Newly Independent States: A Study on International Legal Problems of State Succession.

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DECLARATION

"I the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LLB is my own original work and that I have not used any other souces than those listed in the biblography and quoted in the references".

…….

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Supervisor's Certificate:

I, **S.K. Amoo** hereby certify that the research and writing of this dissertation was carried out under my supervision.

……..

Supervisor's signature

Date…….

DEDICATION

Dedicated to Latoya, my daughter, the source of my inspiration.

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ABSTRACT

Throughout the twenty first century the process of creating new states has exerted an enormous impact on the international community. This paper builds on prior legal studies of problems which newly independent states find themselves faced at independence. The author analyses two recent successions namely, that of South Sudan and Kosovo. With the establishment of new sovereign states there are always questions pertaining to the resulting legal consequences. For Sudan, the key question revolves around the existing contracts entered into with the Republic of Sudan in respect of the resources of the South. Policy considerations will inform the decision whether to bind new states to the agreements of their predecessor state. As for Kosovo, the central issue revolves around international recognition and the status of its ethnic minorities. Further ,this paper attempts to examine the doctrine of state succession, the reactions of the predecessor state, third party states and the International Community at large. The author concludes that the solution to the problems of state succession cannot be left to the caprices of a conquering nation or the bargaining of a powerful one. It has been found necessary in private law to develop principles to govern succession of property. It is more vital in international law to develop or discover principles to govern the disposition of new states and their institutions.

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CHAPTER I

INTRODUCTION

Throughout the twenty first century the process of creating new states has exerted an enormous impact on the international community. It has been an important factor in the unification and dissolution of states in Africa and elsewhere. It has been a primary force behind the dismantling of colonial regimes and the emergence of many new states on the international plane. It continues to be the goal of many ethnic, linguistic, religious and indigenous groups through the world.

9 July 2011 marked the birth of yet another nation into the international community, the Republic of South Sudan. And with the establishment of any new country, there are ultimately legal consequences that need to be addressed. North and South Sudan fought each other for many years from 1955 to 2005 in a civil war fuelled by ethnicity, religion, ideology and oil. The violence claimed an estimated two million lives, forced four million to flee and destabilised much of the region.[1]

The 2005 Comprehensive Peace Agreement (CPA) promised a referendum six years later giving Southerners a choice between staying united with the North or breaking away and forming their own nation. South Sudan became the 54th country in Africa and the 193rd member of the United Nation.

Another recent succession took place when Kosovo declared its independence from Serbia on the 17 February 2008. On 22 July 2010, the International Court of Justice (ICJ) in The Hague gave its Advisory Opinion on the question of the *"Accordance with international law of the unilateral declaration of independence in respect of Kosovo"*[2] and declared Kosovo as an independent State.

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[1] Astier, C &Wood, P. 2011. *Separation strategy - A&O on the legal issues facing the newly-formed South Sudan*. Available at http://www.legalweek.com/legal-week/analysis/2105345/separation-strategy-legal-issues-facing-newly-formed-south-sudan last accessed 12 September 2011.

[2] Available at http://.haguejusticeportal.net/eCache/DEF/9/861.html last accessed 18 July 2011.

It seems that, the problems of a state are solved through the separation of the problematic region, more precisely through the creation of another state. All the communities, regions, territories and separatist movements inside a state that fight against the legitimacy of the government and its policies ultimately want the same thing: independence and sovereignty. Simply put, they fight for exactly the same thing they challenge in the state that encloses them. Kosovo's break up with Serbia was only with the purpose of creating another state.

State succession in layman's terms can be equated to state emergence i.e. a new state emerging out of a prior existing one. Maluwa[3] argues that state succession is generally regarded as arising when there is a definitive replacement of one state by another in respect of sovereignty over a given territory. According to the United Nations Environment Programme (UNEP) official website[4] a state can emerge in several ways; a state can become independent from a colonial power, entering the community of nations as a peer (as was common in the three decades following World War II). States can be created with the dissolution of a former state (for example with the Soviet Union, Yugoslavia, and Czechoslovakia). States can also be created by combining previously independent states.

The problem of state succession and in particular the succession of newly independent states to pre-independence treaties has been of particular relevance to the African continent over a long period after independence. It can therefore be argued that the creation of a state arising from decolonisation is a "new" form of change of sovereignty which traditional international law has not sufficiently covered. The paramount importance and the urgency of undertaking a study of problems of the law of state succession "with appropriate references to the views of states which have achieved independence recently" are shown by the priority given to this topic by the United Nations International Law Commission (ILC).[5]

[3] Maluwa, T. 1999. *International Law in Post-Colonial Africa*. Hague: Kluwer Law International, p236.
[4] www.unep.org; last accessed 06 April 2011.
[5] The problem of state succession was placed on the ILCs agenda at its first session in 1949.

The doctrine of state succession is characterised by legal uncertainty and controversy. This is due partly to the fact that much of the state practice is vague and could be explained on the basis of special agreement and various rules distinct from the category of state succession. Not many settled legal rules have emerged as yet. Moreover, state practice with respect to succession is not coherent and often determined not by legal but political considerations on a case to case basis. The inconsistencies of state practice and the hesitations of international case law, which is insufficient on this subject, is best proof that the rules of international law in this matter are particularly vulnerable to the effects of new situations and new developments.

Theoretically speaking, where there is a separation or succession from an independent state which continues, in order to create a new state, the former continues as a state, even though territorially reduced, with its international rights and obligations intact. With regard to the succeeding territory itself, the leading view appears to be that the newly created state will commence international life free from the treaty rights and obligations applicable to its former sovereign. To the general rule of non-transmissibility (the "clean state" doctrine) there are some exceptions.[6] The clear examples are: law-making treaties or treaties evidencing rules of general international law and/or boundary treaties.[7]

Practically the problem of state succession is one of the most disputed areas of international law.[8] Why this should be so is a fascinating question. Different international crises resulting from termination of particular states or empires have not always been treated in a consistent fashion for a host of political reasons and this has inevitably led to difficulties in formulating the relevant legal rules with predictability. Accordingly, one need to sift through such diffuse and dissonant international practice, bearing in mind that specific bilateral solutions to particular problems may not necessarily be instantly generalisable.

[6] Cassese, A. 2001. *International Law*. New York: Oxford University Press, p.53.
[7] Ibid.
[8] See Brownlie, I. 2003. *Principles of Public International Law*. (6th edition). New York: Oxford University Press, p. 29.

BACKGROUND

The practical problems of state succession arose as the map of Europe was redrawn by way of cession, annexation or regulation of the results of wars.[9] The formulation of new national states during the 19th century was of particular importance. The effects of the birth of the Italian state, for example, of the divisions of Poland gave rise to serious legal difficulties characteristic of the scope of the problem: more specific problems arose within the British Commonwealth or with the national development of the United States.[10] The number of practical cases of state succession grew larger still with the end of the World War I and the disintegration of the Austro-Hungarian and the Ottoman Empires. New problems were added in the wake of World War II, which increased the number both of territorial disputes and of divided states in the world (e.g. Germany, Korea, and Vietnam). The period of decolonisation after 1945 introduced a new demission when some 100 states either came into being or regained their sovereignty.[11] The potential number of disputes was reduced considerably by state practice, which, in spite of some legal doubts, settled the essential problems using devolution agreements, unilateral declarations and other instruments of succession between the states concerned.[12]

Nevertheless, many problems of succession were left unresolved when agreement and consent proved impossible to attain for political reasons, for instance as a result of the escalating conflict between East and West. Further uncertainties were provided by the "re-establishment" of states which occurred for a number of times in the twentieth century: states which in legal terms appeared to have perished over a longer period of time were resurrected.[13] It was apparent that the distinct rules of customary international law then current were incapable of dealing with "resurrected" states of this kind. The

[9] Smith-Macalister, P. (Ed). 2000. *Encyclopedia of Public International Law*. (Vol 4). Elsevier: North-Holland. p641.
[10] ibid.:644.
[11] Shaw, M, N. 2003. *International Law*. (5th edition). Cambridge: Cambridge University Press, p 861.
[12] See for example the Treaty of St German (1919), which resolved some succession questions relating to the dissolution of the Austro-Hungarian Empire. This treaty provided for the responsibility of the public debts of the successor states of the Austro-Hungarian Empire.
[13] Smith-Macalister (2000:642).

gradual development of the rules of customary law in the field of state succession is only partly due to the multiplicity of historic events that had to be taken account of.[14]

Cases of succession affect the national existence of a state over a longer period and thus do not constitute a single legal act. The point of departure of the two Vienna Conventions, the consideration of state succession "occurring in conformity with international law" only (1978 Convention, Article 6; 1983 Convention, Article 3), do not govern the really difficult cases. It has to be added that the process of succession, especially in cases of extinction of states, may extend over several decades, so that a precise "date of the succession of states" cannot be determined. The Vienna Conventions seek to overcome part of the problem by making distinct the constituent facts of succession. Both Vienna Conventions are expressed to apply only to the effects of the succession of states.[15]

Moreover, succession provides that a new state inherits the international obligations that its predecessor had made. In the 1950s and 1960s, many African colonies achieved independence. While some followed the doctrine of succession (such as Nigeria), others followed the Nyerere Doctrine of selective succession to treaties.[16]

RESEARCH QUESTIONS AND OBJECTIVES OF THE STUDY

This paper builds on prior legal studies of problems which newly independent states find themselves faced at independence. This paper attempts to examine the Doctrine of state succession, reactions of the predecessor state, third party states and the International Community at large. The author analyses two recent successions namely, that of South Sudan and Kosovo. With the establishment of new sovereign states there are always questions pertaining to the resulting legal consequences. For Sudan, the key question revolves around the existing contracts entered into with the Republic of Sudan

[14] Smith-Macalister (2000:642).
[15] Article 6 of the 1978 Vienna Convention; Article 3 of the 1983 Convention.
[16] Menon, P.K. 1991. *The Succession of State in Respect to Treaty, State Property, Archives, and Debts*. Canada: The Edwin Mellen Press, p178.

in respect of the resources of the South. And for Kosovo, the central issue revolves around international recognition and the status of its ethnic minorities.

Furthermore, the paper tries to reflect upon the nature of the problems that arise and may go some way towards improving their effect. Finally, the paper will argue that a failure to codify state succession matters (bearing in mind that at present only two Conventions regulate matters related to state succession and one of them never came into force)[17] , state succession would normally lead to a disruption of legal relationships as far as public international law is concerned.

It is the intent of this study to perform some of the "spade-work" necessary to accurate discussion and development of a general doctrine of state succession, to correlate the findings into a description of general principles, and to offer a theory explaining the policy of states relating to the problems arising from change in sovereignty. Ultimately the purpose of the paper is to demonstrate that the process of creating new states comes with problems to international law.

The broad objective is to explore:

- Recognition of newly independent states.
- The attitude of the predecessor state, other states and international organisations.
- The effects of newly created states on Bilateral treaties and other contractual obligations.
- The effect of change of sovereignty on International Treaties.

[17] The Vienna Convention on Succession of Sates in Respect of Treaties (1978) and the Vienna Convention on Succession of States in Respect of State property, Archives and Debts (1983).

LITERATURE SURVEY

Although in recent years the issue of state succession has once again assumed a distinction in international legal practice, there remain considerable doubt and confusion as to the content and application of relevant rules and principles. This may seem surprising given the vast amount of literature on the subject, given the fact that the topic has been considered extensively by the International Law Commission,[18] and that two international conventions on the law of state succession have been adopted. Indeed, the impression is that the more that is written on the subject, the less clear or coherent it becomes.

There is a risk, therefore, that even this essay, written with the aim of analysing the situations in Sudan, with regards to existing contracts entered into with the Republic of Sudan and of Kosovo with regards to international recognition and the status of its ethnic minorities, will do little more than muddy the already dark waters. It is thought, however, that a little reflection upon the nature of the problems that arise may go some way towards improving their effects. The lack of common agreement on some of the central issues in the law of state succession has become particularly evident in the wake of the territorial or political changes in world, particularly following the dissolution of South Sudan and Kosovo.

With regard to the literature survey, Makonnen,[19] is of the opinion that there were and are existing practical problems arising from confusions due to lack of definite answers to most questions involving state succession. Makonnen in his book succeeded to a great extent to clarify the motives underlying the different attitudes of the new states of Eastern Africa for the changes they propose in the rules of international law. The author further attempted to demonstrate what the older states thought of the attitudes and practices of the new states in the area of state succession in contemporary international law.

[18] The problem of state succession was placed on the ILCs agenda at its first session in 1949 following the recommendation of Lauterpacht in his survey (UN Doc A/CN.4/1/Rev.l. 10 Feb. 1949).
[19] Makonnen, Y. 1984. State Succession and the New States of East Africa. Addis Abeba: UNESCO.

However, the author's book is not a miscellaneous description of the various aspects of international law in relation to the new African states but rather a specified study of a very important theme in contemporary international law and practice devoted to the legal problems of decolonisation in the sphere of treaty law. Even so, it does not attempt to deal with the whole subject but rather wisely excludes any treatment of the succession of governments which normally attended the emergence of the new States at independence. It therefore, concentrates on the problems peculiar to succession of states, thus avoiding a discussion of the thorny problems of recognition of government which would be thereby entailed.

Fabry,[20] on the other hand, analyses the practice of recognising new states, asserts that the issue of the norms or criteria of acknowledging new states has attracted little sustained attention even among international lawyers. The declaratory theory has remained the dominant mode of conceiving recognition despite the fact that countries such as Bosnia and Herzegovina, Croatia, Azerbaijan, Georgia, or Moldova, similarly to a number of ex-colonies in the 1960s and the 1970s, have plainly not met the criteria postulated by the theory or to have been considered as a state by international society prior to their recognition. Furthermore, entities such as the "Republic of Somaliland" have met the criteria but are not declared States in terms of international law.

On the contrary, Mahmoudi[21] in his case study of the recognition of the former Yugoslavia Republic expressed that recognition has been applied to demonstrate the concern of the outside world and its interest in the course of events inside former Yugoslavia. He is of the view that state practice in this case may be expected to have some implications for the development of the doctrine of recognition. The most significant one was in fact that secessionist movements within internationally recognised states have perhaps got some indications of the possibility of gaining international recognition as independent states. This is of course an unconscious shift in policy compared to practice after World War II, which has categorically respected the

[20] Fabry, M. 2010. Recognising States: international Society & the Establishment of New States Since 1776. New York: Oxford University Press.

[21] Bring, O & Mahmoudi, S (Eds). 1994. *Recognition of States: The case of former Yugoslav Republics*. Mahmoudi, S (Ed.). Current International Law Issues: Nordic Perspective. Dordrecht: Martinus Nijhoff Publishers.

possibility of secession. It is the purpose of this paper to dwell upon this aspect of recent practice of states and international organisations particularly that of the European Community with respect to Republic of Kosovo.

Moreover, Shaw[22] is of the view that difficulties may result from the change in the political sovereignty over the particular territorial entity for the purposes of international law and the world community. He exclaimed that the issues of state succession can arise in a number of defined circumstances, which mirror the ways in which political sovereignty may be acquired, such as decolonisation of all or part of an existing territorial unit, dismemberment of an existing states, secession, annexation and merger. In each of these cases a once-recognised entity disappears in whole or in part to be succeeded by some other authority, thus precipitating problems of transmission of rights and obligations.

He further noted that the question of state succession does not infringe upon the normal rights and duties of a state under international law. These exist by virtue of the fundamental principles of international law and as a consequence of sovereignty and not as a result of transference from the previous sovereign. The issue of state succession should also be distinguished from questions of succession of governments, particularly revolutionary succession and consequential patterns of recognition and responsibility.

[22] Shaw, M, N. 2003. *International Law*. (5th edition). Cambridge: Cambridge University Press.

SIGNIFICANCE OF THE STUDY

In a world heavily influenced by the geopolitics of regime change and state succession, international law has become increasingly significant in determining when and how to transfer legal responsibilities from a predecessor state to a successor state. International dilemmas including treaty obligations, recognition and acceptance of new states all have been the subject of significant debate and controversy. The International Law Commission (ILC) has made significant progress in developing universal legal rules, yet a great deal of ambiguity remains. Therefore, it is of prime importance that some device is found, accepted and applied to equitably solve the serious problems of person and public rights and obligations that arise.

DELIMITATION OF THE STUDY

This study focuses only on the international problems of state succession with regards to two case studies i.e. Kosovo and South Sudan. The study does not attempt to deal with the whole subject, but rather concentrates on the problems peculiar to creation of these states. Thus, the consequences of a change of sovereignty on the bilateral agreements, recognition by the international community and international affairs of these new states will be analysed in so far as they have a direct impact on Public International Law.

METHODOLOGY

A qualitative desktop approach is to be undertaken as the research method for the study. The key methodological approach will be literature survey, internet and other electronic surveys. Furthermore, a descriptive design will be used for this study to describe phenomena as they exist. This study will also include the analytical and predictive approach as an understanding must be formulated and thereby generalise from the general circumstances. The research will also make use of case studies to abstract key legal issues for the purposes of scrutiny.

OVERVIEW OF CHAPTERS

Chapter I lays out the introduction to the research problem and sets out the aims, significance and outlines the methodology of the study.

Chapter II deals with the background and discusses the nature and scope of the doctrine of state succession analysing the contribution and effectiveness of the Vienna Convention on Succession of Sates in Respect of Treaties, 1978 and the Vienna Convention on Succession of States in Respect of State property, Archives and Debts, 1983. Further, it deals with the general principle of state recognition in an attempt to examine whether recognition serves as a key constitutive function in the process of succession.

Chapter III reviews the theories of state succession, the continuity theory, clean-slate doctrine and the Nyerere doctrine.

Chapter VI looks at succession issues in South Sudan, focusing on the effects of state succession on existing contracts and the effect of change in sovereignty on bilateral treaties.

Chapter V looks at succession issues in Kosovo, focusing on the effects of the declaration of independence of Kosovo on its international status in relation with other countries and international organisations.

Chapter IV deals with concluding remarks.

CHAPTER II
NATURE AND SCOPE

Nature and Scope of state succession

Succession of states in international law consists of a set of express rules and related principles that define the legal consequences of changes in the territorial sovereignty of states.[23] This regime governs some of the rights and duties of the predecessor state. These rights and duties involve international treaties, citizenship, state property, foreign debt, archives, private property, and acquired rights under the laws of the predecessor State. Therefore , the succession of states represents a huge legal vacuum, largely because it has not been codified.[24] The international arena's minimal experience with state succession, prior to the process of decolonisation, did not transform into clear legal rules.[25]

According to Brownlie[26] state succession arises when there is a definitive replacement of one state by another in respect of sovereignty over a given territory in conformity with international law. The political events concerned include total dismemberment of an existing state, session, decolonisation of a part of a state, merger of existing states, and partial cession or annexation of the state territory. In each of these cases a once-recognised entity disappears in whole or in part to be succeeded by some other authority, thus precipitating problems of transmission of rights and obligations. Generally, events leading to the creation of a new state entail matters within the domestic jurisdiction of a state. International law has traditionally acknowledged succession subsequent to a factual state of events which has led to a situation in which the constitutive elements of a state are present rather than stating conditions of its

[23] See O'Connell, D.P. 1967. *State Succession in Municipal and International Law*. (3rd edition). Cambridge: Cambridge University Press, p145.
[24] The International Law Commission started its work on the codification of this subject in 1963. However, after a decade it concluded such work was too difficult (if not impossible) to successfully pursue because "the task of codification was particularly difficult in a field where there was no general doctrine and State practice and custom had not yet produced well established and consistent precedents."
[25] O'Connell (1967:146).
[26] Brownlie (2003: 621).

legality.[27] Thus international law has neither provided for a "right to succession" nor condemned succession aiming at the acquisition of independence.[28] Brownlie[29] further stated that, issue of state succession should also be distinguished from questions of succession of governments, particularly revolutionary succession, and consequential patterns of recognition and responsibility.

Rules and principles on state succession address the legal consequences of the changes in territorial sovereignty of states.[30] Changes in political regime effectuated through illegal means do not result in the activation of the rules and principles on state succession.[31] Taking into account that the succession of states has to do with the legal consequences of changes in sovereignty, no matter the scope and extent of this change, it does not matter whether the predecessor state preserves its legal identity and continuity following a change in territorial sovereignty.[32]

Examples of what might happen in such cases are as follows: the state affected by such changes in territorial sovereignty may lose its membership in some international treaties; some of its citizens may become citizens of another state; the state's rights and duties may pass onto others; and acquired rights under its old laws may fall under the scrutiny of the new sovereign.[33]

Such a state preserves its identity and subjectivity on the international plane because the issues of state identity and continuity are separate from the matter of the succession of states in international law. Whether a state has lost its identity and continuity is a matter decided by the international community, no matter the scope or extent of the

[27] Smith-Macalister, P. (Ed). 2000. *Encyclopaedia of Public International Law*. (Vol 4). Elsevier: North-Holland, p355.
[28] Ibid.
[29] Brownlie (2003: 621).
[30] The 1978 and 1983 Vienna Conventions define State succession as "the replacement of one State by another in the responsibility for the international relations of territory." Neither the 1978 Convention nor 1983 Convention discusses the legal consequences of the changes in the field of international rights and duties of States affected by such changes, which is the very essence of State succession.
[31] The International Law Commission says changes in territorial sovereignty of States should be in conformity with international law. See Hasani, E. 2007. "The Evolution of the Succession Process in Former Yugoslavia. *Miskolc Journal of International Law*, Vol. 4 (No. 2): pp 12-37.
[32] Ibid.
[33] Brownlie (2003:30)

changes in territorial sovereignty. Such a determination is a matter of convention and agreement among the members of the international community.[34] It is not dependent upon the size of the lost territory, or the form of transformation in the predecessor state. A state could totally dissolve. But for the purposes of international law, the predecessor state has preserved its identity and continuity despite its dissolution.[35]

The first problem confronted by scholars attempting to divide doctrinal rules of law on state succession is that international law does not precisely or helpfully define either "state" or "succession," rendering the subjects of the inquiry themselves unclear. With respect to states, the constant but largely academic debate between the declaratory and constitutive criteria for statehood, which offers little in the way of practical guidance or clarity,[36] reflects a more basic truth about the contemporary global order: state identity, like personal identity, is not fixed; it constantly fluctuates and evolves.[37]

The Montevideo or other doctrinal criteria for statehood inevitably convey an oversimplified and incomplete understanding of this principal subject of international law. States may acquire new territory; accede to a treaty regime-such as those governing the European Union and the World Trade Organisation-requiring fundamental changes to their internal laws, elect a new government, or experience a (welcome or unwelcome) *coup d'etat.* Marginal changes to state identity, for example, the acquisition of a disputed piece of territory, consensual border adjustments, or the election of a parliament controlled by a new party-seldom disrupt global economic or other arrangements in a way that requires an authoritative international response.[38]

[34] Aust, A. 2005. *Handbook of International Law*. Cambridge: Cambridge University Press, p17.
[35] Ibid.
[36] For an overview and critique, see generally Sloane, R. D. (2002). *The Changing Face of Recognition in International Law: A Case Study of Tibet.* No.16, p107. Retrieved May 6, 2011, from ABI/INFORM Global database. (Critiquing the declaratory and constitutive schools of thought on the recognition of States and suggesting that, for analytic and normative reasons, recognition could more profitably be subdivided into its political, legal, and civil components).
[37] Hasani, E. 2007. "The Evolution of the Succession Process in Former Yugoslavia. *Miskolc Journal of International Law*, Vol. 4 (No. 2): pp 12-37.
[38] Ibid.

In general the process involved is that of a permanent displacement of sovereign power and thus temporary changes resulting from aggressive occupation or grants of exclusive possession of territory by treaty are excluded. Distinct also is the case where one state acts as the delegate or agent of another for legal purposes.[39]

Cases of succession affect the national existance of a state over a longer period and thus do not constitute a single act.[40] The point of departure is the two Vienna Conventions. Virtually no positive law of general application, conventional or customary, exists in this area.[41] The two treaties were negotiated under the auspices of the International Law Commission: the Vienna Convention on Succession of States in Respect of Treaties ("1978 Convention"),[42] which entered into force in 1996, and the Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts ("1983 Convention"), which has yet to enter into force.[43] But their limited scope, application, and subscription make them of correspondingly limited utility,[44] particularly in view of dramatic changes in the global political and economic order since the era of decolonisation and the Cold War.

(a) Vienna Convention on the Succession of States in respect of Treaties, 1978.

This convention came into force on 06 November 1996 and as January 2007 there were 21 parties, which did not include UK, but did include many states of the former Yugoslavia. Thus, although participation in this Convention is not

[39] Machiavelli, P. 1998. The Prince. Transl. By Manfield, H. C. (2nd edition). Chicago: University of Chicago press, p153.
[40] Smith-Macalister (2000:642).
[41] Dixon, M. 1996. *Textbook on International Law*. (3rd edition). London: Blackstone Press Limited, p73.
[42] CHENG, T. 2006. *State Succession and Commercial Obligations*. Available at http://opiniojuris.org/2008/02/21/the-succession-of-Iraq-and-minimum-public-order/. Last accessed 06 April 2011.
[43] Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, Apr. 8, 1983, 22 I.L.M. 306 (1983) [hereinafter 1983 Convention].
[44] See, example Williams, P.R. 1994. *The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?* No. 23, p18. Retrieved May 6, 2011, from ABI/INFORM Global database. (observing that "it is generally considered that the [1978] Convention does not reflect customary international law" and that despite offering "a number of customary legal rules useful for the determination of treaty continuity," the Convention "does not accurately reflect the divergent practices" relative to the continuity of treaty obligations following State successions).

widespread, there are indications that it is useful in resolving practical difficulties that occur when the federal states break apart.[45]

(b) Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 1983.

This Convention was adopted with 54 votes in favour (mainly socialist and developing states), with 11 votes against and 11 abstentions (Western states). The 1983 Vienna Convention, which has not entered into effect because it has not obtained the requisite fifteen ratifications, failed to resolve many important questions arising in the dissolution of states. For example, the treaty failed to distinguish between territorial and national assets.[46] It did not require any proportionality between assumption of claims and assets.[47] It did not provide for any ongoing dispute resolution machinery. In the main, it provided for claims to be resolved by international agreement and provided only a general framework of default rules.[48]

General provisions of the Convention correspond with the respective provisions of the Vienna Convention of 1978 on the succession of states in respect of treaties. Substantive provisions of the Convention can be divided into two groups: general provisions concerning all the types of succession, and specific regulations dealing with particular types of succession. The state property was defined as all kinds of property, rights, and interests that, at the date of the

[45] Dixon (1996:73).

[46] The 1983 Vienna Convention did not distinguish between national and territorial debt, but it did distinguish between national and territorial assets. Territorial assets are those things, such as power plants, manufacturing enterprises, and mineral deposits that are linked to the physical territory of a particular successor state. National assets are "held by the former central government, and include things such as currency accounts, federal movable property, gold reserves, and diplomatic and state property located abroad."

[47] Equitable allocation can be defined in terms of gross national product, natural resources, territory, population, or some combination, but the main issue is whether a successor state's share of assets is the same as its share of debts.

[48] Dixon (1996:74).

succession of states, belonged to the predecessor state in accordance with its domestic law.[49]

During the codification conference a special provision was added in order to guarantee the integrity of the predecessor's property before its transfer to the successor state.[50] The effects of the transfer of state property were defined in Article 9 of the Convention, according to which the property rights of the predecessor state expire and they are replaced by the equal (as to the scope) rights of the successor state. The transfer of the property cannot influence any possible rights and interests of third parties. The predecessor state is not entitled to any indemnity. Finally, a general rule providing for the priority of an agreement between the predecessor state and successor state (so called devolution agreement) as to the partition of state property was confirmed.[51]

The international arena's minimal experience with state succession, prior to the process of decolonisation, did not transform into clear legal rules. The 1978 and 1983 Vienna Conventions did nothing other than sanction the rules of succession of states within the prior colonial context. Outside this context, the rules on state succession remained applicable only at the level of legal principles. This state of affairs emerged from the "clean slate" doctrine. This doctrine provides that of all dimensions of state succession, former colonies inherit only the rules and principles concerning border regimes and membership in certain international organisations created by their former masters. [52]

The Vienna Conventions of 1978 and 1983 constitute without any doubt a landmark in the process of codification and progressive development of the law of succession of states. These conventions do not, however, represent the conclusion of that process. The conventions do not provide solutions for many legal problems connected with the occurrence of a succession of state, some of these are connected with the issues dealt

[49] Ibid.
[50] Article 13.
[51] Dixon (1996:74).
[52] Ibid.:75.

with in the conventions but are the subject of express reservations, other problems, because of their coverage, lie well outside the scope of application of the conventions.[53]

For a long time the attempt to find a general solution for cases of succession rested on references to Roman law and civil law. However, the civil law rules governing devolution of rights and duties could not be transfered to international law since the rights and duties of individuals are not comparable with those of states.[54] Therefore, the civilian concept had to be ruled out as a "universal touchstone".[55] Unfortunately, neither of the vienna Conventions supplies a sufficient legal basis. The 1978 Vienna Convention on Succession of States in Respect of Treaties covers only a part of the law of treaties, in particular the treaties concluded between states only. The Convention in part relies on rules of customary law in force, but it also provides for new uncertainties in respect of newly independent states.[56] The attempt to apply the clean slate principle to former colonies[57] prevents the acknowledgement of the Convention as representing law already in force. Thus, in every single case it must be ascertained whether a rule of international law actually exists and is applicable.

The Vienna Conventions seek to overcome part of the problems by making distinct the constituent facts of succession and the legal consequences arising from succession. Both Vienna Conventions are expressed to apply only to effects of the succession of states.[58]Therefore the International Law Commission's failed efforts to codify a doctrine for state succession reflects the state of legal doctrine as supported by precedents in state praxis and opinions of learned authors. State practice and legal theory regarding succession yield separate approaches dealing with the legal consequences of such succession.

[53] Ibid.
[54] Smith-Macalister (2000:642).
[55] O'Connell (1967:148).
[56] Smith-Macalister (2000:643).
[57] Article 16 t0 37.
[58] Article 6 of the 1978 Vienna Convention; article 3 of the 1983 Vienna Convention.

Recognition of states

Each state conducts its relations with other states on the basis of particular understandings of the legal status of those other states. In many instances, such understandings are uncontroversial and amount to a recognition of the *status quo*: the UK and its dealings with France, for example.[59] Sometimes, however, a state can take a position which challenges the existing order, such as recognising a new state, for example, the claim of Kosovo in 2008 to constitute a state comprising territory formerly part of Serbia or take a position which rejects a claim itself challenging the *status quo* for example that of the Turkish Republic of Northern Cyprus to constitute a state comprising territory formerly part of Cyprus. Recognition, then, can be an attempt to alter or reaffirm the existing order.[60]

There are two main international law aspects to the recognition process.[61]

1. Recognition can play a role in the international legality of the object of recognition: sometimes, a state is or is not a state legally because, amongst other things, other states have decided to treat it as such.
2. The recognition itself is regulated by international law, in that states are sometimes constrained in their choices when it comes to recognition.

These two aspects are related, and can come into tension insofar as states seek through recognition to create a new sovereignty arrangement which challenges the legal *status quo* and thereby is potentially at odds with their obligations to another state or group of states whose entitlements are being altered by this change.[62] The international law framework is bound up in the rules that define what is and is not a state. In understanding the international law concerning statehood, and their significance for

[59] Bedjaoui, M. (ed). 1991. International law: Achievements and Prospects. Bernardez, S. T. *Succession of States*. Elsevier: Martinus Nijhoff publishers- UNESCO, p389.
[60] Ibid.
[61] Wilde, R, A Cannon & E Wilmshurst. 2010. *"Recognition or Non-recognition in UK and International Law"*. *International Law Discussion Group*. London: Chatham House, p2.
[62] (ibid.).

recognition, a distinction between two particular usages of the term 'sovereignty' is instructive.[63]

International law has little to say about the legality of other states' recognition of newly independent states. In general, there is neither a duty to recognise a state, nor a duty to refrain from recognising a state. Thus, recognition of newly independent states is generally lawful, so long as that new state has effectively established its independence in fact.[64]

Shaw,[65] explains that recognition involves consequences both on international plane and within municipal law. If an entity is recognised as a state it will entail the consideration of rights and duties that would not otherwise be relevant. There are privileges permitted to a foreign state before the municipal courts that would not be allowed to other institutions or persons.

In addition, it is increasingly accepted that it is unlawful to recognise territorial sovereignty acquired through a violation of the prohibition on the use of force, or violation of another peremptory norm of international law.[66] It would also be unlawful to recognize a state where the Security Council has decided, with reference to a particular situation, that states must refrain from recognising that state (e.g., as happened in the case of Southern Rhodesia[67]). It is in such a context that the otherwise separate questions of the existence of a state and recognition of that state may intersect. If the international community collectively agrees not to accord recognition to an entity that is otherwise factually independent, it may be said that that entity's claim to statehood has been denied by international law, as determined by the international community. Conversely, even where a new state has come into being in violation of the prohibition

[63] Dugard, J. 1987. *Recognition and the United Nations*. Cambridge: Grotius Publications Limited, p15.
[64] Dugard (1987:90)
[65] Shaw (2003: 367).
[66] See for example, International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, at article 41 (2001).
[67] See UN Security Council Resolution 217 (1965).

on the use of force, or other peremptory norm of international law, collective recognition may operate to affirm that state's accession to sovereignty.[68]

New states are rarely successful in achieving recognition by all members of the international community within a short period of time (unless they are states that were granted independence by peaceful means). Usually, only a few states grant recognition and accordingly initiate dealings with new entity, exchanging diplomatic envoys, entering into agreements, and so on. A segment of the international community may decide to hold aloof for some time: this attitude is usually motivated by political considerations.[69] If this is the case, the new state will not be able to enter into active relations with those states. In other words no treaties are concluded, diplomats are not exchanged, the nationals of the new state are not allowed to enter the non-recognizing countries and vice versa. Cassese[70] states that this does not, however, necessarily mean that the new entity is devoid of legal personality in relation to non-recognising nations.

Generally international rules such as those concerning the high seas, or respect for territorial and political sovereignty etc do apply to the relationships between the new states and all other members of the community. It follows that non-recognising states are duty bound to refrain from invading or occupying the new states or from jeopardising its political independence.[71]

This was clearly illustrated by the case of *Southern Rhodesia*[72] when its internal political system occupied majority rule in 1980. By Resolution 216 and 217 of 12 November 1965 the UN Security Council had called upon all states "not to recognise this illegal act." Until 1980 all states (except for South Africa) withdrew recognition on account of Southern Rhodesia's racist policy. This general stand only meant that no other state

[68] Where a state comes into being through violation of a peremptory norm of international law, and attracts only partial recognition, it is clear that those recognizing states would be violating their obligation to refrain from recognizing the state; however, it is unclear whether or not the state would have come into existence as a matter of law.
[69] This can be a lack of ideological or political affinity, or even open opposition, or else the existence of strong economic or geographic obstacles to the subsistence of the new entity.
[70] Cassese (2001:51).
[71] Ibid.
[72] From its Unilateral Declaration of Independence (UDI, 1965).

(except South Africa) was ready to enter into relations with Southern Rhodesia as long as it refused to change its domestic policies. Socially, Southern Rhodesia was regarded as an outcast, pariah state.

Legally speaking other states looked upon Southern Rhodesia as a territory under British colonial administration. It did, nonetheless, possess independent rights and duties, although it was not able to make use of most of them.

In a more recent case of the *Unilateral Declaration of Independence of Kosovo*[73] a number of states expressed concern over the unilateral character of Kosovo's declaration, or announced explicitly that they will not recognise an independent Kosovo. The UN Security Council was divided on this issue: of its five members with veto power, three (the United States, United Kingdom, France) had recognised the declaration of independence, while the People's Republic of China has expressed concern, urging the continuation of the previous negotiation framework. Russia had rejected the declaration and considers it illegal.

It has been argued that recognition is merely declarative and not constitutive. Therefore, if Kosovo met the criteria for statehood, then non-recognition does not invalidate its statehood. This view might find some support in the Convention on Rights and Duties of States.[74] However, most of those who adopt this 'declaratory' theory of recognition accept that recognition can have a constitutive role in certain marginal cases: it is capable of pushing things further in favour of a particular outcome towards which the existing criteria are pointing but which itself is not reached by considering them alone. Thus, if an entity claims to be a new state, but is somewhat deficient in conformity to the

[73] On February 17, 2008, Kosovo's parliament voted to declare independence from Serbia. This unilateral declaration accelerated the international decision-making process on the status of Kosovo, and required a collective international response.

[74] Concluded on December 26, 1933 in Montevideo. Article 1 of the Montevideo Convention suggests the criteria for statehood: "The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states." None of these four criteria explicitly depend on recognition.

viability criteria, recognition by other states in favour of its claim to statehood may tip the balance.[75]

[75] Fabry, M. 2010. *Recognising States: International Society and the Establishment of New States Since 1776*. New York: Oxford University Press, P3.

CHAPTER III

REVIEW OF THE THEORIES OF STATE SUCCESSION

The relationship between international law and municipal or rather domestic law has been saddled by an array of conflicting ideas, particularly with regards to the application of International law on an emerging state.[76] This problem has manifested itself mostly in the African continent as a direct consequence of independence of African states. In simple and plain language one can submit that the main debate which troubles the minds of international lawyers, political leaders, as well as national courts is 'what happens when a new state emerges? And whether state should be bound by international commitments of its predecessors?

Some of the vague theories of state succession have been definitely coloured by the thought that the will of the conqueror will be imposed upon the conquered. Herbert[77] argues that not only causes and means but also the forms of state succession may be factors in determining the effects. In spite of the challenging problems raised as a result of state changes, few writers have attempted to find and formulate rules governing their solution. Many general treatises on international law have referred to them only to pass quickly to other subjects.[78] Unfortunately, most of the publicists who have explored the field have given an impression of vagueness in terms and confusion in discussion.

Nevertheless, the development of three main theories of state succession can be found in the literature of the field. For the purpose of this part of the essay the debate will focus on the main theme of this writing which is to discuss the validity of pre-existing international laws on a new emerged state. The discussion will entirely be based on conflicting theories on the issue, one of which being the 'optional doctrine' or authoritatively known as 'the *Nyerere Doctrine* of state succession'.[79]

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[76] Aust (2005:12).
[77] Herbert, A. 1934. *The American Doctrine of State Succession*, Vol LII. No.4. Baltimore: The Johns Horpkins Press, p11.
[78] Ibid.
[79] Ibid.:12.

Doctrine of Universal Succession

Commencing with the "Universal Succession", this is a doctrine taken from Roman law and based on the analogy of a state to a private individual. It has had the influence that may be traced through the writings of many authorised from the time of Grotius to the present day.[80] According to the Roman concept of succession the "estate" with its rights and obligations was a legal personality possessed of immortality.[81] Upon the death of an owner, his estate was preserved completely with all its rights and obligations attached.[82] Although this "universal succession" did not expressly state a liability on the part of the inheritor to more than the inheritance, it nevertheless pointed to it as a possibility. Not only did the legal relationship pass from one subject to another, but the subject of that relationship remained the same. In other words there was no succession, but a continuation.[83]

The general principle is therefore that, when a new state emerges the principle of succession applies. This means that the new emerging State inherits the international obligations that its predecessor had made. This general principle testifies to the basic value of international society which emphasises the importance of continuation and stability of international order.[84] Such adherence to the doctrine of succession can be seen in the case of Nigeria, whereby Nigeria subjected itself to all the treaties and international commitments entered by its colonial masters (the British).[85]

However, while the doctrine of universal succession was adhered to by nations such as Nigeria, some other African countries opposed such a 'political submissive approach' and thus opted to apply opposing doctrines such as the clean-slate doctrine, and Nyerere doctrine of state succession.

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[80] Kaser, M. 1965. *Roman Private Law*. Durban: Butterworthes, p295.

[81] For this view see De Waal, MJ and Schoeman, MC. 1996. *Law of Succession: Student's Handbook*. (2nd edition). Cape Town: Juta & Co, Ltd, p55.

[82] Kaser (1965: 295).

[83] Ibid.

[84] See Marco, A. *Alternative Approach to the International Law of the State Succession*. Available at http://www.lexisnexis.com/; last accessed on 18 July 2011.

[85] Menon, P.K. 1991. *The Succession of State in Respect to Treaty, State Property, Archives, and Debts*. Canada: The Edwin Mellen Press, p177.

Clean-slate Doctrine

The clean-slate doctrine is the one under which a new state starts without any of the obligations of the predecessor state. That means that, the successor state acquires its territory with a clean-slate or *tabulas rasa*, therefore under no obligation to succeed pre-independence treaties. Menon[86] provides that "a notice of termination of all the existing treaties by the new state immediately after it declares independence will undoubtedly create a legal emptiness because of the difficulty for the new state to economic and other relations with other nations". Such a doctrine was tipped to be used in Namibia by Makonnen[87] when he urged that, following Namibia's accession independence on the 21st March 1990; as far as succession is concerned the most appropriate approach to be used should be the clean-slate doctrine. Maluwa[88] argues that Makonnen[89] reached such a conclusion on the ground that all dealings by South Africa and other aliens concerning Namibia since October 1966 were illegal and therefore invalid, as a result of the Advisory Opinion of the International Court of Justice (declaring the continuing South Africa occupation of the territory illegal). This conclusion is somewhat correct and arguably has been vindicated by Article 145[90] of the Namibian Constitution.

Based on the "clean slate" doctrine, former colonies refused to accept most of the rights and duties of their predecessor states, especially when it came to foreign debt and the acquired rights of private persons (individuals and legal entities alike). The two Vienna Conventions, as well as states' practices based on them, bluntly denied the doctrine of universal succession that had firmly been entrenched in traditional international law. The opposite of the "clean slate" doctrine (universal succession) stresses that every change in territorial sovereignty should result in an activation of the historical rules and principles on state succession.

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[86] Ibid.:178.
[87] Makonne, Y. 1984. *State Succession and the New States of East Africa*. Addis Abeba: UNESCO, p144.
[88] Maluwa (1999:243).
[89] Makonne (1984:146).
[90] Article 145, a saving clause, provides that nothing contained in the Constitution shall be construed as recognising in any way the validity of the Administration of Namibia by South Africa. The interpretation of this provision was at issue in the case of *Minister of Defence, Namibia. V. Mwandinghi* 1992 (2) SA 355 (NmS).

The clean-slate principle was considered controversial on the applicability to the newly independent states resulting from decolonisation. International Law Commission members maintained that new states should not be bound by the agreements and treaties concluded by the rulers in the colony. Schachter[91] provides that the application of the clean-slate principle regarding the new state that emerged from separation rather than decolonisation was not approved in the Vienna Convention. Contrasting with the colonies, the new states could conclude or accept the treaties based on their interests. Vagts[92] confirms that now that the decolonisation has come to an end there is still ambiguity and the question whether states which have successed are able to claim the right of applying the clean-slate principle in choosing the treaties they want to be part of.

A major criticism to the clean-slate doctrine has been offered by Udokang[93] when he argued that 'abrupt discontinuity of all treaty obligations contracted by predecessor state might well lead to a legal vacuum and serious confusion where the successor state can find themselves isolated from international community.

Nyerere Doctrine

The third conflicting doctrine to that of traditional adherence to succession is termed the 'Nyerere doctrine of state succession'. Julius Nyerere, the first President of Tanzania, considered that international agreements dating from colonial times should be renegotiated when a state becomes independent, as the nation should not be bound by something that the nation was not in a sovereign position to agree to at that time.[94] According to this doctrine, a newly independent State can, upon independence, review the international treaties that it stands to inherit and decide which of the agreements it will accept and which it will repudiate. Although such an "optional" approach to events of state succession was not new and was already recognised by customary international law, Nyerere is recognised for the modern formulation of the optional doctrine of the law of state succession. It is worth mentioning that this doctrine came to existence after

[91] Schachter, O. 1993. "State Succession: The Once and Future Law". *Virginia Journal of International Law*. Vol. 33 (No. 253): p23-37.
[92] Vagts, D.F. 1993. "State Succession: The Codifiers view". *Virginia Journal of International Law*. Vol.33. (No. 275): p30-57.
[93] Udokang, O. 1972. *Succession of New States to International Treaties*. New York: Oceana Publications, p349.
[94] Ibid.

Nyerere (the Prime Minister of newly independent Tanganyika) made a unilateral declaration to the Acting general Secretary of the United Nations in 1961.

In addition, with regards to multilateral treaties, the new government would review them and indicate to the depositary concerned what steps would be taken in relation to each such instrument, whether by way of confirmation of termination, confirmation of succession or accession. The Nyerere doctrine is advantageous in several ways;[95]

(a) It allows states to fill the void created by the lapse of predecessor's treaties while maintaining the right to examine each treaty individually before deciding whether to maintain such legal obligations.
(b) With the above advantage, Nyerere doctrine is also important as it rectifies the aforementioned shortcomings with regards to negative succession or clean-slate doctrine.
(c) Unlike the clean-slate doctrine under which a new State starts without any of the obligations of the predecessor State, Nyerere doctrine of succession however, does not rule out or prejudice the possibility or desirability of renewal (after a legal interruption during the succession) of commitments or agreements of mutual interest to the parties concerned.

The doctrines have contributed to the literature of international law as devices by which the problem of state succession may be solved. However, it is the task of international law, after taking into consideration all the variable factors, to develop some method or device for equitably determining the legal effects of these changes in sovereignty. The utility of a principle (and by principle is meant a recognised and observed working device) which would be applied in the settlement of problems of state succession. Regardless of whether or not such a principle can be found, in view of the importance of the subject any search for a solution to the problems involved is not only justified but necessary.

[95] Udokang (1972: 351).

CHAPTER IV

STATE SUCCESSION ISSUES IN SOUTHERN SUDAN

The people of Southern Sudan have decided overwhelmingly to create the newest African state by a referendum in January 2011. On the 9 July 2011 the Republic of South Sudan was born with an independence ceremony held at the Garang Memorial site in the capital Juba; the burial place of former Southern leader and rebel hero John Garang.

The secession of Southern Sudan from the Republic of Sudan pursuant to the 2011 referendum will almost certainly be defined as a *continuation*. Based on the language of the Comprehensive Peace Agreement (CPA) and application of international norms, the Republic of Sudan is considered the "continuing state" and Southern Sudan is considered a newly independent or "successor state."[96]

It is worth noting that whenever there is a change of sovereignty in a given territory of a State; for example, when a part of a given territory of a state separates from its parent State, many international legal issues relating to state succession may arise. Is the new State of Southern Sudan bound by the bilateral agreements of its predecessor (Northern Sudan)? Briefly summarised, the newly independent states generally benefit from what may be said to be an 'optional clean-slate', permitting them to choose whether or not to be bound by any or all of the treaties, whether multilateral or bilateral, that had applied in respect of their territory on that date of independence.[97] One example is the Nile agreements between North Sudan and Egypt.

As Southern Sudan seceded from North Sudan, it became the 11th riparian of the Nile Basin. It is located downstream of the Nile Equatorial Lakes region and has strong

[96] Iyob, R. 2009. *'Prospects for a New Sudan: Which People, Who's Right? What Choices?'* background paper for the 8-9 June 2009 EUISS workshops. Available at

[97] Van Wyk, D, Wiechers, M & Hill, R. (Eds). 1991. NAMIBIA*: Constitutional and International Law Issues*. Szasz, P. C. *Succession to Treaties under the Namibia Constitution*. Pretoria: VerLoren van Themaat Centre for Public Law Studies, p65.

connections to the Eastern Nile.[98] Due to the successful separation and emergence as a new sovereign state, South Sudan will have to decide on how to proceed on succession with respect to international Nile water agreement currently applicable in the territory.

The Anglo-Egyptian Nile Water Agreement of 1929 and 1959

Water boundaries are perhaps the oldest and most widely used of man's boundaries. Yet, despite this long history of usage, water boundaries are probably, in today's society, the most frequently and bitterly contested boundaries. The edge of the water forms an excellent natural boundary; complex technical and legal predicaments may result. Therefore, unique laws and techniques must be developed for defining and locating water boundaries.[99]

On 7 May 1929, the government of the United Kingdom entered into an agreement by an exchange of notes concerning the use of the Nile water. The United Kingdom became a contracting party to this agreement because of its status as the state responsible for the affairs of Sudan and for its Eastern Africa colonial territories.[100] The agreement is "essentially directed towards the regulation of irrigation arrangements on the Nile basin." The Agreement included specific volumetric water allocations[101] and helped to institutionalise the belief that Egypt and Sudan had "natural and historic rights" to the Nile water. The 1959 Agreement aimed at the full utilisations of the Nile. After the Independence of Sudan in 1956, Egypt's plans to build the High Aswan Dam and the need to renegotiate existing water allocations under the 1929 Agreement

[98] Chelkeba, A. 2011. *Succession of Southern Sudan to the 1929 and 1959 Nile Water Agreements and its implications*. Available on the website of the International Water Law Project at http://internationalwaterlaw.org/documents/regionaldocsNile_River_Basin_Cooperative_Framework_2010.pdf Last accessed on the 08 April 2011.
[99] Cole, G.M. 1997. *Water Boundaries*. New York: John Wiley & Sons Inc, p xi.
[100] Makonnen (1983:303).
[101] About 48 billion m3 (Bm3)/year (yr) to Egypt and 4 Bm3/yr to Sudan.

prompted the two countries to come up with new volumetric water allocations (55.5 Bm3/yr to Egypt and 18.5 Bm3/yr to Sudan) under a new agreement.[102]

In some cases of state succession, separation treaties dealing with key issues relating to the succession (including who remains responsible for the obligations entered into by the predecessor state) are agreed in advance of the secession.[103] The essence of the fundamental question as to whether the Southern Sudan is bound by the North Sudan's obligations may bring about the following international legal issues:

i. Whether the new Southern Sudan state is under an international legal obligation to respect and honour the 1929 and 1959 Nile agreement made by North Sudan with Egypt.
ii. What are the conditions that may obligate the new Southern Sudan state to be under the duty to fulfil its presumed international law obligation under the 1929 and 1959 Nile agreement?
iii. What are the conditions that may release the new Southern Sudan state from honouring its presumed obligation?
iv. What laws or conventions of international law governing state succession apply to a new successor state and more specifically to the case of the new Southern Sudan state and the states (Egypt) which entered into an international Nile water agreements with the former sovereign (North Sudan)?

It has been argued that agreements relating to the use of international rivers could be included in the category of treaties automatically binding successor states as they are considered by some as related to the territory. However, newly independent states have often declined to be bound by water agreements concluded by predecessor states, for example Tanzania.[104] A distinction should be made between rights and obligations concerning international rivers that are of territorial character and those rights and obligations that concern the waters flowing in a river in their characteristics as a natural

[102] Makonnen (1983:303).
[103] There are many historic examples of this, such as the famous Treaty of 1921 between the UK and the Irish Free State or the Indian Independence Act of 1947.
[104] Makonnen (1983:304).

resource.[105] Established navigation rights are the equivalent to right of passage over a states territory taking advantage of the specific surface texture of water; they are inherently linked to territory of a state and therefore are not affected by succession. Automatic continuity of rights and obligations that relate to water use as a resource use, such as water supply to non-riparian population would constitute an ex-ante restriction of sovereignty of the new state with respect to its right to dispose of natural resources on its territory.[106]

Application of the 1978 Vienna Convention to new Southern Sudan

There are currently few, if any, crystallised rules regarding the effects of state succession on pre-existing international obligations. Every succession has unique variables and intense political pressures that have precluded the formation of customary law through consistent state practice and *opinio juris*. The Vienna Convention on Succession in Respect of Treaties of 1978 has entered into force, but lacks widespread ratification and binds only its handful of signatories.[107]

The International law Commission which drafted the 1978 Vienna Convention had declared its support for the principle of permanent sovereignty over natural resources and had voted in favour of *Article 13* for it was convinced that states must have full sovereignty over their natural resources.[108] Article 13 had the merit of treating the principle of permanent sovereignty over natural resources as an element of international law. Article 13 states that *"Nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every state over its natural wealth and resources".*

Therefore, the International Law Commission felt that continuity of bilateral treaties with respect to the successor state did not reflect a customary rule, as distinct from the will of the states concerned, and that the fundamental rule with regard to bilateral treaties was

[105] Cole (1997: xi).
[106] Ibid.
[107] Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, Apr. 8, 1983, 22 I.L.M. 306, available at http://www.un.org/law/ilc/texts/tresufra.htm last accessed on the 23 April 2011.
[108] Fox, H. 1992. *International economic law and developing states: an introduction*. London: BIICL, pp.1–23.

that their continuance in force after independence was a matter for agreement, express or tacit, between the newly independent state and the other state party which had contracted with the predecessor state.[109] Article 24 notes that a bilateral treaty in force for the territory in question is considered to be in force for the newly independent state and the other state party where they expressly so agree or by reason of their conduct they are to be considered as having so agreed.

Examining the transmissibility of the 1929 and 1959 Nile Agreement to the new state of South Sudan in light of the 1978 Convention, one would conclude that the new state of South Sudan has an internationally recognised right to dispose of natural resources on its territory as a result of the principle of clean slate doctrine. Additionally, the 1929 and 1959 Nile Agreement is about the use of water as a natural resource which the 1978 Vienna Convention under its Article 13 has declared support for the principle of permanent sovereignty over natural resources.[110] This is applicable to the new state of South Sudan. The 1929 and 1959 agreements do not deal with the contours of boundaries in any shape or form but with the concrete issue of allocating the waters of the Nile between riparian states. As a result, the 1929 and 1959 agreements governing transboundary water resources do not fall within the boundary exceptional clause.[111]

In addition, the 1929 and 1959 Nile water agreements are in the more expansive category of treaties that can be nullified at independence.[112] To put it differently, the new state of South Sudan can nullify the agreement if it wishes to do so according to Article 24 of 1978 Vienna Convention because the 1929 and 1959 Nile Agreements were a bilateral international water treaty between Sudan and Egypt.

Moreover, as far as predecessor state is concerned, North Sudan is under an obligation to observe the 1959 Nile water agreement. Article 35 of the 1978 convention states, *"When, after separation of any part of the territory of a state, the predecessor state*

[109] Nile Basin Initiative, "Agreement on the Nile River Basin Cooperative Framework opened for signature", available at www.nilebasin.org/index.php?option=com_content&task=view&id=165&Itemid=1 last accessed on 08 September 2011.
[110] Ibid.
[111] Ibid.
[112] Brownlie (2003: 289).

continues to exist, any treaty which at the date of the succession of states was in force in respect of the predecessor state continues in force in respect of its remaining territory unless the states concerned otherwise agree and/or it is established that the treaty related only to the territory which has separated from the predecessor state and/or it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor state would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation."

However, based on recent state practice, the international community would likely expect Southern Sudan to continue with Northern Sudan's treaty obligations. Exceptions to this presumption of continuity occur when: (1) both parties agree otherwise, (2) the treaty is not relevant to the new state's territory, or (3) continuity would frustrate the treaty's object and purpose.

The fact that there had been a successful separation and emergence of a new sovereign state does not make things any easier for South Sudan. The new state will have to decide on how to proceed on succession with respect to international Nile water agreement currently applicable in the territory. The new state can either decide to: (i) apply universal continuity by unilateral declaration of succession, or (ii) review Nile water treaty and declare subsequently whether to be bound or not.

As a result, just because the newly independent state of South Sudan decides on this matter does not guarantee that this decision will be automatically accepted by other contracting Parties with respect to the 1929 and 1959 Nile bilateral agreement in force, which do not include any provision regarding state succession. As a result, a unilateral declaration of succession 1929 and 1959 Nile bilateral agreement by South Sudan would need to be accepted by other contracting parties.

There are no clear cut answers to these questions but there is some international practice demonstrating that; successor states may be willing to recognise contracts entered into by predecessor states, but rejection of pre-existing contracts does happen. This may open the door to other forms of redress, including adequate and effective compensation in the event of expropriation. Foreign entities may also be able to rely on

bilateral investment treaties to bring compensation claims if the South Sudan continues to acknowledge that the 1929 and 1959 Nile bilateral agreement is still in force. Flowing from that argument there is no reason why the 'clean slate' practice should not apply also in respect of South Sudan.

The major argument of this paper is that the birth of the new state of South Sudan has created the question of state succession and that the 1929 and 1959 Nile Agreement concluded between Sudan and Egypt is no longer binding as the direct consequence of state succession and the principle of clean slate doctrine when a new state is formed does not abide by any previous international legal agreements entered by the predecessor state or coloniser. It starts from a clean slate. However the South Sudan state can follow the principle of practical doctrine, that is South Sudan is not bound by previous agreements but can decide which one to accept and reject but must make pronouncements.[113]

Consequently, the principle of discharging a new state from the obligations of its predecessor and the preference of a "clean slate" solution corresponds with the understanding of sovereignty under classical international law. In conflict with this principle are interests of the community of states and those of third states in the continuation of treaties.

[113] Chelkeba, A. 2011. *Succession of Southern Sudan to the 1929 and 1959 Nile Water Agreements and its implications*. Available on the website of the International Water Law Project at http://internationalwaterlaw.org/documents/regionaldocsNile_River_Basin_Cooperative_Framework_2010.pdf Last accessed on the 08 April 2011.

CHAPTER V

STATE SUCCESSION ISSUES IN KOSOVO

Declaration of Independence of Kosovo

On 22 July 2010, the International Court of Justice (ICJ) in the Hague has given its Advisory Opinion on the question of in *"Accordance with international law of the unilateral declaration of independence in respect of Kosovo"*.[114] Kosovo declared its independence from Serbia on the 17 February 2008, sparking celebration among the country's ethnic Albanians, who form 92% of the country's population.[115]

However, Serbia and the Kosovo Serb minority heatedly objected to the declaration and refused to recognise it. Serbia continues to view Kosovo as a province of Serbia. On the other hand, the United States formally recognised Kosovo as a sovereign and independent state on the 18 February 2008. As of February 2011, 75 countries had recognised Kosovo's independence, including 22 of 27 European Union member states, all of its neighbours (except Serbia), and other states from the Americas, Africa, and Asia.[116]

In determining whether the declaration of independence constituted a violation of international laws, the Court first addressed the question of the identity of the authors of the declarations. The Court found that the authors should be regarded as representatives of the people of Kosovo, acting outside the framework for the interim administration.[117] In accordance with the Court's reasoning this further means that due to the fact that there is no specific request addressed to the representatives of the Kosovo Albanians to comply with certain aspects of Security Council Resolution 1244,

[114] Available at http://www.haguejusticeportal.net/eCache/DEF/9/891.htm/ last accessed on 18 July 2011.
[115] Woehrel, S. 2011. *Kosovo: Current Issues and U.S. Policy*. Congressional Research Service, p1 available at www.crs.gov last accessed 24 August 2011.
[116] For more detailed information visit http://www.ico-kos.org/; last accessed on 18 July 2011.
[117] *Unilateral Declaration of Independence of Kosovo.* Available at http://www.haguejusticeportal.net/eCache/DEF/9/891.htm/ last accessed on 18 July 2011.

they cannot be considered as legally prohibited from issuing a declaration of independence.[118]

In its declaration of independence, Kosovo committed to fulfilling its obligations under the Ahtisaari Plan, drafted by United Nations envoy Martti Ahtisaari, to embrace multi-ethnicity as a fundamental principle of good governance, and to welcome a period of international supervision. [119] The document further, contains provisions aimed at safeguarding the rights of ethnic Serbs and other minorities. The provisions of the plan have been incorporated into Kosovo's new constitution, which went into effect on June 15, 2008.The status settlement calls for Kosovo to become an independent country, supervised by the international community. Under the plan, Kosovo has the right to conclude international agreements and join international organisations. It has the right to set up its own "security force" and intelligence agency. However, Kosovo is not permitted to merge with another country or part of another country.[120]

As part of its commitment to the Ahtisaari Plan, the Kosovo Government rapidly enacted after independence laws on minority protection, decentralisation, special protection zones for Serb cultural and religious sites, local self-government, and municipal boundaries. The Kosovo Assembly approved a constitution in April 2008, which entered into force on the 15 June 2008. International Civilian Representative Feith certified that the constitution was in accordance with the Ahtisaari Plan.[121]

Thereafter, a number of states established an International Steering Group (ISG) for Kosovo that appointed Dutch diplomat Pieter Feith [122] as International Civilian

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[118] *Unilateral Declaration of Independence of Kosovo.* Available at http://www.haguejusticeportal.net/eCache/DEF/9/891.htm/ last accessed on 18 July 2011.
[119] Ahtisaari's report to Secretary General Ban Ki-Moon on the plan available at http://www.un.org/Docs/sc/unsc_presandsg_letters07.htm last accessed on 24 August 2011.
[120] Borgen, C.J. 2008. *Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition.* Asil Insight: American Society of International Law, p12. Available at http://www.asil.org/insights/2008/02/insights080229.html last accessed on 18 July 2011.
[121] Ahtisaari's report to Secretary General Ban Ki-Moon on the plan available at http://www.un.org/Docs/sc/unsc_presandsg_letters07.htm last accessed on 24 August 2011.
[122] Faith is also the European Union Special Representative (EUSR) in Kosovo.

Representative (ICR), charged with ensuring Kosovo's implementation of the Ahtisaari Plan and supporting Kosovo's European integration.

Kosovo Seeking Recognition

Kosovo's problems are especially severe, as it has had little recent experience in self-rule, having been controlled by Serbia in the 1990s and by the inter Kosovo faced overwhelming challenges in the struggle for international recognition and the status of its ethnic minorities. Kosovo suffered from the same problems as other countries in the region, but is in some respects worse off than many of them[123] national community from 1999 until 2008. According to a November 2010 European Commission report on Kosovo, the country suffers from weak institutions, including the judiciary and law enforcement. Kosovo has high levels of government corruption and powerful organised crime networks. Many Kosovars are poor and reported unemployment is very high.[124]

Consequently, as of 11 July 2009, 62 out 192 sovereign United Nations member states have formally recognised the Republic of Kosovo as an independent state. Remarkably, a majority of members states of the European Union (22 out of 27) and NATO (24 out of 28) have recognised Kosovo.[125] States such as china and India remain neutral or voiced concerns over the unilateral character of Kosovo's declaration, Serbia and Russia[126] even stated officially that they would not recognise the independence of Kosovo. The United Nations, for its part, has maintained to date a position of strict neutrality on the question of Kosovo's status'.

[123] Woehrel, S. 2011. *Kosovo: Current Issues and U.S. Policy*. Congressional Research Service, p5. Available at www.crs.gov last accessed 02 October 2011.

[124] Kosovo (Under UNSCR 1244/999) Progress Report, from the European Commission website at http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/ks_rapport_2010_en.pdf last accessed on 02 September 2011.

[125] http://en.wikipedia.org/wiki/International_recognition_of_Kosovo, last accessed on 18 July 2011.

[126] Serbia and Russia argued that, inasmuch as Serbia did not consent to an alteration of its territory and borders; there can be no legal recognition. However, owing to no justifications this argument cannot be legally correct. Changing the boundaries of a sovereign state (Serbia) in and of itself would not make Kosovo's independence illegal because, as discussed above, the international community has come to accept the legality of secession under certain circumstances. See Woehrel, S. 2011. *Kosovo: Current Issues and U.S. Policy*. Congressional Research Service. Available at www.crs.gov last accessed 02 October 2011.

The international law framework determining whether or not a new entity does or does not constitute a state, and whether an existing state no longer exists, can be understood to comprise:

- Criteria concerned with the practical viability of the state or claimant state, such as a permanent population, existing in a defined territory, over which there is an effective government operating independently from external control, in the sense that it purports to govern the people and the territory on the basis that it, and they, constitute an independent state.[127]

Thus, with respect to the case of Kosovo's declaration of independence in 2008, one of the problems is conformity to the independence criterion, bearing in mind the continued international involvement in its governance, operating on the basis of Security Council Resolution 1244 (1999) passed under Chapter VII of the UN Charter which affirms the status of Kosovo as part of Serbia.[128]

In order for recognition to have a constitutive effect, however, it needs to be of a certain quantum, since this effect is based on the general notion that international law is made, and altered, only if one can identify a general trend across most, if not all, states.[129] One would have to see, therefore, considerable recognition by states generally, although not necessarily, manifesting through a decision by the United Nations to admit the claimant entity as a new member, something which presupposes statehood. The recognition of Bosnia and Herzegovina as an independent state and its admission as a member of the United Nations in the first half of the 1990s would appear to illustrate this role for recognition. With respect to Kosovo, on the other hand, on the issue is whether the

[127] Brownlie, I. 1990. *Principles of International law*. (4th edition). Oxford: Clarendon Press, p74.
[128] Wilde, R, Cannon, A & Wilmshurst, E. 2010. *Recognition of States: the Consequences of Recognition or Non-Recognition in UK and International Law*. London: Chatham House, p5. Available at www.chathamhouse.org.uk last accessed 24 August 2011.
[129] Brownlie (1990:74).

number of states that have recognised it 65[130] is enough to make a difference, given that there are approximately 192 member states of the United Nations.

It is worth mentioning that states are bound to respect the sovereignty of other states, which includes their territorial integrity and political independence. If, then, an entity is a state as a matter of international law, all other states are bound to 'recognise' this, even if they object in some way to that state's legitimacy or some aspects of its policy. Equally, if an entity claims to be a state, but is not, and is formed of the territory that forms part of an existing state, then other states are bound not to recognise this because of their obligations owed to the existing state.[131]

Moreover, non-recognition in the case of Kosovo may draw on the obligation not to recognise as lawful any situation created by a serious breach of an obligation arising under a peremptory norm of general international law', in relation with the 1999 NATO bombings of Serbia, which have been widely recognised as illegal under international law. Such an obligation was enshrined in Resolution 2625 (XXV) of the UN General Assembly and restated by the International Court of Justice in the *Namibia* advisory opinion.[132] The application of the non-recognition obligation in the case of Kosovo was disputed.

Certain other core obligations also operate on this basis, including, most obviously, the international law relating to the use of force. But in many areas of international relations, states remain free to limit their mutual relations.[133] In these areas, then, states can, in effect, choose not to 'recognise' another entity as a state, even if, as a matter of the basic contours of their relationship, they are actually bound to do so. Sometimes such a policy is concerned with a political objection to what may ultimately be a lawful arrangement. In other cases, such as the situation with respect of some states and

[130] According to www.kosovothanksyou.com; last accessed on 18 July 2011.
[131] Cassese (2001:51)
[132] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion 1971 ICJ Report 16, at 56, paragraph. 126.
[133] Aust (2005:224).

Kosovo, for example, states may wish to stay outside the political process surrounding Kosovo's independence, their position amounting to one of remaining on the fence, or failing to give clear support, rather than a clear repudiation of Kosovo's status as a state, something which would be unlawful because Kosovo has been declared as a state.

The international status of Kosovo

The international community may use two distinct approaches to recognise the independence of Kosovo: (1) a declarative approach in regards to traditional law governing the recognition of states, or (2) earned sovereignty, which would establish a process to review the circumstances surrounding Kosovo's statehood and offer recommendations on the same.[134] Notably, state practice concerning the international community's recognition of newly independent states is largely dependent on political factors.

In order to determine the international standing of Kosovo one has to access the reactions of predecessor state, third party states and the international community with regard to its independence. There have been strong reactions to the International Court of Justice advisory opinion on Kosovo's declaration of independence, rendered on 22 July 2010. The ruling, which held that the Kosovo declaration of independence was not in violation of international law, drew praise from some quarters and negative reactions from other quarters led by Serbia and other states which said their position would not change.

As far as it can be observed from available records, the predecessor state of Kosovo (Serbia) strongly objected to the declaration of independence of Kosovo that expressed the intention to exercise its freedom of being an independent State.[135]

[134] Borgen, (2008:12)

[135] In an official statement by His Excellency Mr. Boris Tadic, President of the Republic of Serbia stated that *"The Republic of Serbia will not accept the violation of its sovereignty and territorial integrity. The Government of Serbia and the National Assembly of the Republic of Serbia have declared the decision of the Pristina authorities null and void. Likewise, we are taking all diplomatic and political measures to prevent the secession of part of our territory"*.

Serbia has questioned the arguments of the international community that the Kosovo case was unique. There were many other similar cases of secession around the world and Kosovo was not an exception. At the same time, independence has been seen as a punishment for democratic Serbia which has been dealing slowly with its nationalistic past. If the reason for international intervention in Serbia in 1999 were human rights, why is the international community rewarding Kosovar Albanians with independence even though they have expelled 200,000 Serbs from Kosovo since 1999 and the Serbs remaining south of the Ibar River have been living in enclaves with constrained freedom of movement. Also, what is the rationale behind two Albanian states in Europe? For Serbia, Kosovo's proclamation of independence, supported by the international community, was actually a zero-sum solution.[136]

Furthermore, Serbia contested the unilateral proclamation of Kosovo by diplomatic means. Serbia had stated that it would never recognise Kosovo as an independent state[137] and that all countries that recognise Kosovo were violating international law, and has also raised questions in the International Court of Justice about the legality of Kosovo's proclamation of independence. Serbia has Russia as a powerful ally in the UN as well.

Taking into account the attitudes of third party states, Russia has contested Kosovo's independence and stated that it would never accept Kosovo as a member of the UN; the Organisation for Security and Cooperation in Europe, and the Council of Europe, having in mind its position as a permanent member of the Security Council who has a veto right for acceptance of new members and gives recommendations to the General Assembly for new members.[138] One can thus conclude that Russian's opposition is likely to block Kosovo's membership in the United Nations for the foreseeable future.

[136] Available at http://www.ico-kos.org/. , last accessed on 18 July 2011.
[137] the preamble of the Serbian Constitution states that Kosovo is a part of Serbia; the presidential and parliamentary oaths of office include words of defending Kosovo as a part of Serbia
[138] UN Charter, Section 2, Article 4.

Similarly, a lot of countries are afraid to recognise the independence of Kosovo because they are facing similar problems of minority secession. The failure of Kosovo and its allies to arguably persuade other countries to recognise Kosovo's independence shows us that the international norm of sovereignty and territorial integrity is still important in the international community. In addition, Kosovo seeks to eventually join the European Union and NATO, although this is at best a distant prospect, due to the non-recognition of Kosovo by several NATO and EU states, as well as the country's poverty and weak institutions.[139]

All of these problems will have an impact on Kosovo's ability to grow its economy, improve a situation in which unemployment floats at 50 percent (the majority of whom are under the age of thirty), or to attract foreign investors, who tend to avoid places where legal systems are weak, political risk is high, and infrastructure is in bad shape. Potential foreign investors will be deterred by the fact that Kosovo is in many ways a geographic backwater in the region.[140]

Meanwhile, international organisations require specific and positive consent and notification from the new State before they consider that it is a potential bearer of the rights and obligations of any international instrument. The central question is whether recognition by the European Union would constitute recognition by all of its member states? Ultimately, there is considerable doubt cast on whether EU recognition would actually have any legal effect, notwithstanding the provisions of the Lisbon Treaty.[141]

As for international organisations generally, the United Nation's admission is premised on an application of the international law of statehood. However, it is an open question as to whether international organisations are governed by international law, which, by its nature, is intended to govern states. In the human rights field, there have been some efforts to bind international organisations to human rights obligations, such as seeking

[139] Available at http://www.ico-kos.org/. , last accessed on 18 July 2011.
[140] Hoare, M .A . 12 February 2007. Kosovo: the Balkans' last independent state. Open Democracy, available at http://www.opendemocracy.net/conflict-yugoslavia/kosovo_process_4341.jsp last accessed 02 September 2011.
[141] Kosovo Report. 2000. Independent International Commission on Kosovo. Oxford University Press.

the European Union's accession to the European Convention on Human Rights (ECHR). Additionally, the International Law Commission has been working on Draft Articles on the Responsibility of International Organisations.[142]

[142] Cheng, T. (?). The Succession of Kosovo and Minimum Public Order. Available at http://opiniojuris.org/2008/02/21/the-succession-of-Iraq-and-minimum-public-order/. Last accessed 06 April 2011.

CHAPTER IV

CONCLUSION

Concluding Remarks

Following a vote for independence, both states, Kosovo and South Sudan needed to formalise their independence through recognition by the international community. Principally, state practice concerning the international community's recognition of newly independent states is largely dependent on a multiplicity of factors the major one being political.

Kosovo's problems are especially severe as it has had little recent experience in self-rule, having been controlled by Serbia in the 1990s and by the international community from 1999 until 2008.[143]

Therefore, in seeking recognition, the Republic of Kosovo was rejected by its predecessor state and some of the most powerful states of the United Nation. As a practical matter, however, if a substantial number of states reject Kosovo's independence by withholding recognition, these states would be hard pressed to enter into diplomatic relations with Kosovo, to conclude treaties with it, or to grant it sovereign immunity independently of Serbia. In such a situation, regardless of whether scholars think Kosovo has become a state, it would not be able to fully function as a state in the international system. The reality is therefore that recognition serves a key constitutive function in the process of succession.

Moreover, non-recognition by these states could result in the obstruction of Kosovo becoming a member of the UN in view of the fact that these states have the greatest say in setting the conditions for the admission of new members. The same attitude is likely to, prevail when Kosovo decides to take up admission into the financial and trade

[143] Kosovo (Under UNSCR 1244/999) Progress Report, from the European Commission website at http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/ks_rapport_2010_en.pdf last accessed on 02 September 2011.

institutions .i.e. International Monetary Fund (IMF) and World Bank Group. The governance structures of these institutions are dominated by industrialised countries such as Russia, due to their large quotas or share of the contribution, thus entitling them to have the greatest say in decision-making and policy implementations.[144]

By and large, state practice demonstrates that the modern law and policy of succession to membership into international organisations will be determined by: the procedures and the constitutional provisions of the particular organisation; the characterisation of the breakup as a dissolution or a continuation; and the interest of other states in recognising the predecessor and successor states' claims.[145]

In contrast, the international community has observed and demonstrated respect for the right of the people of South Sudan, as affirmed in the Comprehensive Peace Agreement (CPA) to vote in a final status referendum of 2011, the outcome of which resulted in Southern secession. Through the CPA, its predecessor state also consented to this outcome. These two factors placed South Sudan in a more favourable position, as compared to Kosovo. However, even if a free and fair referendum resulted in a decision to secede and the South Sudan Legislative Assembly subsequently adopted resolution, constitutional amendment, or other legislative act declaring independence, past experiences throughout the world indicated that South Sudan still needed to demonstrate that it has met international standards for statehood in order for the international community to recognise it as an independent state.

For a long time state succession remained a "grey area" of international law which arguably, altogether is unable to coexist to the process of codification, let alone of progressive development. Its most developed area is succession in respect of treaties whose theoretical idea is formed by the interaction of two driving objectives: the need to ensure the continuity of obligations beyond the changes of sovereignty and the need to

[144] See M. R. Islam. 1999. *International Trade Law*. Sydney: LBC Information Services, p59.
[145] Shaw (2003: 871).

observe the principle of consent.[146] The rationale behind the principle of consent dictates that a state can only be bound by an international obligation only if it so agrees.

With respect to succession to international treaties, South Sudan could follow the Nyerere Doctrine; reviewing earlier treaties regarding their binding force. With respect to treaties dating from before 1956, it could claim further that it was under colonial rule and that even after 1956 it continued its struggle for political autonomy and independence.

In not accepting the binding force of the 1959 agreement, a possible sovereign South Sudan would signal alignment with the upstream neighbours. It might further decide to sign and ratify the CFA, a step that will most likely antagonise Northern Sudan and Egypt in particular if South Sudan becomes the sixth country to ratify. The treaty provides in Article 42 that it shall enter into force "on the sixtieth day following the date of the deposit of the sixth instrument of ratification or accession with the African Union". In order to change this requirement, the treaty text needs to be reopened for negotiation which is unlikely.[147]

It has to be noted that whatever a newly independent state of South Sudan decides on this matter does not guarantee that this decision is automatically accepted by other contracting parties to treaty; response to a unilateral declaration of universal continuity of international treaties can be different. According to international customary law, rights and obligations relating to territory remain unaffected by succession.[148]

Arguably, the Nile issues are not amongst the most pressing priorities between North and South Sudan, the Government of South Sudan will not be obliged to take a public position immediately. This also gives time to the South Sudan to see the benefits, limitations and risks of all the options available. Keeping silent and not compromising to any positions gives flexibility to South Sudan, as a new midstream riparian, to decide on aligning downstream or upstream at a later stage, if at all. In the meantime, South

[146] O'Connell (1967:725).
[147] Granit, J. et al. December 2010. Regional Water Intelligence Report: *The Nile Basin and the Southern Sudan Referendum.* Stockholm, p24.
[148] Cassese (2001: 52)

Sudan will be able to observe how the Agreement on the Nile River Basin Cooperative Framework (CFA) processes evolves independently of its own actions.[149]

The solution to the problems of state succession cannot be left to the caprices of a conquering nation or the bargaining of a powerful one. it has been found necessary in private law to develop principles to govern succession of property. How much more vital is it in international law to develop or discover principles to govern the disposition of new states and their institutions? The difficulties of such tasks are regional. This is readily recognised when it is realised that the factors determining the effects of a change of sovereignty are so numerous that they must be divided into four classes: causes, means , forms and political organisation.

[149] Available on the website of the International Water Law Project at http://internationalwaterlaw.org/documents/regionaldocsNile_River_Basin_Cooperative_Framework_2010.pdf last accessed 02 October 2011.

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