 (1625), *translated in* HUGO GROTIUS, ON THE LAW OF WAR AND PEACE (A.C. Campbell trans., 1814) (stating that, "[w]henever two nations become united, their rights, as distinct states, will not be lost, but will be communicated to each other." Also stating that "[i]t may happen that a nation, originally forming but one state, may be divided, either by mutual consent, or by the fate of war; as the body of the Persian Empire was divided among the successors of Alexander. When this is the case, many sovereign powers arise in the place of one, each enjoying its independent rights, whatever

entered the legal discourse and practice in the late nineteenth century. Influenced by the voluntarist theories, the clean slate conception originated based on the understanding that states can enjoy rights and be held responsible only if they have consented to such rights or obligations.[69]

In any event, in today's ratified language, the most relevant provision for this discussion remains Article 9 of the 1978 Vienna Convention—coinciding to Paragraph 9 of Kosovo's Declaration of Independence. Article 9, which addresses the use of unilateral declarations to determine the continuity or termination of treaties as a result of succession, stipulates:

> *Obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States Parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.*[70]

Thus, the 1978 Vienna Convention provides that a unilateral declaration by the successor State with regard to the predecessor State's treaties does not in itself create treaty obligations for the successor State or other parties to the treaties. This notwithstanding, Article 9 leaves open the possibility that unilateral declarations, if accompanied by other facts or actions, may be binding on other states. The expression "by reason only of the fact" would appear to suggest that if a declaration is made along with other actions, it may be binding on third parties, though it remains unclear what these other necessary components are. Free consent may be assumed to be such a component.[71]

As noted above, a succession of States does not, however, affect a boundary established by a treaty or obligations and rights established by a treaty that relate to the regime of a boundary.[72] A case at point would be the border demarcation agreement between the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia of February 23, 2001. Article 3(2) of the Ahtisaari Settlement, which is given legally-binding effects internally by the Constitution of Kosovo, provides that "the territory of Kosovo shall be

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belonged to the original state, in common, must either continue to be governed as a common concern, or be divided in equitable proportions.").

[69] Emanuelli, *id.*

[70] *See* 1978 Vienna Convention, *supra* note 58, art. 9(1).

[71] *See* Marco A. Martins, *An Alternative Approach to the International Law of State Succession: Lex Nature and the Dissolution of Yugoslavia*, 44 SYRACUSE L. REV. 1019, 1039 (1993).

[72] *See* 1978 Vienna Convention, *supra* note 58, art. 11.

defined by the frontiers of the Socialist Autonomous Province of Kosovo within the Socialist Federal Republic of Yugoslavia as these frontiers stood on 31 December 1988, except as amended by the border demarcation agreement between the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia on 23 February 2001."[73]

In concluding this section, it should be noted that the Paragraph in the Declaration of Independence concerning succession should be most properly conceived as a unilateral declaration providing for the continuance in force of the treaties in respect of its territory in the meaning of Article 9 of the 1978 Vienna Convention on Succession to Treaties. Given the fact that state practice often does not corresponded to the principle idea embraced by Article 9 of the Convention that a declaration of independence does not per se create legally-binding obligations on either the successor State or other State Parties,[74] and especially the fact that this Article does not close the door for the option that a unilateral declaration may be binding for either side, the following section seeks to shed further light on the precise legal character and implications of Paragraph 9 of Kosovo's Declaration of Independence.

D. The Specific International Legal Character of Paragraph 9 of the Declaration of Independence of Kosovo

This section seeks to analyze and understand the legal effects of the content of Paragraph 9 of the Declaration of Independence of Kosovo for both Kosovo and states that have recognized its independence. In order to understand the effects of declarations made by way of unilateral acts, one should see how customary international law treats such acts.

The relevant question is whether Kosovo's particular commitment possesses sufficient qualities to bind the State by the international obligations undertaken therein; more specifically, whether the authorities of Kosovo are bound before the international community to act or behave in their international relations in ways consistent with the specific undertakings in Paragraph 9.

In its *Nuclear Tests cases* (*Australia v. France* and *New Zealand v. France*), the International Court of Justice determined the status and scope of unilateral declarations on the international plane. In the context of considering and clarifying whether the declarations made by the French authorities met the object of the claim by the Applicant States—i.e.,

[73] CSP, *supra* note 32, art. 3.2. *See also* Statement by the President of the Security Council, S/PRST/2001/7, 12 March 2001; Enver Hasani, *The Evolution of the Succession Process in Former Yugoslavia*, 29 T. JEFFERSON L. REV. 111, 149 (2006).

[74] On divergences that exist between state practice and the Convention's "clean slate rule," *see*, *e.g.*, INTERNATIONAL LAW ASSOCIATION, THE EFFECT OF INDEPENDENCE ON TREATIES 2 (1965); D.P. O'Connell, *Independence and Succession to Treaties*, 38 BRIT. Y.B. INT'L L. 84, 131 (1962); Kenneth J. Keith, *Succession to Bilateral Treaties by Seceding States*, 61 AM. J. INT'L L. 521 (1967); Sari T. Korman, *supra* note 65, at 194–95.

Australia and New Zealand—that no further atmospheric nuclear tests should be carried out in the South Pacific, the Court stated:

> *It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.*[75]

The Court, thus, removed any doubt whatsoever as to the legally-binding effects on the international plane of declarations made by way of unilateral acts. It established two conditions that have to be satisfied for a unilateral act to produce legally-binding effects. The declaration should (1) be given publicly, and (2) with an intent to be bound by such unilateral undertaking. It is sufficiently clear that the test set forth by the ICJ is met by the undertaking in Paragraph 9 of Kosovo's Declaration of Independence.

As to the first requirement, the Declaration has been widely publicized,[76] has continued to remain public,[77] has been relied upon by the states that participated in the advisory proceedings in the case of *Accordance with International Law of the Unilateral Declaration*

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[75] *See Nuclear Tests* (Australia v. France), I.C.J. Reports 1974, at 253, ¶ 43; *Nuclear Tests* (New Zealand v. France), Judgment, I.C.J. Reports 1974, at 457, ¶ 46.

[76] *See*, *e.g.*, BBC News, *Full text: Kosovo declaration*, *available at* http://news.bbc.co.uk/2/hi/europe/7249677.stm.

[77] The text of the Declaration can be found in various publicly-accessed instruments of the central institutions of Kosovo. *See*, *e.g.*, Assembly of Kosovo, Kosovo Declaration of Independence, *available at* http://www.assembly-kosova.org/?cid=2,128,1635.

of Independence in Respect of Kosovo,[78] and dealt with, or described and quoted by, the ICJ itself.[79]

Regarding the second requirement set forth by the Court, the intent to be bound by a unilateral undertaking: Paragraph 12 of the DoI—*"We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply . . . ."*—combined with Article 145 (1) of the Constitution of the Republic of Kosovo—*"International agreements and other acts relating to international cooperation that are in effect on the day this Constitution enters into force will continue to be respected until such agreements or acts are renegotiated or withdrawn from in accordance with their terms or until they are superseded by new international agreements or acts covering the same subject areas and adopted pursuant to this Constitution"*—as confirmed by the subsequent practice of the Ministry of Foreign Affairs provide abundant evidence of Kosovo's will and intent to be bound by the Declaration of Independence in general, and its Paragraph 9 in particular.

Therefore, it can be established that the undertaking in Paragraph 9 of the Declaration of Independence is a legal undertaking of Kosovo by which it is bound to respect the international obligation specified therein. On the other side, the recognizing States "are entitled to require that the obligation thus created be respected."[80] In spite of this entitlement, and the fact that a State recognizes the Republic of Kosovo, it cannot be argued that there exists an automatic obligation on the part of the recognizing states to be bound by Paragraph 9 of Kosovo's DoI in their bilateral relations. This notwithstanding, the practice so far has demonstrated that all interested states have relied on Kosovo's commitment in the Declaration of Independence.[81] Often, states in their statements of recognition or other communications related specifically to treaty relations have made explicit references to this undertaking. For instance, the recognition letter of the United States is unequivocal in its understanding of the legally-binding character in international law of Kosovo's commitment in the DoI. It reads in relevant part: "The United States relies upon Kosovo's assurances that it considers itself legally bound to comply with the provisions in Kosovo's Declaration of Independence."[82] Likewise, a *Note Verbale* of the

[78] *See* Written Contributions of the Republic of Kosovo, as well as Written Statements and Comments submitted by other States, *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=1.

[79] *See* Kosovo Advisory Opinion, *supra* note 28.

[80] *See Nuclear Tests cases, supra* note 76, ¶ 46 (Australia v. France), and ¶ 49 (New Zealand v. France).

[81] *See supra* note 2.

[82] Letter from the President of the United States to the President of Kosovo (Feb. 18, 2008), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080218-3.html (also noting that, "in its declaration of independence, Kosovo has willingly assumed the responsibility assigned to it under the Ahtisaari Plan. The United States welcomes this unconditional commitment to carry out these responsibilities and Kosovo's

British Embassy in Kosovo addressed to the Ministry of Foreign Affairs notes the affirmation in the DoI,

> reaffirmed in a letter dated 17 February 2008 from the President and Prime Minister of the Republic of Kosovo to the Secretary of State for Foreign and Commonwealth Affairs, that Kosovo shall be legally bound to comply with the provisions contained in that Declaration, including, especially, the obligations for Kosovo contained in the Comprehensive Proposal of UN Special Envoy Ahtisaari, and that the [British] Government is entitled to rely on that affirmation.[83]

A more specific paragraph of the British Embassy's Note expressly refers to Kosovo's undertaking in the DoI of its treaty obligations. It reads as follows:

> *The British Government . . . has the honour to note that, in that Declaration, Kosovo expressly undertook its international obligations, including those concluded on its behalf by the United Nations Interim Administration Mission in Kosovo and those to which Kosovo was bound as a former constituent part of the Socialist Federal Republic of Yugoslavia, and the British Government hereby confirms that the British Government regards treaties and agreements in force to which the United Kingdom and UNMIK, and the UK and the SFRY, and as appropriate the UK and the Federal Republic of Yugoslavia, were parties as remaining in force between the United Kingdom and the Republic of Kosovo*.[84]

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willingness to cooperate fully with the international community during the period of international supervision to which you have agreed."). *Id.*

[83] Note Verbale No. 02/2008 of the British Embassy in Pristina, *in* Succession to Treaties with the UK, *supra* note 8.

[84] *Id.*

E. The Identification of Entities and International Obligations Covered by the Declaration of Independence

Paragraph 9 of the Declaration of Independence explicitly specifies that Kosovo undertakes the international obligations under international agreements concluded by UNMIK and the international obligations under international treaties concluded by the SFRY.[85]

The Declaration of Independence is clear in that Kosovo undertakes to comply fully with the Comprehensive Proposal for the Kosovo Status Settlement,[86] and that it accepts fully the obligations for Kosovo contained in this Plan.[87] According to Ahtisaari Plan:

> Kosovo shall continue to be bound, on the basis of reciprocity where appropriate, by all international agreements and other arrangements in the area of international cooperation that were concluded by UNMIK for and on behalf of Kosovo, and which are in effect on the date of the entry into force of this Settlement. Financial obligations undertaken by UNMIK for and on behalf of Kosovo under these agreements or arrangements shall be respected by Kosovo.[88]

It is, therefore, well-established that Paragraph 9 of the DoI covers international obligations under international agreements concluded by UNMIK on behalf of Kosovo. Paragraph 9 is also explicit when it comes to international obligations under international treaties concluded by the SFRY. As the discussion in the preceding section illustrated, this commitment provides sufficient basis for undertaking the international obligations under the former SFRY treaties.

The Declaration does not set any time limit concerning the applicability of SFRY treaties, hence the authors' intentions can be presumed to assume the international obligations under SFRY treaties concluded until the date of its dissolution. Lacking a specific date in the DoI, one is left with the option of identifying a more objective criterion based on past authoritative and relevant decisions. Two key moments can be identified: First, Opinion No. 8 of the Arbitration Commission of the Peace Conference on Yugoslavia, dated July 4, 1992, which ruled that the process of dissolution of the SFRY "was now complete and that

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[85] *See* Kosovo Declaration of Independence, *supra* note 9, para. 9.

[86] *Id.* para. 1.

[87] *Id.* para. 3.

[88] *See* CSP, *supra* note 32, art. 15.2.2.

SFRY no longer exists,"[89] followed in September 1992 by the U.N. Security Council Resolution 777, considering "that the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist."[90] Although both decisions contain authoritative values, they do not however specify the date the former SFRY ceased to exist. Both documents note the fact that the SFRY has ceased to exist, without specifying the date when it did so. This dictates the need for a more precise identification, which in this case could be the position taken by UNMIK concerning laws applicable in Kosovo.

In its Regulation Nr. 1999/24 of December 12, 1999, UNMIK decided that the law applicable in Kosovo shall be: (a) the regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and (b) the law in force in Kosovo on March 22, 1989.[91] More specifically, Regulation Nr. 1999/24 provides:

> If a court of competent jurisdiction or a body or person required to implement a provision of the law determines that a subject matter or situation is not covered by the above laws, but is covered by another law in force in Kosovo after March 22, 1989, which is not discriminatory and which complies with internationally-recognized human rights standards, as specified in section 1.3 of this Regulation, the court, body or person shall, as an exception, apply that law.[92]

In the absence of any other specific determination, both under domestic and international instruments, March 22, 1989 would seem to be the date that should most properly be conceived as the date that marks the applicability of the SFRY treaties to Kosovo. This does not preclude Kosovo from undertaking the international obligations under treaties concluded by the SFRY after March 22, 1989. In any event, any such treaty should be approached with care. Although discriminatory provisions or provisions contravening basic human rights and fundamental freedoms are less likely to be found in legal instruments of an international character compared to domestic legislation, one has to make sure that those treaties comply with the requirements stipulated in Regulation 1999/24, or the principles enshrined in the constitutional and legal order of Kosovo.

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[89] Opinion No. 8, Arbitration Commission of the Peace Conference on the Former Yugoslavia, 31 I.L.M. 1521 (1992).

[90] S.C. Res. 77, U.N. Doc. S/RES/777 (Sept. 19, 1992).

[91] *See* Regulation No. 1999/24, art. 1.1, *available at* http://www.unmikonline.org/regulations/1999/reg24-99.htm.

[92] *Id.* art. 1.2.

After considering the applicability of treaties concluded by UNMIK and SFRY, the next question naturally concerns the applicability of treaties concluded by Federal Republic of Yugoslavia (FRY). The phrase at the beginning of Paragraph 9 of the DoI—"we hereby undertake the international obligations of Kosovo, including those . . . ."—may be the key phrase to analyze, as it may be subject to several interpretations. A simple conclusion is that if the authors intended undertake the international obligations under FRY treaties, this would have been done explicitly as done for the UNMIK and SFRY. Yet, the plain interpretation of this phrase may lead to another conclusion, that it encompasses, or at least does not exclude, the international obligations of Kosovo under FRY treaties. This more expansive interpretation can also be understood as referring to the international obligations of Kosovo under customary international law, obligations related to the external debt of FRY, or other obligations contained in the Ahtisaari Plan, including the international obligations under the treaties Kosovo intends to be bound.[93]

As discussed above, through the Declaration of Independence, Kosovo explicitly declared that it undertakes the international obligations concluded on behalf of Kosovo by UNMIK and under treaties concluded by former SFRY, hence it has explicitly declared that it will be bound by the treaties concluded by UNMIK and SFRY. No reference to FRY is made in Paragraph 9 or in any other provision of the Declaration in the context of assuming international obligations, in other words, there exist no explicit declaration that the Kosovo will be bound by the treaties concluded by FRY. Therefore, consistent with relevant rules and principles of international treaty law, Kosovo through its Declaration of Independence did not legally assume international obligations under the treaties concluded by the FRY. While it is free to deny their application in its international relations, Kosovo may still choose at its own discretion, for purely pragmatic reasons, to give effect to the treaties concluded by FRY. The possible applicability of such treaties should be determined on a case-by-case basis, taking into account a pre-determined set of well-defined principles and objectives—e.g., mutual interest, conformity with international human rights standards, and domestic constitutional or legal order. A number of States have already indicated that such treaties might be applicable in their relations to Kosovo,[94] or were already made applicable temporarily, and "until such time as agreement is reached over their

[93] For example, Kosovo already assumed the responsibility to repay a loan that had been taken for activities in Kosovo and for which, in 2001—through an agreement with the World Bank to restructure its portion of outstanding SFRY debt—the FRY became the borrower. In its Loan Assumption Agreement with the International Bank for Reconstruction and Development (IBRD), noting "the Loan Agreement between the IBRD and the Federal Republic of Yugoslavia . . . , now the Republic of Serbia, dated December 17, 2011," Kosovo accepted "the rights and benefits" and assumed "the obligations, of the Republic of Serbia . . . including the obligation to make payment of principal, interest, service, and other charges." *See* Loan Assumption Agreement between International Bank for Reconstruction and Development and Republic of Kosovo (Jun. 29, 2009), *available at* http://gazetazyrtare.rks-gov.net/Documents/anglisht-196.pdf.

[94] *See*, *e.g.*, Succession to Treaties with the Czech Republic, *supra* note 5; Succession to Treaties with the UK, *supra* note 8.

amendment or termination."[95] In this case, applicability was determined based on mutual consent, formally expressed via the Exchange of Notes. It should be noted, in this context, that it has been the consistent position of UNMIK that international agreements and treaties ratified by or acceded to by the FRY or Serbia and Montenegro after June 10, 1999—i.e., establishment of UNMIK—were not automatically applicable to Kosovo, and they could only "be made applicable thereto by incorporation through a bilateral agreement between UNMIK and a third State."[96]

F. Conclusion

The Declaration of Independence, issued by the democratically-elected representatives of the people of Kosovo, is an act that possesses the sufficient qualities and meets the demanded prerequisites of a legal undertaking, which binds Kosovo to honor its obligations toward the international community with respect to treaties concluded by UNMIK and SFRY. Kosovo is under an obligation to respect the commitments it has undertaken through its DoI. The same cannot be said of states that have recognized Kosovo's independence, for those states by their recognition acts alone did not necessarily indicate that they have accepted Kosovo's commitment to be bound by treaties between UNMIK or SFRY and themselves. The fact remains that all recognizing states so far have responded positively to Kosovo's requests to establish bilateral treaty relations that encompass treaties concluded by the SFRY.

Overall, this article reveals that the relevant existing practice in the case of Kosovo confirms the tendency toward the application of the universal succession doctrine, except perhaps certain treaties that, owing to special circumstances after June 10, 1999—e.g., the exercise by UNMIK, as opposed to FRY, of all legislative, executive and judicial powers, including the treaty-making power—may not be applicable automatically or without further bilateral agreement. The most significant feature is the fact that states have essentially relied on a unilateral declaration that provides for the continuance in force of the treaties in respect of its territory, which could not necessarily be "only of [this] fact,"[97] yet, practice nonetheless appears to contradict the main thrust of Article 9 of the 1978 Vienna Convention.[98]

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[95] *See*, *e.g.*, Succession to Treaties with Germany, *supra* note 6.

[96] *See* Note verbale to a Permanent Mission to the United Nations regarding the legal personality and treaty-making power of the United Nations Interim Administration Mission in Kosovo (UNMIK) (Mar. 12, 2004), 2004 YRBK. U.N. 351, 352.

[97] *See* 1978 Vienna Convention, *supra* note 58, art. 9(1).

[98] *See id.*