Rights and Obligations of Successor States: An Alternative Theory

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In the last fifty years, the legal implications of state succession have become a major source of international confusion and conflict. World War II extinguished old regimes and created vacuums in sovereignty which nationalist groups used to form new states. In addition, a wave of decolonization led to the birth of new nations and the redrawing of national boundaries. As a result of this successor influx, property claims, both territorial and personal, and obligations, both treaty and contractually based, have arisen.

The settling of these claims has been difficult and inconsistent. The traditional theories involving successor rights and obligations have never been broadly accepted by scholars or nations and even seemingly straightforward fact patterns have been confused by definitional difficulties. Moreover, successor states joining the world community have criticized and refuted the traditional rules which would dictate their succession rights and obligations as imperialistic and self-serving inventions of colonial masters. Thus, even if some traditional principles could

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* J.D. Candidate, Case Western Reserve University (1985).
2 "Probably ninety-five percent of the international disputes involving state responsibility over the last century had been between a great industrial state and a small, newly established state." P. Nervo, 1 Y.B. Int'l L. Comm. 155 (1957), reprinted in H. Bokor-Szego, New States and International Law 55 (1970).
3 Shaffer, Succession to Treaties: South African Practice in the Light of Current Developments in International Law, 30 Int'l & Comp. L.Q. 593, 596 (1981); H. Bokor-Szego, supra note 2, at 77.
4 See, e.g., K. Marek, Identity & Continuity of States in Public International Law 208 (1968) (analysis of an Austrian Supreme Court decision in which the court ruled that the Republic of Austria was not a successor state because it was newly created. Obviously, a successor state may be "new.").
5 Aide Memoire of the Ministry of Foreign Affairs, reprinted in 22 I.L.M. 81 (1983) [hereinafter...
be fathomed from custom and practice, these principles have been so am-
biivalently analyzed that their legal repute is doubtful.

The confusion and criticism does not imply that succession is to be
forever an area of dispute and contention. The key to developing a prag-
matic yet fair principle of succession is to encourage an efficient and or-
derly transition of rights and obligations during succession while at the
same time to respect the needs and ideology of the successor state. Such
rules would primarily arise from focusing on the new state as an embod-
iment of its populace and thus only requiring or allowing the succession
of obligations and rights that aid the basically unchanged core popula-
tion. Through this approach, a clear yet less occidental basis of determi-
nation can be attained without forcing the newborn nations to swallow
one-sided or otherwise deleterious obligations, or to battle (literally or
diplomatically) over disputed property.

I. THE NORM

Before the various propositions of successor rights and obligations
can be discussed, a definition of successor state is necessary in order to
lay a foundation on which to review that state's concerns. A somewhat
simplified, but sufficient, definition of a successor state is one which has
sovereignty over a territory and populace which was previously under
the sovereignty of another state. This definition carries with it several
implications. First, successor states need not be totally new, since a con-
quest or annexation of a state, or a part thereof, may place an existing
nation in the position of successor state to the ceded territory and popu-
lace. Second, a partial loss of a sovereign's territory will not make that
sovereign a successor to itself of its remaining land since the now smaller
nation has acquired nothing. Third, a state is not a successor simply
because the government has changed. Fourth, a change in government
could create a successor state. While this factor is seemingly contradic-
cited as Aide Memoire]. As Bokor-Szego states: "[T]he attitude of new States toward international
law is a living problem of relations between states." H. BOKOR-SZEGO, supra note 2, at 59.
6 This is the author's definition. For another definition, see 1 D. O'CONNELL, STATE
SUCCESSION IN MUNICIPAL LAW & INTERNATIONAL LAW 3 (1967).
7 "It does not matter whether the new state has come into existence by the integration of
several states or parts of states . . . ." H. BOKOR-SZEGO, supra note 2, at 9.
This is a logical extention of the rule that a mere change in territory does not affect the rights or
obligations of a state, unless that change is complete. Draft Convention on the Law of Treaties, Oct.
1925, art. 26, reprinted in 29 AM. J. INT'L L. Supp. 4, at 662 (1935) [hereinafter cited as Law of
Treaties].
9 As stated by Lord MacNair: "It is necessary to remind ourselves from time to time that when
we say that a state is a subject of international law . . . . we mean the state itself, not its Government.
Governments are the agents or representatives of states . . . ." Note, Revolutions, Treaties and
State Succession, 76 YALE L.J. 1669, 1674 (1967).
tory and is in fact contrary to some declarations,\textsuperscript{10} its feasibility will be discussed later.\textsuperscript{11}

A. Succession Theory in the World of Scholars

With this definition and its implications as background, the various propositions from scholars, state practice, and treaties can be discussed. The first, and perhaps oldest, scholarly theory of succession is that of universal succession. This theory, dating from at least the era of Roman law, holds that the state as a "personality" unto itself always passes all rights and obligations to its successor.\textsuperscript{12} Universal succession is based on two premises. First, the state and its sovereign receive their powers from God or nature, so that any change in government does not affect the omnipotent origins of the state.\textsuperscript{13} Second, the state itself is immortal since it always contains the "single essential characteristic" of a citizenry, even if the individuals who make up the citizenry change.\textsuperscript{14} As a result of these premises, the theory of universal succession actually becomes a theory of universal continuity since the immortality of the state combined with the everlasting power of God creates a constantly recurring transfer of unchanging rights and obligations from agent to agent.\textsuperscript{15}

This theory served the purpose of safeguarding the rights and obligations that existed in the world without forcing too deep an analysis of the international identity of states.\textsuperscript{16} In a time primitive in its under-

\textsuperscript{10} Law of Treaties, supra note 8, art. 24, at 662.

\textsuperscript{11} See infra text accompanying notes 64-71.

\textsuperscript{12} H. Wilkinson, The American Doctrine of State Succession 13 (1934).

\textsuperscript{13} 1 D. O'Connell, supra note 6, at 9-10. This assumption was exemplified in Emperor Nicholas II's proclamation in the Fundamental Laws of the Empire, art. I: "The Emperor of all Russians is an autocratic and unlimited monarch. God himself commands that his supreme power be obeyed, out of conscience as well as fear." M. McAuley, Politics and the Soviet Union 21 (1981).

\textsuperscript{14} Grotius, De Jure Belli ac Pacis Libri Tres 310-11 (F. Kelsey trans. 1925). To use an analogy taken from Aristotle, just as the river is the same even with different waters, so is a state the same even with different citizens. Aristotle, Politics 99 (E. Barker trans. 1979).

\textsuperscript{15} H. Wilkinson, supra note 12, at 13. See also I. Bibo, Paralysis of International Institutions and the Remedies 17 (1976). For comparative purposes the author will use as an example throughout this discussion occurrences in the mythical nation of Prior. During her reign over Prior, Queen Regina contracted with a foreign state owned company, Xeno, to build a barge for her personal use. The Queen also entered into a treaty with the neighboring nation of Nahron which granted to Nahron exclusive fishing rights for one hundred years in the seas upon which both nations bordered, including the rights which Prior would otherwise have possessed.

Queen Regina eventually went senile and was incapable of preventing the conquest of her nation by the nation of Successia. Under the universal succession theory, all rights and obligations would pass unequivocably to Successia once it seized control of the nation. Therefore, Successia would have to pay the barge company, Xeno, and recognize the fishing rights of Nahron. However, the rights to the territory of Prior, including its remaining interest in the fishing territory, would become Successia's.

\textsuperscript{16} K. Marek, supra note 4, at 12.
standing of international law, this theory was easily understandable.\textsuperscript{17} Indeed, universal succession actually precluded any need for analysis of succession since continuity rather than succession was the result.\textsuperscript{18} In addition, the theory paralleled the idea of the sovereign individual as the state\textsuperscript{19} since just as a sovereign personally passed the state to his (or her) heir, his rights and obligations passed.

Unfortunately, as the world community became more sophisticated in its international legal and political theories the universal succession idea came to be viewed as unfounded and unrealistic. The idea that a state's (i.e., sovereign's) powers were God-given became unacceptable, thereby making illogical one premise of the universal succession theory.\textsuperscript{20} Moreover, universal succession blurred the necessary distinction between a successor state and a state which has experienced a mere change in internal government.\textsuperscript{21} Because of this blurring, the world community was faced with nations suddenly "new" internally but "old" internationally whose new governments felt no duty or even connection to pre-succession obligations.\textsuperscript{22}

These difficulties led to the establishment of a new theory, that of partial succession. The principal distinction between this theory and universal succession is that it was not assumed that personality automatically passed from state to state. Rather, partial succession held that if the state's personality survived from one nation to another, then the successor state acquired the rights and obligations of the predecessor state.\textsuperscript{23} Otherwise, the new nation started afresh, free of any obligations.

The use of partial succession necessarily gave rise to two important analytical questions. First, in order to determine if a state's personality has passed to a successor, one must define a basis for a state's personality. From this definition it would follow that obligations which are merely personal to the former sovereign are not connected to the personality of the state and thus are not succeeded. Therefore, it was necessary to decide when an obligation was considered merely personal to the sovereign.

The answer to these questions, according to classical scholars, was popular continuity—the use of the society or populace as the basis of a

\textsuperscript{17} I. BIBO, \textit{supra} note 15, at 17.
\textsuperscript{18} H. WILKINSON, \textit{supra} note 12, at 13.
\textsuperscript{19} As illustrated by the famous statement attributed to Louis XIV of France, "L'etat, c'est moi." As a factual matter it is unlikely that Louis XIV actually ever said this, though his attitude communicated it. B. Evans, \textit{Dictionary of Quotations} 658 (1968).
\textsuperscript{20} 1 D. O'CONNELL, \textit{supra} note 6, at 24.
\textsuperscript{21} K. MAREK, \textit{supra} note 4, at 10. In other words, universal succession ignored the status differences between a state which has crowned a new ruling family, and one which has been invaded and conquered.
\textsuperscript{22} \textit{Id.} at 12.
\textsuperscript{23} 1 D. O'CONNELL, \textit{supra} note 6, at 5.
state's personality. By using the populace as a basis of state personality scholars concluded that a change in the framework or ideology of a government, for instance from democracy to monarchy, did not affect the rights and obligations of the state. Therefore, the population itself had to change in makeup or size in order for the status of its rights and obligations to come into question.

Moreover, since this theory's focus was on the personality of the state, the status of the questioned rights and obligations was decided upon a distinction between rights and obligations personal to the sovereign and those that were for the public, i.e., the state personality. Thus, if a treaty was purely personal to the king and no nexus could be established between the state's personality and the obligation, then the succession to only the state's personality could not include the succession to the personal obligation. Moreover, any acts of the sovereign illegal under the state's laws would not obligate or indemnify the state since the illegality of these acts made them inherently independent of the state's personality.

The partial succession theory with its idea of popular continuity evolved into the theory, expressed by Huber, of organic substitution. Under this theory, the identity of the state is actually determined by its populace, the organic core of the state. At the state's death the organic core is absorbed by the new state. Likewise, the rights and obligations of the state are absorbed as the core is absorbed. Therefore, rights and obligations pass intact with succession because of citizen continuity rather than political continuity.

However, because this continuity is not political in nature, the absorption of rights and obligations was not considered mandatory, since the lack of political agreement meant nothing exists to bind the political entity, the state. Instead, Jellinek posited a duty of self-abnegation, a

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24 Id. at 11.
25 Grotius, supra note 14, at 315. This theory has continued to present times. See Law of Treaties, supra note 8, at art. 24.
26 1 D. O'Connell, supra note 6, at 11.
27 As the Italian Minister to Spain stated in a dispute over Sicilian archives when that island was succeeded by Italy:
   It is impossible for me to confuse the personal consideration that can be shown to a de-throned king with the rights and obligations which can only pertain to him while he remains in his kingdom with rights and prerogatives which were subsequently bound to pass, by force of circumstances, to his successor in authorities.
Letter from the Italian Minister of Madrid to the Spanish Minister for Foreign Affairs, Sept. 1, 1861, reprinted in U.N. Succession Materials, supra note 1, at 483.
28 K. Marek, supra note 4, at 11.
29 1 D. O'Connell, supra note 6, at 12.
30 Id.
moral duty on the part of the state to absorb these rights and obligations in the interest of stability in the world order it is about to join.\textsuperscript{32} By applying this theory, the stability and continuity of universal succession remains, though now through the self-coercion of the moral obligation, without the identity problem resulting from an omnipotent power source or the ruler/state confusion.\textsuperscript{33}

Unfortunately, the eventual extensions of this theory disclosed its defects. On one side, some scholars felt the moral obligation was so overwhelming that they determined a state could not be recognized as a state without accepting the obligation.\textsuperscript{34} This, however, made the non-mandatory obligation now mandatory, thereby ignoring the lack of political foundation (other than the now extinct predecessor government) on which to base the mandate. On the other side, a flexible approach was suggested whereby the moral obligation had to be fulfilled only to the extent that a state could economically and politically afford the assumptions.\textsuperscript{35} This resulted in such complete flexibility that the subjectivity of the decision negated the stability desired of obligations and encouraged "moral" decisions on the basis of greed or contempt.\textsuperscript{36}

These defects all stemmed from theoretical problems involving the succession of obligations. To correct these defects, the Keith theory of discontinuity eliminated the succession of obligations. Under Keith's theory, obligations do not pass, as in the self-abnegation theory, but rights do.\textsuperscript{37} While rights pass under both theories, the distinction is that in Keith's theory the rights pass in essence by constructive assignment from the predecessor to the successor. However, the prior obligations cannot bind the new party,\textsuperscript{38} just as a contract between two parties in common law cannot bind a third party. The result is that the successor nation need only honor those obligations that it decides to honor, usually in light of the practical benefit the obligations have to the nation.\textsuperscript{39}

\begin{itemize}
\item \textsuperscript{32} I. D. O'CONNELL, \textit{supra} note 6, at 14. As I. BIBO, \textit{supra} note 15, at 7, stated, high morals and ideal standards were to be applied to every international resolution.
\item \textsuperscript{33} In Successia's case, because the prior political entity, Queen Regina, had been deposed, it would not be bound politically to uphold the agreement to pay Xeno, or recognize Nahron's fishing rights. However, it would have a moral duty to fulfill both obligations.
\item \textsuperscript{34} \textsc{Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States}, U.N. Doc. A/CN.4/2, at 53, 55 (1948) [hereinafter cited as \textit{Preparatory Study}].
\item \textsuperscript{35} I. BIBO, \textit{supra} note 15, at 6.
\item \textsuperscript{36} O'Connell writes that this fear led to theories "of a sceptical nature." I. D. O'CONNELL, \textit{supra} note 6, at 17. See also I. BIBO, \textit{supra} note 15, at 78.
\item \textsuperscript{37} Comment, \textit{Optional Succession to Treaties by Newly Independent States}, 63 AM. J. INT'L L. 782, 783-84 (1969).
\item \textsuperscript{38} H. WILKINSON, \textit{supra} note 12, at 14.
\item \textsuperscript{39} B. BOT, \textit{Nonrecognition and Treaty Relations} 6 (1968). In the case of Prior's succession by Successia, the barge would be totally personal to Queen Regina, so Successia would not be obligated to pay Xeno. However, the fishing rights of Prior which Queen Regina granted by treaty
\end{itemize}
While this separation of succession of rights and obligations has received some support, many others have criticized the theory as a threat to world order because of its one-sided nature. In addition, Keith's theory is viewed as conferring too much of a benefit on successor states to the detriment of the obligees of the extinct agreements.

Keith's theory survived this criticism until the 1960's. At that time, the Keith theory succumbed to a theory which advocated the discontinuity of rights and obligations, the theory of "optional succession." This theory recognized that a state's rights and obligations arise from the legal order of its internal government. When a state is succeeded the legal order is replaced by a new government and thus becomes extinct. Likewise, all rights and obligations to which that order was a party are extinguished, just as a private contract would end if one party died.

Any property of the old state, including the actual territory, is acquired by the successor state only because it happened to claim unclaimed land first. A successor fulfills obligation only by choice, perhaps because of moral concerns or practical benefits (for example, to ensure the continuance of vital services provided by a contract entered into by a predecessor state).

This creates new practical problems. First, this theory threatened international stability since contracts and treaties could suddenly cease without completion or compensation, and not even an obligatory moral incentive existed for fulfillment. Second, this theory suggested that a land rush would ensue when a state succeeded. That is, since the new state had no property rights, property in a foreign state owned by the

to Nahron would be part of the state's personality, so Successia would be obligated to recognize Nahron's exclusive fishing rights. Nonetheless, the territory of Prior, including the remaining fishing rights, would become Successia's since the territory was part of Prior's personality, not the Queen's.


41 1 D. O'CONNELL, supra note 6, at 17. The theoretical problems with separating rights from obligations will be discussed infra text accompanying notes 96-108.

42 1 D. O'CONNELL, supra note 6, at 17.

43 Comment, supra note 37, at 782.

44 Id. at 783-84. 1 D. O'CONNELL, supra note 6, at 17 analyzes the Keith theory and "optional succession" theory not as a chronological evolution, but as two branches of the same theoretical tree.

45 This theory was applied by the Supreme Court of the Phillipines in Aquado v. City of Manila, the Phillipines, reprinted in UNITED NATIONS, MATERIALS ON SUCCESSION OF STATES IN RESPECT TO MATTERS OTHER THAN TREATIES 375, 377, U.N. Doc. ST/LEG/SER.B/17 (1978) [hereinafter cited as U.N. NON-TREATY SUCCESSION MATERIALS].

46 1 D. O'CONNELL, supra note 6, at 15-16. This rule was embodied in the International Law Commission Report on State Succession. Comment, supra note 37, at 784 n.4. In the hypothetical, see supra notes 15, 33 & 39, Successia would be considered the rightful possessor of Prior's territory because it happened to be there first. Once again, however, Xeno and Nahron could be left without recourse because of Prior's extinction. But see, 1 D. O'CONNELL, supra note 6, at 15.

47 1 D. O'CONNELL, supra note 6, at 15.
predecessor could be grabbed by the foreign state before the successor
government could claim it. Military equipment, embassy property, and
foreign bank accounts could be stripped from the successor, leaving the
citizenry destitute simply because its state had changed.48

B. Succession Theory in the Real World

The countries of the world have been afforded numerous theories
from which to determine successor rights and duties. The options have,
in turn, produced a multitude of practices, even within the stated policy
of individual countries.49 In the end, like the world’s legal scholars, state
practices have set no clear standard which could be called a custom or
accepted principle of international law.

As stated previously, the earliest national practices, those of the Ro-
man Empire, reflected the universal succession theory.50 With the em-
peror considered the same as the state, and all territory in the state
ultimately belonging to the king, it followed that all succession of land
from one state to another was nothing more than the personal convey-
ance of land from one individual to another.51 Moreover: “[I]n those
times not even a newly formed State differed very much in its social and
economic order from the older ones, and consequently the earlier forms
of international law . . . were not alien to the interests of any new State,
and their application met with consent.”52 Because of its acceptance and
stability, this theory predominated well into the nineteenth century, until
the divine right of kings succumbed to the pressures of the social contract
and ended such a personal view of rights and obligations.53

The first conflict to arise in the practice of state succession involved
the treatment of “backward” territories and their “savage” nations.54 In
the sixteenth century, scholars first argued that these nations could be

48 For example, if Nahron’s royal fishing fleet happened to occupy Prior’s waters when Queen
Regina was ousted, Nahron could be the successor state to the fishing territory, regardless of the fact
that Successia was the conqueror of Prior.
49 See 702nd Meeting of the International Law Commission, [1963] 1 Y.B. INT’L L. COMM.
50 H. Wilkinson, supra note 12, at 12.
51 Thus, when Caesar made his famous proclamation, “Veni, vidi, vici,” the use of first person
singular was a literal pronouncement of ownership based on the law of successor states of the time.
52 H. Bokor-Szego, supra note 2, at 64.
53 1 D. O’Connell, supra note 6, at 10. As late as the last half of this century, Great Britain
attempted to impose universal succession upon Israel, but was rebuffed by Israel’s assertion that this
rule was obviously outdated and ignored by all nations. U.N. SUCCESSION MATERIALS, supra note 1,
 at 40.
54 At first glance, the treatment of aboriginal tribes might appear out of the scope of a discus-
sion on successor states. However, arguably the conquest and/or annexation of aboriginal lands was
the first major acquisition of one societal group’s land by another in the “civilized” world. Thus,
some notion of succession should be examined for sake of encompassment.
succeeded (by force usually) by the European Christian powers in order to benefit the “infidels.” This view implicitly contradicted universal succession because it placed the focus of the successors’ obligations on the inhabitants of the succeeded state and not solely on the sovereign’s interests, since the Christian state successor had the obligation to raise the succeeded populace in “the scale of civilization.” However, this contradiction apparently went unnoticed.

The issue that did arise was whether aborigines could be considered a state which could be succeeded. An example of this was the conflict in 1888 in the Institute of International Law. A reporting committee recommended that aborigines be considered outside the scope of international law, which would make any issue of succession of rights and duties non-existent. This recommendation was refused by the full committee of the Institute, which decided that it would not decide the question. However, this nondeclaration itself amounted to a declaration since an acknowledgment of confusion indicated that the original “benefactor” status of successors to aborigine nations was being reconsidered.

This confusion over aborigine nation status and whether they could be succeeded was reflected by the practice of the United Kingdom in the South Pacific. In the nineteenth century the United Kingdom originally declared that aborigine tribes would not be recognized as nations unless the “family of nations” recognized them as such. However, later the United Kingdom entered into a treaty with the Maoris of New Zealand over succession of the island to the Empire. Clearly this use of treaty contradicted the prior British policy since, unless given standing as a state, the Maoris could not validly enter into a treaty.

Eventually, the policies of most colonizing powers evolved into what could be considered a consensual practice, even if that practice never quite attained the status of international law. As stated by Woolsey, the consensual practice recognized that a colonizing power had title to the acquired land against all nations but the Indian tribes. Thus, as successor to the aborigine nations, the colonizing power received the right of title to the aborigine lands under international law, but also had the obligation to respect the existing communal identity of lands neces-

56 Id.
57 Id. at 16.
58 Id.
60 Id. at 18.
61 M. Lindley, supra note 55, at 353.
62 Id. at 15.
sary for grazing and farming. Interestingly enough, this evolution seemed the reverse of the evolution of scholarly opinion, since the European powers went from an optional succession theory, under which no rights or duties were recognized by the acquisition of the land, to a theory of universal succession, or at least partial succession, under which the colonial powers acquired both the territorial rights of the aborigines and at least a moral obligation to respect aboriginal sanctity of communal lands.

The next major impact on succession law involved the overthrow of monarchal dynasties, especially in the nineteenth century. At first revolution was treated as nothing more than an internal change which did not affect a nation’s internationally recognized rights and obligations and thus did not fall within the purview of successor law. For example, the United States clearly accepted the pre-Constitution obligations of the colonies and Confederation in its Constitution. Likewise, the French Revolutionary government agreed to assume the pre-revolution obligations of Louis XVI with, among other nations, the United States, Austria, and Sardinia. Some commentators have argued that such a view remains a “black letter” rule under international law.

However, this view of merely internal change was challenged by the realities of more recent ideological upheavals. The Russian Revolution is a case in point. The overthrow of a totalitarian monarch and its replacement by a Marxist-Leninist regime was such a fundamental change that states could no longer consider the Revolution to be merely an internal reformation. For example, the Swiss Federal Tribunal ruled that, despite the long-standing rule on revolutions, the Russian transformation was so overwhelming and complete that it was fatal to any agreements between the Russian Empire and other parties. Therefore, the Tribunal allowed a joint withdrawal from all agreements.

The Soviet Union augmented this argument:

To lay the foundations for such a society [as was created by the Revolution] it was necessary to destroy old institutions, economic, cultural, and political, and to create new ones. This meant staying in power in turn depended, at least in large part, upon Bolshevik ability to destroy old institutions.

63 Id. at 353.
64 U.S. Constitution art. 7, § 2.
65 K. Marek, supra note 4, at 30.
66 1 J. Moore, International Law Digest § 98, at 385 (1906).
67 Id.
70 M. McAuley, supra note 13, at 57.
In other words, the revolutionary government did not merely change the internal workings of a government, it plowed under any vestiges of the old sovereign and began afresh. The old rules of international law, however, which treated revolutionary governments as non-successor nations were not cognizant of such a fundamental change. Instead:

Account must be taken of the fact that relations created in the past by conquest and occupation are inappropriate to our time, and conflict with the principles of cooperation between sovereign States enjoying equal rights, and with the principles and purposes of the United Nations. Inasmuch as the Governments of the United Kingdom and France, and of the United States of America, accept the lofty principles of the United Nations . . . they should not impede the exercise by [independent] countries of their sovereign rights [in succession matters].

Thus, some revolution-wracked nations could be considered successor states if change was fundamental and pervasive. Still, the question of succession to rights and obligations was as confusing as ever. The Swiss Tribunal appears to have followed the extreme of Keith's discontinuity, since it ruled that all obligations from pre-revolution agreements were extinct. However, in a recent U.S. court case it was held that even if it is considered a successor state a revolutionary nation automatically assumes all prior rights and obligations, thereby applying the traditional universal succession rule.

After the colonization and revolution periods, the next important impact on state succession theory was World War I. An example of succession in this period was the formation of Yugoslavia, a nation born in 1918 from a union of four separate kingdoms and from territory of the Ottoman Empire. Article 12 of the Yugoslavia Minorities Treaty was a self-imposition of the duties of Serbia and the other predecessor nations on the new nation, thus implying a universal succession approach to this succession. This implication was affirmed by a U.S. court ruling that the Yugoslavic formation was in essence only an enlargement of (with the other predecessor states) the Serbian state, and so was a "successor of Serbia in its international rights and obligations."

An even more traumatic event, World War II, forced the world to again confront the succession idea, especially in regard to the Third Reich successors. The treatment of Austria represented a use of partial

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74 K. Marek, supra note 4, at 13.
75 Ivancevic v. Artukovic, 211 F.2d 565, 573 (9th Cir. 1954).
succession. Since the Third Reich legal order was no longer in existence, the new Austria "was in no way bound by the changes effected in Austria" after its invasion. In other words, since the Austrian "personality" was changed after the war, the successor state was not bound by previous obligations. Albania was treated in a like manner.

The two Germanies which succeeded the Third Reich became a unique source of succession controversy. Three theories surfaced after the war to explain the nature of each state's existence, and thus the succeeded rights and obligations. One theory advanced was that of Identitatstheorie, which held that the divided Germany was one country with the same identity as the Reich, but with limited jurisdiction for each government. Under this theory the new nation(s) were successors but with the same "personality" as their predecessor, and thus with the same rights and obligations. As a second theory, the Federal Republic of Germany advanced as its official policy a Dach (roof) theory that the organic core of the Reich was preserved as one, but the representative governments had separate and distinct jurisdictions. In response, the German Democratic Republic (GDR) announced still a third policy in 1956 of a zwei staaten theory, i.e., a succession of two different states.

Under this theory the GDR refused to accede to any obligations, but did claim rights to all property that had been within its jurisdiction prior to its creation.

In addition to these post-war states, over the last forty years many colonies have gained independence from their former rulers. Establishing its own succession policy to deal with this decolonization, Britain, as the major colonial power, instituted the practice of implementing devolution agreements as a condition for independence of its colonies. These agreements required that the colony agree to succeed to all prior rights and obligations when the colony became a nation. While this treaty arrangement may have preemptively settled any possible questions of succession with Great Britain, the successor problem still existed when third-party states were involved because non-signatory nations are not considered bound by the rights given to states through bilateral treaties.

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76 Moscow Declaration, United Kingdom-United States-Soviet Union, Dec. 1, 1943, Annex 6, 3 Bevans 827, 1943 For. Rel(I) 749.
79 Id. at 265.
80 Id. at 266.
81 Kunstsammlungen zu Weimar v. Elicofon, 536 F. Supp. 829, 856 (E.D.N.Y. 1981), aff'd, 678 F.2d 1150 (2d Cir. 1982). In other words, the GDR espoused Keith's discontinuity theory.
82 Shaffer, supra note 3, at 597. Examples of such an agreement include the independence treaties between Britain and Iraq, and the treaty between Britain and Jordan. Id. at 598.
83 Id. at 600.
Unfortunately for Britain, its independent colonies did not always accede to these devolution agreements. For example, in 1961 Tanganyika announced a unilateral declaration to decide for itself which obligations would be respected. The declaration stated specifically it would fulfill any obligation that was not personal to the succeeded government. This type of unilateral declaration became the norm for much of Africa.

While this independence movement was occurring, the Communist bloc began formulating its own ideas of what rights and obligations a successor state should receive. Prior to World War II, the Soviet Union had espoused Keith's theory of discontinuity. It claimed that older theories which required the assumption of the Russian Empire's obligations were merely excuses by which the West could interfere with the Soviet Union's internal affairs by forcing the new nation to accept prior obligations, thereby continuing the effects of the West's imperialistic policies which had existed in Russia and in most of the world prior to the birth of the "new order." After World War II, the Communist bloc switched to the universal succession theory, stating that this theory was the best means to world stability. Also, Communist nations believed that, since universal succession required a complete non-distinguishable transfer of rights and obligations, it more closely paralleled Communist non-recognition of a private/public distinction.

The United States has made similar significant changes in its policy on succession. One of the most important statements on U.S. succession theory, the opinion in The Sapphire, held that a successor takes all the rights and obligations of the predecessor state. This policy was applied specifically by the Attorney General in instances in which one nation was absorbed by another. However, this universal succession rule as applied to U.S. assumption of obligations was later amended after the Spanish-American War. The new policy stated that those obligations that related to anti-U.S. activities would not be accepted upon succession, thereby at least in this case indicating the acceptance of a flexible ap-

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84 Id. at 602.
85 Specific examples include Uganda, Botswana, Lesotho, Nauro, Kenya, and Malawi, id. at 604; Tanganyika, Succession Materials, supra note 1, at 177; and, Uganda, id. at 179.
86 B. Bot, supra note 39, at 26. See also the statement of Yugoslavia in Representation of Member Nations in the United Nations, 1950 U.N.Y.B. 433. According to some commentators, this embracing of the discontinuity theory was actually to avoid any of the obligations of the predecessor czarist regime. See supra notes 65-67 and accompanying text; E. Korovin, MezDunarodnoe PRAvo 211 (1951), cited in 1 D. O'Connell, supra note 6, at 19.
87 1 D. O'Connell, supra note 6, at 20-21.
88 78 U.S. (11 Wall.) 164, 168 (1871).
89 22 Op. ATT'Y GEN. 583, 584 (1899) (Hawaiian claims).
90 H. Wilkinson, supra note 12, at 84. The Spanish responded that if the United States was to succeed to all rights, then it had to succeed to all obligations. Id.
proach to succession. More recently, the United States adopted a discontinuity theory, stating that new nations start *tabula rasa*.

A review of other nations' declarations and practices demonstrates the variety and inconsistency of succession theories similar to that shown by U.S. and U.S.S.R. practice. At the time of Ireland's independence, the question of state succession to treaties arose. From a polling of other nations, five categories of practice appeared:

1) the successor state succeeds to the treaty—Ecuador, Bolivia, Hungary, Luxembourg;
2) no succession occurs—Cuba, Guatemala;
3) the decision is "dependent on the wishes of the signator states"—Denmark, the Netherlands;
4) the successor state is not bound except by its specific declaration—Switzerland, Italy;
5) each treaty is to be decided by agreement of the signators and the successor state—Austria, Haiti.

In other words, based solely on state practice, "[t]here appears to be no settled rules of International Law governing the succession of states."

Thus, a survey of scholars and state practice suggests no clearly enunciated international law of succession upon which to determine rights and obligations. This leaves such determinations on dangerous grounds: "[A]n agreement with 'eternal life' is foredoomed to failure, and [imposing obligations] on weak powers by force or duress is unjust." Because such problems still exist and probably always will, an alternative theory of succession is necessary since the "solutions of such problems cannot be left to the caprice of a conquering nation or the bargaining of a rich one."

II. AN ALTERNATIVE THEORY: THE SUCCESSION THEORY OF POPULACE BENEFACIATION

Such is the inconsistency of state practice and cacophony of succession theorists. The current state of affairs suggests at least three factors which have affected the development of succession theory. First, the basis itself on which some theorists have formulated theories has led to some defects. Second, the attractiveness of many of these theories suggests that an amalgamation of some of their best features could produce a better theory. Third, the refutation of many Western-born succession

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91 1957 DEPT ST. BULL. 94-95.
94 Note, supra note 9, at 1686 n.59 (quoting McDougal & Lans).
95 H. WILKINSON, supra note 12, at 10.
theories by emerging nations clearly implies a feeling (or fact) of imbalance or inadequacy in these theories. Considering these factors, the theory of populace benefaction is presented as an alternative.

A. The Correlation of Rights and Obligations

Before the main issue is discussed, the secondary issue of whether rights and obligation should be analyzed in the same manner in succession determinations, must be decided. Some would argue that the rights and obligations of successor states are not correlated in any way, and thus should not be linked in a succession analysis. Nonetheless, other indices exist which do point to a correlation and therefore require that any succession theory cover both rights and obligations.

First, a natural symmetry exists between the ideas of rights and obligations. "A subjective right embodies legal titles due to the entity while, on the other side of the legal relationship, it creates obligations corresponding to legal rights." In other words, one only possesses a right if one has also devoted some sort of consideration to obtaining or insuring that right. In the case of states, this symmetry may be as obvious as the rights to favored nation status in exchange for restricting one's exports, or as subtle as the right to military uniforms produced in a foreign state that arrive with the obligation to pay for their production as one cost of a state's defense.

While this symmetry assertion, standing alone, may be uncomfortably nebulous to some, it does have support from more concrete sources. Many theorists have treated rights and obligations as correlative. Grotius correlated rights and obligations as did Hall who, in his discussion of state "personality," analyzed rights and obligations as correlated by a common nexus. The attractiveness of correlation is further demonstrated by its use in international pronouncements. For example, article 9 of the U.N. Declaration on the Rights and Duties of States, in dictating that states must respect each others rights and duties, recognizes the correlation between rights and duties.

Perhaps the strongest support for the assertion that rights and obligations are correlated appears in state practice. As long ago as 1883, in the dispute between Peru and Chile involving the Tarapacá region, the

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96 See, e.g., paper by Professor R. McGehan, part of the Second Comment from New Zealand on the Declaration on the Rights and Duties of States, reprinted in PREPARATORY STUDY, supra note 34, at 176 (originally printed in U.N. Doc. No. A/400 at 14-17).

97 H. BOKOR-SZEGO, supra note 2, at 39 (quoting L. Buzza).

98 See, e.g., GROTIUS, supra note 14, at 260.

99 1 J. MOORE, supra note 66, § 96, at 337. Despite the fact that this nexus is territory rather than populace, the analysis is illustrative of the logic in using the same foundations for rights and obligations.

100 PREPARATORY STUDY, supra note 34, at 78.
Italian government as arbitrator observed that "it must seem inequitable that Chile, while leaving Peru in a state of complete ruin and annexing Peruvian territories which contain the greater and better part of Peru's patrimony, should be unwilling to assume any part of the national debt" which was associated with that region. Thus, the greatest danger in separating rights from obligations in matters of succession was illustrated: the natural legal symmetry between the two is broken, and one party to the agreement becomes enriched at the other party's great expense.

The United States was subject to the same argument by Spain at the end of the Spanish-American War. The Spanish government argued that if the United States was going to assume sovereignty over the ceded areas after the war, it must expect to assume the obligations attached to those territories. More recently, in their agreement concerning ceded territory, France and India state that "[t]he government of India takes the place of the territory, with effect from the 1st of November, 1954, in respect to all credits, debts, and deficits in the care of the local administration." The connection between rights and obligations has been further recognized in treaty negotiations between nations seeking independence and their colonial masters. For example, the correlation was recognized in the independence treaty between Great Britain and Ceylon, the treaty which established Cyprus, and the independence treaty between Great Britain and Somalia. Even those nations which refused to accept Great Britain's devolution agreements often correlated the rights and obligations which succeeded when making their unilateral announcements of independence. In short, states by both agreement and unilateral act have forwarded and preserved the natural symmetry which requires that rights and obligations be equally recognized in succession

101 U.N. NON-TREATY SUCCESSION MATERIALS, supra note 45, at 12.
102 H. WILKINSON, supra note 12, at 83.
107 See supra text accompanying notes 84-85.
108 See, e.g., Botswana Independence Act, art. 17, reprinted in U.N. NON-TREATY SUCCESSION MATERIALS, supra note 45, at 129, 137; Swaziland Independence Order in Council 1968, art. 16, reprinted in id., at 405, 408. "Existing orders shall not affect the rights, liabilities, obligations, property, or assets vested in the Government . . . ."
matters. Therefore, whether standing alone or supported by scholars and practice, the symmetry of rights and obligations leads to the determination that rights and duties should be correlated in any succession theory.

B. The Substance of the Theory

This preliminary determination now leads to the main issue, the alternative succession theory of populace benefaction. Under this theory, the population that is transferred to the successor nation is the focus of the succession analysis, and the determination of which rights and obligations are to be succeeded turns on which of these rights and obligations are based on some benefit to the populace. Simply put, any rights which benefit the transferred citizenry and any obligations which are the result of or the precursor to benefits acquired for the citizenry are succeeded to by the successor nation.

The populace benefaction theory contains several advantages which the other theories do not. For one, an emerging nation need not concern itself with a land scramble or the resulting loss of any extraterritorial property. Any rights, corporeal or incorporeal, which benefit the succeeded populace succeed to the state regardless of what the rights protect. In addition, established nations need not fear for their rights, i.e., the new state's obligations, since any obligation which has resulted from or led to a benefit for the populace is succeeded. Because this succession is mandatory, no basis of moral obligation or unilateral declaration is necessary, and thus no subjective loophole exists by which to ignore the obligation. Finally, if the existing obligation is contrary to the interests or the ideology of the populace of the successor state, the successor state is not bound by the obligation because it is not beneficial to the population. Therefore, any Western or colonial empire bias is negated, imperialism is countered, and world order is furthered by the stable transition of rights and obligations to successor states.\(^{109}\)

To best analyze this theory, the elements of 1) a populace base and 2) demonstration of benefaction to the populace, should be separately considered. The first element, the use of people rather than territory as a basis of succession analysis is logical when one considers for what reason nations exist. Nations represent a collection of people under a legal order in a defined territory which have the capacity to enter into relations with other states.\(^{110}\) However, the legal order only exists to work on behalf of

\(^{109}\) No attempt will be made in this paper to show how this theory is to be applied in practice. The author assumes that this theory may be applied by whatever states or world mediation and adjudicatory bodies which may be faced with a succession question, just as any other international law would be applied.

the population and to enter into relations with other countries for the benefit of its people.\textsuperscript{111} Moreover, the territory is nothing more than the area in which the legal order has jurisdiction.\textsuperscript{112} Because the legal order works for the people and the territory is only the area in which that order functions, this leaves the populace as the logical focus of identity for any nation.

A second reason for focusing on a state's populace when establishing a nexus between rights or obligations and a successor state is expressed in Huber's organic core theory.\textsuperscript{113} Because the population of a nation is the integral element of the nation, it is the organic core to which any rights and obligations of that nation are attached. Thus, to effectively analyze the existence of succession rights and obligations, one must first determine which rights and obligations are correlated to the succeeded core populace.

This is further illustrated by the fact that because a populace retains its status quo throughout a governmental transformation, which is inevitable in any state, it must be considered the anchor of a state's rights and obligations. That is, if "[t]he people change their allegiance, their relationship to their sovereign is dissolved: but their relationship to each other . . . remain[s] undisturbed."\textsuperscript{114} So, for continuity to be present in a state's relationship to others, the stabilizing anchor—its populace—must be the ultimate source of that nation's international rights and obligations. Therefore, the succession of rights and obligations should only be considered concurrently with the population which is succeeded.\textsuperscript{115}

The next consideration is why only those rights and obligations of benefit to a populace are succeeded. The first reason is an outgrowth of the sovereign entity's right to do whatever is necessary to preserve, continue and develop that nation's existence.\textsuperscript{116} If a sovereign was forced to either succeed to obligations made to the detriment of its populace, or to abandon those rights which had previously aided the citizenry, then it could not enjoy the right to aid and advance the nation. In order to allow a new sovereign to act beneficially for the populace, only those rights and obligations beneficial to the populace should succeed to the sovereign.

The need for both this right of self-preservation and the populace benefaction theory, which the right of self-preservation supports, is warranted by the exigencies of history. Exploitation by foreign nations of

\textsuperscript{111} See, e.g., Cook v. Tait, 265 U.S. 47, 56 (1924).
\textsuperscript{112} K. MAREK, supra note 4, at 20.
\textsuperscript{113} 1 D. O'CONNELL, supra note 6, at 12.
\textsuperscript{114} United States v. Percheman, 32 U.S. (7 Peters) 51, 87 (1833).
\textsuperscript{115} This also overcomes the problems caused by extinction of the legal order which plagued the organic core theory. See supra notes 29-36 and accompanying text.
\textsuperscript{116} 1 J. MOORE, supra note 66, § 23, at 60-61.
colonies or impotent sovereigns has been a part of international politics since time immemorial. One need only look to the chronology of the Chinese Empire, now the People's Republic of China, to understand the need for a populace benefaction determination in succession matters. Imperial China was forced to open its borders to Western trade and grant concessions and privileges to Westerners who threatened its stability and bankrupted its treasury and population. If China had been forced to continue these concessions and privileges when independent, it would have faced the same threats to its stability and economy.

No succession theory should be apathetic to these instances of exploitation. Rather: "[A] general convention on the succession of states should, above all, prevent [treaties unequal in fact or in law] from leading to abuses or the exploitation of weak States by means of bilateral treaties which have been succeeded." Under the populace benefaction theory those treaties which injured China, like all inequitable treaties, unquestionably would terminate upon succession since in no way did the treaties benefit the populace. Thus, under this theory of succession a nation's right to preserve itself is insured and the former inequities of states' actions may be countered.

While the populace benefaction theory in and of itself could be interpreted to allow any self-serving state to bind and breach as it pleased, other concepts clarify both the limits to and advantages of this succession theory. The first is the concept of attributive justice, that laws are only just when they are for the good of the society. Attributive justice is an inherent part of the populace benefaction theory since its use would guide the ways in which both rights and obligations pass under this theory. Applying attributive justice to succeeded obligations, those duties which were enacted by the former sovereign and are for the good of the nation are just and so should succeed to the new sovereign as a just benefit. Thus, this theory binds a successor to enforce and fulfill all obligations which are to the advantage of its people, thereby eliminating unilateral selectivity, and allows the successor to keep only that property which is for the benefit of its people.

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118 702nd Meeting of the International Law Commission, supra note 49, at 192.
119 In no way would this theory affect only agreements with the West, the nations more commonly thought to be imperialist. This same theory would have been the basis on which Afghanistan, upon its independence, could ignore Pakistan's prior annexation of Afghan territory against the wishes of the subservient Afghan people. See U.N. Succession Materials, supra note 1, at 2-3. It could now also be applied to whatever subservient agreements the Soviet Union attempts to implement with the Afghani nation in its present state of invasion by the Soviets.
120 Grotius, supra note 14, at 37.
121 Id. at 265.
122 Granted, a nation could by unilateral action attempt to avoid an obligation of benefit to its
A similar yet distinct concept is the idea of a nation's "public character," in other words the moral foundation on which a nation has chosen to organize and conduct itself.\textsuperscript{123} This public character, for which people have organized a society, selected an ideology (or overthrown another), or vanquished an invader, must play a part in a succession theory if the organization, selection, or battle is not to be futile. That is, to avoid bankrupting a nation's treasury, stripping a land of its resources, or perverting its ideology through the enforcement of obligations which may have been the downfall of its former state,\textsuperscript{124} only the rights and obligations which benefit a populace and its public character should be succeeded under international law.

This use of "public character" to determine which rights and obligations benefit a populace, and thus succeed with it, is not as radical as it may seem. As stated previously, the Russian Revolution was recognized as an "overwhelming" change in the Soviet nation's foundations which freed the new Marxist state of any czarist obligations.\textsuperscript{125} Analogously, Austria was declared to be "in no way bound by any changes effected in Austria" during its membership in the Third Reich since the interloper Reich had not acted for the Austrian people, had corrupted the public character, and thus left no succeeding obligations which benefited the Austrian people.\textsuperscript{126} Thus a nation's "public character" has implicitly been recognized already as a determinative factor in succession matters.

The support given by the populace benefaction theory to the right of self-preservation and the upholding of public character culminates in the first of two main purposes of this theory—protecting the right of self-determination held by a successor state. This right has been expressed in article 6, paragraph 2, and article 55 of the United Nations Charter, and has become a part of international law.\textsuperscript{127} Moreover: "[T]he right to self-determination does not cease when independence or another possible populace. However, a tribunal or mediator could then use the populace benefaction theory as the basis for denying the legitimacy of this assertion.

\textsuperscript{123} This term was used by Justice White in his opinion in Downes v. Bidwell, 182 U.S. 244, 288 (1901).

\textsuperscript{124} For example, the overthrow of the Chinese monarchy by nationalists disgusted with foreign exploitation of Chinese resources and people. Aide Memoire, supra note 5, at 81.

\textsuperscript{125} See supra notes 69-73 and accompanying text.

\textsuperscript{126} Moscow Declaration, supra note 76. Interestingly, this concept of benefit for the public character, i.e., populace, seems to have also played a role in the determination of which body should be considered the successor agent for populaces after World War II. The Soviet Union claimed that the Polish Resistance could not represent the successor state of Poland since the Polish nationalists were really traitors to the national interests of Poland—the national interests implicitly reflecting what the Soviet Union viewed as the public character of Poland. Korovin, The Second World War and International Law, 40 Am. J. Int'l L. 742, 744-45 (1946).

status is achieved and recognized; it extends into the permanent defense and maintenance of the independence or other status achieved as a result of the initial exercise of the right to self-determination."

Thus, the theory by which rights and obligations are determined to succeed will affect the ability of a state to exercise its right to self-determination.

Not only does the populace benefaction theory inherently recognize a populace' right to self-determination, but by its very premises it forwards and protects this right. By allowing a successor state to terminate those treaties and other obligations which are not in the interests of the core population, the populace benefaction theory ensures that a state has the ability to exercise its right of self-determination. Moreover, because this theory guarantees that a successor state will succeed to all beneficial treaties and duties, it also furthers self-determination by preventing established nations from cancelling their involvement in treaties and agreements vital to the new state by simply declaring the other party to the treaty (in other words, the succeeded state) has become extinct. Instead, the new nation may declare that it is the successor to the beneficial treaty and thus may demand the treaty's fulfillment. In this way the successor state may protect the contracted rights upon which it exercises its right of self-determination. The successor state's right of self-determination, therefore, is protected by the populace benefaction theory.

The populace benefaction theory also prevents the abuse of, and thus the threat to, the right of self-determination by successor states. New nations have a duty to uphold and further the right of self-determination as a principle of international law if they wish to be this principle's benefactors. Just as imposing inequitable treaties on successor states leads to the questioning of the entire international legal system by these states, thereby threatening the system, if enough successor states attempted to renege on obligations which had arisen out of past benefits by invoking the right of self-determination, they would also threaten the right of self-determination as a rule of law. Those established nations who would be cheated out of just consideration would soon decry the right of self-determination and threaten its continued existence as a principle of international law. The populace benefaction theory requires that new nations accept those obligations which have arisen from benefits to their core population, thereby preventing these nations from abusing their right of self-determination and threatening its very status as a rule of international law. As such, the populace benefaction theory supports the right under international law to self-determination by implementing it, and protects this right by guarding it from abuse.

128 Id. at 21.
129 Id. at 10.
130 Comment, supra note 37, at 790.
Requiring a successor state only to fulfill obligations that are of benefit to it and protecting its rights over beneficial property also has its practical aspects. Many succession determinations have depended upon political and economic factors rather than application of international law. This is because the existing international legal guidelines are inconsistent and difficult to apply without invoking unrest among the population burdened by fulfilling nonbeneficial duties.\textsuperscript{131} For example, many of the successor nations in Africa recognized the desirability of legal continuity, but could not and did not care to justify to their constituents why they were accepting all the burdensome obligations entered into by their imperial predecessors.\textsuperscript{132} The quandary which these nations faced indicates that successor rights and obligations should be tied to populace benefaction, both since the realistic political and economic concerns of emerging nations could then be reflected in international law and because many successors could and would more ably and happily accept succeeded rights and obligations.

This practical aspect would further the second major purpose and final attraction of the populace benefaction theory, that of furthering world order, since it would help insure stability even in an unstable atmosphere of succession. It is a recognized duty that every state must ensure that conditions prevailing within its territory do not threaten international peace and order.\textsuperscript{133} The best way for a young, probably somewhat unstable nation to ensure internal stability is to accept only those obligations which it can justify to its populace. Obviously, the most justifiable obligations are those which will benefit the populace. Likewise, the state will be most tranquil and most inclined to accept and support world order if other nations recognize the state's right to all property, even that which is extra-territorial, which is for the benefit of the populace. Inherently, the practical aspects of the populace benefaction theory would encourage the order and stability expected of and by the world community.

C. Criticisms of the Theory

It might be argued that because the populace benefaction rule is not absolute—i.e., it requires a determination of what is of benefit before the determination of what is succeeded can be made—this theory is actually a threat to world order, not a furtherance of it.\textsuperscript{134} However, such an argument is one that posits simplicity rather than substance. Because

\textsuperscript{131} Shaffer, supra note 3, at 596.
\textsuperscript{132} Id.
\textsuperscript{133} PREPARATORY STUDY, supra note 34, at 120.
each successor state is necessarily emerging from a past and culture into a different political and economic condition than any other prior successor state, theoretical absolutes which result in an "all or nothing" effect only lead to the inequities and conflicts already experienced by the international order. The populace benefaction theory prevents inequities and at least provides a framework under which conflicts may be negotiated or adjudicated. The populace benefaction theory, therefore, while on its face less clear than an absolute theory, is in the long run a far more substantive and acceptable determinant than any other previous theory.

Several other criticisms may appear to be self-evident. First, because this theory does not require the acceptance of all succeeded obligations, some have expressed the fear that nations would excuse themselves from an obligation simply by changing governments. The immediate response to this concern is that changing a government simply to avoid fulfilling an obligation is such a drastic measure that it would rarely, if ever, occur. However, even if a nation were to attempt this, two barriers inherent in the popular benefaction theory would likely prevent the effectiveness of this attempted breach. First, the nation would not necessarily be a successor state unless, like Russia or China, the change was so fundamental that it signaled an entirely new political ideology or economic order. This fundamental change is unlikely in an attempt to avoid an obligation since the government agents who effected the breach would place their political existence in serious jeopardy. Second, if the obligation was for the benefit of the populace, no amount of change would release the ruling government from fulfilling its duties. In fact, because beneficial treaties must continue regardless of the degree or pervasiveness of the internal political change, this theory is actually more stabilizing than some of the previously described theories.

The next problem is the theory's focus upon what is deemed important for the populace. Since the ideology of a population is non-binding on the rest of the international community, allowing a populace to decide which elements of succession are consistent with that populace's ideology would seem to allow that nation's ideology to unduly influence the rest of the world. However, as previously stated, to allow the opposite—requiring a nation to succeed to an obligation antagonistic to its ideology—is just as unjustifiably imposing. Moreover, this theory would not actually impose a nation's personal ideology on the world, since most obligations are purely budgetary line items or pragmatic agreements which have nothing to do with ideology and thus would exist regardless of, or external to, a nation's ideology.

Another possible criticism is that, by focusing on a population's ben-

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135 Law of Treaties, supra note 8, art. 24, at 662.
136 K. Marek, supra note 4, at 2.
efaction, those governments that are monarchies, despots, or otherwise unelected may do nothing to which a populace consents and thus may not act for the populace's benefit. This criticism actually misconstrues the populace benefaction theory, since benefaction does not require citizen approval any more than a government's recognition by other governments is based on its citizens' control over it. For example, the worst tyrant can benefit his or her citizens by entering into a construction contract for new irrigation systems. Actually, the focus on benefaction resolves the present problems of continuity when a populist government replaces a despotic one, since the common place rhetoric of imperialist extortion which acts as an excuse for breaching obligations would be meaningless if the "extortion" really benefited the populace.

Yet another problem with this theory is its inconsistency with some established rules of succession. For example, it is "settled" that a revolution does not affect the succession of all rights and obligation from the extinct nation to the new one, regardless of populace benefits. One answer to this criticism is that, as detailed in the discussion on current succession theory, so many "settled" rules abound in various stages of outdatedness that such an inconsistency is not only unimportant but even expected. Another response is that these rules cause their own problems such as the previously mentioned encouragement of self-serving unilateral decision, which this theory is specifically proposed to correct. Therefore, this problem collapses under the weight of the theories it attempts to uphold in the alternative.

D. The Theory in Light of International Law

Moreover, other rules of international law related to but not actually a part of succession law are indeed consistent with this theory. Perhaps the most important compatible rule is that of rebus sic stantibus, the theory that treaties terminate with respect to a party when the party experiences a "vital" change in its nature. This rule indicates that international law does not require or even suggest that a treaty lasts forever, thereby giving support to a terminating concept like populace benefaction. Moreover, by focusing on the identity of the parties in the agreement, this rule implies that a change in ideology may affect the agreement as much as any other fundamental change in the sovereign which affects its nature.

Other rules pertaining to specific sovereign changes are even more clearly consistent. The fact that a mere change in government does not alone affect succession interests is quite rational within this theory

137 I F. Wharton, Digest of International Law § 5, at 19 (1886).
138 Note, supra note 9, at 1669.
139 K. Marek, supra note 4, at 24.
since a governmental change neither affects the benefits of the state's interests to its population nor even implies that the prior government's actions were contrary to the benefaction of the society.\footnote{On the other hand, a change so significant as to trigger this rule, such as revolution, would signify the prior government was defective in some way and therefore acting contrary to the benefaction of the populace.} Another example is the rule that the division or unification of a populace proportionally divides or unifies the obligations of the nation that previously represented the citizenry.\footnote{1 J. Moore, supra note 66, § 96, at 334.} Clearly, this rule reflects the importance of tying the succession concerns to the populace and is consistent with the populace benefaction theory which would require the transfer of beneficial concerns with the population which the concerns benefit.

Two even more specific rules are also consistent with this theory. First, some tribunals have advanced a rule that legal liability for personal torts committed by a government against its citizens dies with the predecessor government.\footnote{Hawaiian Claims, American & British Claims Arbitration Tribunal, Nov. 10, 1925 [Claim No. 84], reprinted in 20 AM. J. Int'l L. 381 (1926).} Since such actions by the government against its citizens, even from negligence, would be contrary to the benefaction of one or more of its populace, the obligation of the original government against a citizen is non-transferable as a non-beneficial obligation. Second, the rule that a public treasury does succeed to the new government\footnote{1 D. O'Connell, supra note 6, at 204-05.} is clearly applicable under this theory as a beneficial property right which transfers to the new sovereign.

\section*{E. The Theory in Light of Ideology}

Perhaps even more significantly, the consistency of this theory with any particular national or cultural ideology avoids the problems of Western bias that other theories possess. This is not to say that this succession theory somehow conflicts with Western ideology. On the contrary, basing succession on the rights and obligations that benefit the populace is quite consistent with the social contract theory in that both theories are based on the idea of a government empowered by and working for its people.\footnote{See generally J. Locke, The Second Treatise of Government (originally published in 1690).}

On the opposite side of the political spectrum, this theory also fits well with Marxism or socialism. Actually, Marxism can treat property and obligations in three ways. In the Hungarian ideology, because the private sector—the citizenry—is the basis of the government, all property and obligations are privately held since no public sector actually
Governments, however, ultimately own all property through the controlled economy, so all property and obligations are public. Finally, in the Yugoslav constitutional system, anything connected to production is considered to be neither public nor private. Instead, such property and duties are considered a matter under the collective citizenry and thus are managed by the government but actually worker-based. Nonetheless, the populace benefaction theory covers all three alternatives because it connects all obligations and rights to a citizenry and does not concern itself with whether these matters are private, public, or an amalgamation of the two. In any case, rights and obligations would succeed if beneficial to the populace and thus would not interfere with the ideology on which a sovereign based its legal order.

Between the Western view and Marxist ideology is the varietal Third World. It is this political sector which feels the most exploited and is, therefore, the least willing to follow an international law which forces it to assume rights and (especially) obligations. For example, according to article 27 of the Mexican Constitution, original ownership of all land is in the Mexican government, which in turn disburse the property to its citizens to avoid foreign control. Populace benefaction would still allow this method of property allocation because the property would be considered Mexico's to do with as it saw fit, since the populace would be benefited by the property. However, had the original Mexican regime acted in such a way as to harm the populace, such as transferring all mineral rights to foreigners without just compensation, the present government would be free to ignore this obligation and transfer the rights to the public as it does now, because the original obligation was only exploitative and not for the benefit of the Mexican people.

As a final example, even the Third World ideology under Islamic law is complementary to the populace benefaction theory. While Islamic law recognizes the obligations inherent in sales contracts and property transfer agreements, it also considers common to all citizens any item which is inherently unownable, for example the air or the seas. Populace benefaction would allow this law to continue since an attempt to "sell" a state's air or access to the sea would jeopardize that state's citizens, and thus need not be succeeded by a successor state. Therefore,

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146 R. Wesson, supra note 117, at 10-11.
149 Id.
151 Id. at 223.
whether the state is Islamic, Marxist, Western or Third World socialist, the populace benefaction theory would allow a fair succession that is also consistent with the ideology of the state.

F. The Theory in Light of State Practice

The practice of states in succession matters is the final indication of the efficacy of the populace benefaction theory. Those actions which support the populace benefaction theory are, first, prior practice in disputes involving archives. It has been asserted under international law that "as a rule the archives concerning a province belong to it." This rule would not change under the populace benefaction theory since archives and other national records are kept solely for the benefit of the population, either because they provide information as to the populace's activities or they help the government regulate the populace's activities for the benefit of the populace. Thus, this settled rule of international law is supported by the proposed theory.

Another example of state practice which reflects the value of the populace benefaction theory is that surrounding the transfer of a succeeded nation's public debt. The treaty ending World War II required that successor nations to Italian territory assume only those public debts "in so far as these obligations [are] attributable to public works and civil administration services of benefit to the said territory but not attributable directly or indirectly to military purposes." This statement could not have more fully paralleled a determination under the populace benefaction theory—debts attributable to public works and civil administration were definitely to the populace's benefit and thus should succeed, while funds spent on the Italian war effort had no benefit, indeed were a detriment, to the Italian populace and should not succeed. State practice in

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152 Communications surrounding the succession of Turkish territories to Greece, 1881, reprinted in U.N. Succession Materials, supra note 1, at 11.

153 The only conceivable exception would be those records used only for furthering a tyranny through intimidation and police control. However, even these might be of benefit to a populace in terms of research materials for later historical analysts. At any rate, they certainly would be of no use to a prior sovereign.

154 Treaty of Peace Between the Allied and Associated Powers and Italy, supra note 77, at Annex XIV, para. 6.

155 This example raises the interesting question of whether a party which has supplied or funded the losing side in a war can ever receive payment from the victor if the losing party is absorbed. Apparently, the party never would receive payment since the successor (conqueror) state would have no duty to assume those obligations that were to the detriment of the populace, which a war loss certainly must be. This is not to suggest that this result is in any way unjust, given the chances a party assumes with the winds of war. In fact, it would take great temerity for such a party to dare approach the victorious nation, whose existence had been threatened in part by that party's actions, and ask for payment.
requiring the assumption of only that debt incurred for the benefit of the population thus supports adherence to the populace benefaction theory.

A third practice which is not always considered but can have great significance is the effect succession has on a nation's standing in world financial organizations. For example, the debts a successor nation could assume from a succeeded nation’s involvement in the International Monetary Fund or World Bank could be tremendous. The member states of the International Bank for Reconstruction and Development (IBRD) have stated that, as a matter of international law, the liabilities of a dependent territory to IBRD continue as liabilities of the state upon independence.\(^1\) This would also be the rule under the proposed theory if these liabilities were incurred for the funding of public welfare projects or in furtherance of establishing the independent nation. However, if these debts were incurred to fund projects which merely exploited a territory for the benefit of the colonial power or were clearly intended for the sole financial enhancement of the prior ruler and were condoned by the financial organization,\(^2\) then the debts would be extinguished upon independence because the populace was not benefited.

These are but three examples of state practice which would be reflected under the populace benefaction theory. Other obvious examples include the transfer of all property held by the succeeded state to the successor state,\(^3\) the assumption of those treaties which were for the benefit of the populace,\(^4\) and even the undertaking of the preexisting contractual and legal obligations of the state to its people which resulted

\(^1\) Observations transmitted by letter from the General Counsel of the IBRD, March 25, 1974, reprinted in U.N. SUCCESSION MATERIALS, supra note 1, at 530-31. This letter summarized the view of the IBRD, the International Development Association and the International Finance Corporation.

\(^2\) If the liability was originally represented to the finance organization as for a public good, and later was used solely for the ruler's benefit, a different question might arise. However, the finance organization could have easily monitored how the funds were being spent by the prior ruler and thus should not be allowed to require payment from the successor nation for a quasi-beneficial obligation which the finance organization condoned through negligent oversight. Thus, the result is the same, regardless of the loaning party's perception of the transaction.

\(^3\) E.g., Treaty of Peace Between the Allied and Associated Parties and Germany, June 28, 1919, art. 56, T.S. 874, 2 Bevans 43 (in which Germany gave France all “moveable or immovable property located in territory seceded to France”). Of course, if any property held could be shown to be a detriment to a populace, then the successor nation would have no more right to it than any other nation.

\(^4\) In the Draft Agreement on Transitional Measures, Nov. 2, 1949, Netherlands-Indonesia, 69 U.N.T.S. 266, the parties agreed that all “commitments which are not inconsistent with the interests and economic development of the people” of Indonesia would die upon Indonesia's independence. Id. at art. XXII. Moreover, the parties agreed that all treaties would be terminated or adjusted to conform with the Draft Agreement. Id. at art. XXV. Thus, any treaties which were inconsistent with the interests or economic development of the people would die, a result favored under the populace benefaction theory.
These practices illustrate the efficacy of the populace benefaction theory in a variety of matters which arise from the succession of states.

On the other hand, the need for the populace benefaction theory to prevent injustice from occurring may also be shown by state practice. For example, in several cases a newly independent India was allowed to ignore legitimate claims to civil service tenure by government employees, contractual obligations involving the shipping of timber for government projects and the construction of a local courthouse and licensing agreements entered into by the former colonial rulers. It was stated that "an act of state can always be pleaded however unjust the result." Such unjust actions would not be allowed under the populace benefaction theory. Civil service employees could still expect tenure since the tenure was in consideration of years of work for the government and thus the populace. Parties who had contracted to ship supplies or construct buildings could expect payment from the successor because these supplies and buildings could be used for the populace's benefit. Finally, those licensing agreements which allowed the state to use a private device or property right would have been for the populace's benefit. This is because the license allowed the government access to a needed property interest for the populace's benefit and because, by recognizing the need for a license to use the privately held right, the state protected the rights of private individuals in general to intellectual property or other property interests. Therefore, the populace benefaction theory would require that consideration be remitted for the license because the populace had benefited by the licensing agreement. In other words, if the populace benefaction theory were in existence, none of these actions, admitted to be unjust by the country's own court, could have been permitted. Thus, state practice, both good and bad, underscores the need for and advantages of the populace benefaction theory.

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160 E.g., the agreement involving the Cession of Venetia and Mantua by Austria to the Kingdom of Italy, 1866, reprinted in U.N. Succession Materials, supra note 1, at 10, which recognized the right of those whose land had been seized by Venetian authorities to have compensation for the seizure. This is to be distinguished from the situation described in the text accompanying note 142, supra, since in this instance the government could use the land for the populace's benefit, while in the former instance any personal injury caused to a citizen benefited no one.

161 For a summary of these and other cases, see U.N. Succession Materials, supra note 1, at 211-13.

162 Id. at 213.

163 Of course, if the contract was for services which were purely to benefit the deposed ruler, for example the construction of a private vacation residence, the contractor would be placed in the same position as any creditor who was collecting from a private party, in this case the deposed ruler, and thus should not and could not expect the succeeding state to pay the bill for the prior services from which no benefit accrued to the state.
III. Conclusion

The recognized theories of state succession to rights and obligations are numerous, inconsistent, and individually flawed. Some, depend on decisions by individual nations, thereby encouraging or at least tempting succeeding nations to ignore obligations which are legally legitimate but economically or politically burdensome. Other theories force the acceptance of all rights and obligations with no distinction between those that have been legitimately entered into by predecessor states and those which are exploitative, one-sided, or otherwise defective due to duress or coercion. The populace benefaction theory solves both these problems since only those obligations and rights which are beneficial are carried over to the successor state. Once obligations and rights are found to be beneficial, however, they are in turn legally binding agreements regardless of how politically controversial or economically burdensome they may be.

The populace benefaction theory appears to be a method of bridging the gap between the world "establishment," whose interests are usually in protecting itself from breaches of lucrative contracts, and the emerging nation bloc, whose interests lie in establishing economic and political independence quickly while concurrently preserving the rights which have always benefited its people. This theory possesses both the theoretical attributes of equality and fairness, and the practical attribute of stability. Moreover, while enforcement problems are inherent in any rule of international law, this theory contains enough incentives for a country of any ideology to base its decision of enforcement or acceptance on the populace benefaction theory. At the same time the theory offers some guidelines under which mediation, arbitration, or adjudication may take place should the need arise. Succinctly stated, the populace benefaction theory is both the practical incentive for stability and the sympathetic determinant of burdens which the established community as well as the newborn nations have found lacking in previously espoused succession theories.