Chapter III: The Continued Relevance of the Doctrine of Acquired Rights

"*International law seems, so to speak, condemned to take on an increasingly human dimension.*"[426]

A) Preliminary Remarks

The doctrine of acquired rights has not featured prominently in recent scholarly debate or publications. Many modern authors even consider acquired rights an obsolete relict of former times without any significant independent content in cases of state succession besides human rights and the protection of foreign investment or expropriation concerns.[427] This disdain towards the doctrine may arise from three sources. First, it might result from the general idea of fragmentation, the separation of international law into singular specialized fields with their own rules, sometimes called "self-contained regimes". Human rights and international investment law

426 Luigi Condorelli, 'Some Thoughts about the Optimistic Pessimism of a Good International Lawyer' (2010), 21(1) EJIL 31 32.

427 Cf. e.g. Delbrück and Wolfrum (n 266) 183/184; Stern, 'La Succession d'États' (n 283), 115; Zimmermann and Devaney, 'State Succession in Matters Other than Treaties (2019)' (n 295) para. 44; Burkhard Schöbener, 'Enteignung und Entschädigung im Systemvergleich' in Otto Depenheuer and Foroud Shirvani (eds), *Die Enteignung: Historische, vergleichende, dogmatische und politische Perspektiven auf ein Rechtsinstitut* (Springer 2018) 53 59; Dumberry *Guide to State Succession in International Investment Law* (n 14) paras. 10.14–10.16; Reinisch and Hafner (n 2) 57 who see the theory of acquired rights as a sub-section of the international law on expropriation/protection of property; also Drinhausen (n 2) 140; Antonio Fernández Tomás and Diego López Garrido, 'The Impact and Consequences of Brexit on Acquired Rights of EU Citizens Living in the UK and British Citizens Living in the EU-27: Study Prepared for the European Parliament's Committee on Constitutional Affairs' (2017) PE 583.135 57 "In any case, the principle has proven incapable of withstanding the onslaught of trends contrary to it in the evolution of law, and it is reasonable to assume that it has lost all legal value today"; in general critical on the "unhelpful" theory of acquired rights Cheng (n 326) 55–56; especially for concessions Crawford *Brownlie's Principles of Public International Law* (n 3) 418–419.

have been considered "fragmented".[428] Routinely, acquired rights are only discussed in isolation and separately from human rights or investment law or offered as an additional argument besides the two.

Second, when discussing "acquired rights", many authors refer back to the traditional definitions from the 1930s to 1960s. They especially limit their interpretation to pecuniary or property rights[429] of foreigners[430] without inquiring whether these restrictions have ever been necessary or useful and in how far the doctrine might have developed. These authorities thereby tend to have recourse to a very confined notion of acquired rights that "freezes" the doctrine in the time of its inception. Their approach measures the doctrine by today's standards but negates its possible evolution. The argument is, for example, that the doctrine of acquired rights offers less protection than human rights or investment law as the new state would be free to abrogate the predecessor's domestic legal order and hence acquired rights contained therein. Human rights or investor rights, in comparison, would persist and could not as easily be changed.[431]

428 Cf. ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group, Finalized by Special Rapporteur Koskenniemi' (2006), 2006(II(2) Addendum) YbILC 1 para. 8; for property protection Ursula Kriebaum, *Eigentumsschutz im Völkerrecht: Eine vergleichende Untersuchung zum internationalen Investitionsrecht sowie zum Menschenrechtsschutz* (Duncker & Humblot 2008) 39; with respect to human rights treaties Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006), 17(3) EJIL 483 524–529; critically Alain Pellet, 'Notes sur la "Fragmentation" du Droit International: Droit des Investissements Internationaux et Droits de l'Homme' in Denis Alland and others (eds), *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Brill 2014) 757 762.

429 Cf. Waibel, 'Brexit and Acquired Rights' (n 8), 444 ("considerable monetary value"); Schöbener, 'Enteignung und Entschädigung im Systemvergleich' (n 427) 59; Petra Minnerop and Volker Roeben, 'Continuity as the Rule, not the Exception: How the Vienna Convention on the Law of Treaties Protects Against Retroactivity of "Brexit"' [2018] EHRLR 474, 478; Drinhausen (n 2) 140–141; Reinisch and Hafner (n 2) 57; Lowe, 'Written Evidence Before the European Union Committee of the UK House of Lords' (n 47) paras. 1-11; Dumberry *Guide to State Succession in International Investment Law* (n 14) 271–295 limits his discussion of acquired rights to "state contracts".

430 Lowe, 'Written Evidence Before the European Union Committee of the UK House of Lords' (n 47); Shaw *International Law* (n 266) 1001; apparently Crawford *Brownlie's Principles of Public International Law* (n 3) 418.

431 Delbrück and Wolfrum (n 266) 184; Stern, 'La Succession d'États' (n 283), 309 who rejects the application of the principle to human rights treaties as acquired rights

Yet, apart from general doubts about the utility of the fragmentation debate at all,[432] all international sub-systems, no matter how specialized, will have to take recourse to general international law.[433] Moreover, the influence can also work the other way round: A perspective routinely neglected in the discourse is the possibility of human rights law and the law on the protection of foreign investment constituting particular, specialized expressions of the "old" acquired rights doctrine. These special fields again can influence the development of the general underlying principle:

> "these sub-systems of international law, more densely integrated and more technically coherent, may show the way forward for general international law, as both laboratories and boosters for further progressive development at the global level."[434]

Third, what is often missed, is that both fields, human rights law and the law on the protection of foreign investment, have substantial gaps in their ability to protect individuals. These caveats will regularly become even more relevant in cases of change of sovereignty over a territory - the classic area for applying the theory of acquired rights.

The burial of the doctrine of acquired rights might therefore have been too short-sighted. Evolutions and developments in human rights law and investment law might not simply have superseded the doctrine of acquired rights. On the contrary, they might also have contributed to the further evolution of that doctrine. On the other hand, it is conceivable that, vague and fluent as it may be, the doctrine of acquired rights, if updated and applied to today's legal environment, may not only be applicable "apart

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could always be abrogated if compensation was paid. However, property, also under human rights law, does not have to be protected in its factual substance.

432 Cf. e.g. Pellet, 'Notes sur la "Fragmentation" du Droit International' (n 428) 758, 784 "Le droit international n'est pas fragmenté - ou plutôt, s'il se fragmente, c'est surtout parce que les universitaires et les praticiens en traitent de manière fragmentée"; for investment law Jorge E Viñuales, 'Sources of International Investment Law: Conceptual Foundations of Unruly Practices' in Samantha Besson, Jean d'Aspremont and Séverine Knuchel (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017) 1069 1070.

433 Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 385), 275, 289; Simma and Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (n 428), 529; Thirlway (n 266) 196; for human rights and investment law Pellet, 'Notes sur la "Fragmentation" du Droit International' (n 428) 780, 782.

434 Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 385), 276.

from" human rights law and investment law but together with them.[435] This way, it may even further their goals and facilitate their enforcement.

B) The Elevated Status of the Individual under International Law and Its Influence on the Doctrine of Acquired Rights

Even if essentially being constructed as an inter-state rule, the classic doctrine of acquired rights has always been envisaged as a protector of the interests of private persons. Since the inception of the doctrine, and especially after the Second World War, the individual's role in international law has changed significantly, and this change has also influenced the doctrine.

435 Cf. Hervé Ascensio, 'Art. 70' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary (Vol. II)* (OUP 2011) para. 21 "Today, the two domains particularly affected [by acquired rights] are international investment law and international human rights". In the context of the Yugoslavian process of dismemberment Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 396 "While international human rights law undoubtedly has a strong impact on the law of state succession with respect to private property and acquired rights, in some instances a situation of state succession may actually broaden the human rights protection usually guaranteed in a state."

I) Where We Come from – the Status of the Individual from around 1900–1970

1) General Observations

According to traditional thought at the beginning of the 20th century,[436] states were the principle subjects of international law.[437] They were in charge of its creation and both directly bound and empowered by it, and individuals played a subordinate role.[438] Nevertheless, even then attempts were being made to protect the rights of individuals under international law.[439] In particular, the law relating to the protection of foreigners, i.e.

436 "Traditional thought" in this context means the legal doctrine which emanated after the Peace of Westphalia in 1648 until the turn of 1900; see similarly Rainer Hofmann, 'The Protection of Individuals under Public International Law' in Marc Bungenberg and others (eds), *International Investment Law* (C.H. Beck; Hart; Nomos 2015) 46 47, para. 5. However, the "standard" rules of international law were mainly made by Western states and octroyed on other states, that later fiercely opposed them. It has to be acknowledged that in some non-Western legal systems individuals or peoples played a more prominent role even before the 20th century. Furthermore, preceding natural law theories included the individual as a subject, cf. Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (CUP 2016) 11–12.

437 *The Case of the S.S. "Lotus",* 7 September 1927, PCIJ Ser A No 10 18 (PCIJ); Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green and Co. 1905) 99/100, para. 63; Thomas Buergenthal, 'Human Rights (2007)' in: *MPEPIL* (n 2) para. 3; Thirlway (n 266) 20/21; Hofmann, 'The Protection of Individuals under Public International Law' (n 436) 46/47, para. 2, 58, para. 6; forward-looking Philip C Jessup, 'Responsibility of States for Injuries to Individuals' (1946), 46(6) ColumLRev 903 903; cf. Peters *Beyond Human Rights* (n 436) 12–15. Admittedly, the binary system of states and individuals constitutes a rough categorization. Even before the rise of the individual there existed other, albeit exceptional, subjects of international law, such as the Holy See, the International Committee of the Red Cross or the Order of Malta, cf. Christian Walter, 'Subjects of International Law' in: *MPEPIL* (n 2) para. 7. Furthermore, international organizations are sometimes also mentioned as subjects of international law. However, their status is rather derivative from their member states.

438 Simone Gorski, 'Individuals in International Law (2013)' in: *MPEPIL* (n 2) paras. 11, 19; Buergenthal, 'Human Rights (2007)' (n 437) para. 3; Thirlway (n 266) 21; Hofmann, 'The Protection of Individuals under Public International Law' (n 436) 46-47, 48-49, paras. 2, 7.

439 Cf. e.g. the mentioned Minorities Treaty with Poland (n 75); *Jurisdiction of the Courts of Danzig,* 3 March 1928, Advisory Opinion, PCIJ Ser B No 15 17/18 (PCIJ); Frederick S Dunn, 'The International Rights of Individuals' (1941), 35 ASIL Proceedings 14 15; examples in Kate Parlett, 'The Individual and Structural Change in the International Legal System' (2012), 1(3) CJICL 60 64–65, 67 and Buergenthal,

"rules that grant a certain standard of protection to foreign legal and natural persons vis-à-vis the host State",[440] and a theory of a "minimum standard" for their treatment were developed.[441] But individuals were mostly considered mere beneficiaries of inter-state-obligations, not holders of the rights themselves.[442] The general idea underlying the law on the protection of foreigners, especially the protection of foreign property, was that, by guaranteeing foreigners' status, the state of residence protected the rights and wealth of the foreigner's home state.[443]

'Human Rights (2007)' (n 437) paras. 3-7; generally Astrid Kjeldgaard-Pedersen, 'Global Constitutionalism and the International Legal Personality of the Individual' (2019), 66(2) NILR 271 276.

440 Stephan Hobe, 'The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law' in: *Bungenberg/Griebel International Investment Law* (n 436) 6 7, para. 1; Jörn Griebel, *Internationales Investitionsrecht* (Beck 2008) 14.

441 Kay Hailbronner and Jana Gogolin, 'Aliens (2013)' in: *MPEPIL* (n 2) para. 11; Verdross (n 59), especially 354–376; Jessup (n 437), 904; Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (2nd ed. OUP 2019) 6–7. *See also Neer v. United Mexican States,* 15 October 1926, UNRIAA IV 60 61/62 (US-Mexican Claims Commission). For a detailed analysis *infra*, Chapter III C) III) 1) b).

442 Cf. Alwyn V Freeman, 'Response to Dunn' (1941), 35 ASIL Proceedings 19 19-20; Parlett (n 439), 63-66, 67; still holding that opinion Klaus F Gärditz, 'Bridge of Varvarin' (2014), 108(1) AJIL 86 91. The holding in *PCIJ Jurisdiction of the Courts of Danzig* (n 439) 17 that "It may be readily admitted that, according to a well established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts" can be and has been interpreted in different ways, see Parlett (n 439), 66; Peters *Beyond Human Rights* (n 436) 29–31.

443 Verdross and Simma (n 23) § 423; Arnauld *Völkerrecht* (n 255) 421, para. 593; Walter, 'Subjects of International Law' (n 437) para. 15; Kälin and Künzli (n 441) 6; *Federal Republic of Germany et al. v. Philipp et al.* No. 19–351, 592 U. S. (2021), 3 February 2021, https://wwwsupremecourtgov/opinions/20pdf/19-351_o7jppdf 5 (U.S. Supreme Court); Verdross (n 59), 371; Ursula Kriebaum, 'Expropriation' in: *Bungenberg/Griebel International Investment Law* (n 436) 959 962, para. 2; Kriebaum and Reinisch, 'Property, Right to, International Protection (2009)' (n 2) para. 2 "This high level of protection of foreign property was based on the underlying assumption that any uncompensated taking of property belonging to nationals of another State would lead to an unjustified transfer of wealth from that State to the expropriating State and was thus of international concern"; Tomuschat, 'Die Vertreibung der Sudetendeutschen' (n 266), 23. Cf. also *ICJ Barcelona Traction* (n 266) para. 86 "The opinion has been expressed that [...] since such investments

Procedurally, the inter-war period from 1918-1939 was marked by a remarkable interest in the individual person and saw the proliferation of arbitral tribunals or mixed claims commissions before which individuals were accorded standing to enforce their claims.[444] Nevertheless, the lasting impact of this evolution was limited.[445] Those tribunals seem to have been perceived as being intrinsically linked to rectifying the consequences of the First World War and their tradition was not continued after 1945. Arguably, not even the 1907 establishment of the Central American Court of Justice,[446] which could receive complaints from individuals, could noticeably change this perspective.[447]

Until the end of the Second World War, the protection of individuals was largely dependent on their nationality, i.e. their affiliation to a specific state.[448] Stateless individuals were not deemed to have any international position.[449] When the UN Secretariat in 1949 issued its survey of international law in preparation of the future work of the ILC, only four subtitles appeared under the heading of "The Individual in International Law": the

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are part of a State's national economic resources, any prejudice to them directly involves the economic interest of the State."

444 For an overview Edvard I Hambro, 'Individuals Before International Tribunals' (1941), 35 ASIL Proceedings 22 24–25; Gerhard Hafner, 'The Emancipation of the Individual from the State under International Law' (2013), 358 RdC 267 385–393; P. K Menon, 'The Legal Personality of Individuals' (1994), 6 Sri Lanka JInt'l L 127 133–135; Peters *Beyond Human Rights* (n 436) 26–29; Gorski, 'Individuals in International Law (2013)' (n 438) para. 25.

445 Parlett (n 439), 68; mixed conclusions Hafner (n 444), 387, 393.

446 Hudson, Manley, O. 'The Central American Court of Justice' (1932), 26(4) AJIL 759; Rosa Riquelme Cortado, 'Central American Court of Justice (1907-18) (2013)' in: *MPEPIL* (n 2).

447 Crititical Hudson, Manley, O. (n 446), 785–786. For a comparison to the Upper Silesian Tribunal cf. Gerard Conway, 'The Arbitral Tribunal for Upper Silesia: An Early Success in International Adjudication' in Ignacio de La Rasilla and Jorge E Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (CUP 2019) 98 102–105.

448 Cf. *PCIJ Panevezys-Saldutiskis Railway Case* (n 130) 16; Hafner (n 444), 394; Buergenthal, 'Human Rights (2007)' (n 437) para. 3.

449 Verdross and Simma (n 23) § 47; Katja Göcke, 'Stateless Persons (2013)' in: *MPEPIL* (n 2) para. 5; cf. *Dickson Car Wheel Company (U.S.A.) v. United Mexican States,* Award of July 1931, UNRIAA Vol IV 669 678 (General Claims Commission); Freeman (n 442), 19; examples referred to by Jessup (n 437), 909; *see also Reparation for Injuries Suffered in the Service of the United Nations,* 11 April 1949, Advisory Opinion, ICJ Rep 1949 174 183/184 (ICJ) "it is essential that […] the agent […] should know that in the performance of his duties he is under the protection of the Organization. This assurance is even more necessary when the agent is stateless."

law of nationality, the treatment of aliens, extradition, and the right of asylum.[450] These all constituted topics in which the special bond between the state and its nationals was decisive. This "mediation" of the individual through the state found its institutional expression in the tool of diplomatic protection, i.e. the home state's espousal of its nationals' claims on the international plane. As individuals had no standing under international law, they depended on their state of nationality to assert claims against another state;[451] and vice versa, a state could only espouse claims of its own nationals.[452] It was in this respect that the PCIJ in its *Mavrommatis Palestine Concessions Case* in 1924 stated that

> "[i]t is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. *By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights* - its right to ensure, in the person of its subjects, respect for the rules of international law."[453]

450 *UN Secretariat Survey of International Law* (n 2) IV.

451 Verdross and Simma (n 23) § 47; Jessup (n 437), 908/909; Hofmann, 'The Protection of Individuals under Public International Law' (n 436) 46-47, para. 2; 49 para. 8; *Dickson Car Wheel Company* (n 449) 678; Freeman (n 442), 19 "To say international law protects the rights of individuals *qua* individuals is not only just half the story, but it is an erroneous statement of the law. For the link that gives individuals the benefit of international law is the link of nationality, and it is his *foreign* nationality that does this" [emphasis in original]. This fact is overseen by Dunn (n 439), 15–16 who argues that "The fact that such cases are presented in the name of the state and the private claimant appears only in parenthesis is of little practical consequence. Everybody knows that the private citizen is the real party in interest and any monies recovered almost always go directly to him".

452 *PCIJ Panevezys-Saldutiskis Railway Case* (n 130) 16; *ICJ Barcelona Traction* (n 266) para. 35. In case of corporate entities, the state of nationality is the state in which it is incorporated and in whose territory it has its registered office, cf. ibid para. 70; cf. also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* 24 May 2007, Preliminary Objections, ICJ Rep 2007 582 paras. 86-91 (ICJ).

453 *PCIJ Mavrommatis Palestine Concessions* (n 90) 12 [emphasis added]; repeated in *PCIJ Panevezys-Saldutiskis Railway Case* (n 130) 16; affirmed by *Nottebohm (Liechtenstein v. Guatemala),* 6 April 1955, Second Phase, ICJ Rep 1955 4 24 (ICJ); *ICJ Barcelona Traction* (n 266) para. 85 "whether claims are made on behalf of a State's national or on behalf of the State itself, they are always the claims of the State"; for the UN *ICJ Reparation for Injuries Suffered* (n 449) 183.

The corresponding dogma that, on the international plane, the individual had no rights, proved overwhelmingly influential. One imminent consequence was that the taking up of such claims was a right of the state and could be exercised by the state on a discretionary basis, i.e. irrespective of the will of the injured individual,[454] and the home state could deliberately dispose of such claims, e.g., by way of lump sum agreements.[455] This state of the law was set out clearly by the ICJ in the 1970 case concerning *Barcelona Traction*

> "a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress."[456]

What can also be taken from this judgment is a clear distinction between the international and the domestic sphere. While international law occasionally had to make recourse to domestic law, both spheres remained separate. Domestic law was treated as a "fact" by international tribunals.[457] Until recently, international law had no say with respect to the internal affairs of a state.[458] In fact, both these dogmas, that of non-capacity of the individual on the international plane and that of a neat separation of

454 Cf. Jessup (n 437), 907; John Dugard, 'Diplomatic Protection (2009)' in: *MPEPIL* (n 2) para. 13; *ICJ Barcelona Traction* (n 266) para 79 "The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case".

455 Enzo Cannizzaro, 'Is There an Individual Right to Reparation? Some Thoughts on the ICJ Judgment in the Jurisdictional Immunities Case' in: *Alland/Chetail Unité et Diversité* (n 428) 495 498; Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003), 74(1) BYbIL 151 169; still for today Jeswald W Salacuse, *The Law of Investment Treaties* (2nd ed. OUP 2015) 63.

456 *ICJ Barcelona Traction* (n 266) para. 78.

457 *PCIJ Certain German Interests (The Merits)* (n 7) 19.

458 Freeman (n 442), 19; Verdross and Simma (n 23) 627, §1004; cf. Buergenthal, 'Human Rights (2007)' (n 437) para. 3. Also before the Central American Court of Justice, persons could not bring claims against their home state, see Riquelme Cortado, 'Central American Court of Justice (1907-18) (2013)' (n 446) para. 21; Menon (n 444), 132–133. On the power of a state to divest its nationals of their

the international and the national legal systems, are inherently connected. As long as international law was constructed as law between states only, it could not pierce the "veil" of sovereignty and statehood. As long as individuals were not considered bearers of international rights, they could only have recourse to national law.

2) The Relevance of Acquired Rights

In light of the background of an international system in which individuals were mere beneficiaries of inter-state agreements, the doctrine of acquired rights in the 1950s and 1960s was often seen as nothing more than a particular expression of the law on the protection of foreigners, one that had found a specific area of application in the law of state succession.[459] Authors rarely alluded to some kind of "individualistic" or "humanity" argument when referring to the doctrine.[460] Remarkably though, and innovative for the time of its inception at the beginning of the 20th century, the doctrine was read as an *international guarantee for individuals* for the protection of a certain domestic *status quo*, *even against the own (new) state of nationality.*[461] On the basis of the Geneva Convention, the Upper Silesian Arbitral Tribunal held in an award in *Steiner and Gross v. Poland* that

> "[t]he Convention conferred [...] jurisdiction upon the tribunal irrespective of the nationality of the claimants, and [...] the respect of private rights and the preservation of the economic unity of Upper Silesia [...] [was not compatible] with the exclusion of any category of claims for the sole reason of the nationality of the claimant."[462]

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property by treaty with another state cf. McNair, 'The Effects of Peace Treaties Upon Private Rights' (n 62), 386–389.

459 E.g. Castrén (n 8), 491; O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 135, 139-140; Lalive (n 8) 152, 183, 198-199; Bedjaoui (n 35), 540; ILC, 'Fourth Report on State Responsibility (Special Rapporteur Garcia-Amador)' (n 2); Krueger (n 39) 337; Sik (n 8), 128; *ICJ Barcelona Traction - Separate Opinion Morelli* (n 249) 233.

460 But see Lalive (n 8) 151; O'Connell *The Law of State Succession* (n 2) 274 "respect for property is by no means unrelated to [...] the requirements of human nature".

461 *Steiner and Gross v. Polish State* , Case No. 188, [1931], 30 March 1928, ADIL, 4 (1927/28) 291 (Upper Silesian Arbitral Tribunal 292. Cf. *PCIJ German Settlers* (n 4).

462 *Steiner and Gross v. Poland* (n 461) 292.

It is important to see that this conclusion, similar to the approach of the tribunal in general, was based on and hence confined by the provisions of the Geneva Convention, a particular bilateral international instrument regulating a specific situation. The then presiding arbitrator of the tribunal, *Georges Kaeckenbeeck*, emphasized that, in his opinion, this conclusion did not reflect the customary law at the time.[463] Nevertheless, the option chosen by the treaty parties in the Geneva Convention, driven by wanting to keep together an economic union, called into question the typical reciprocal relationship between host state and home state.[464] This calling into question was most probably also due to the doctrine's special field of application – the law of state succession. This particular situation questioned notions of nationality and citizenship and therefore also of whom was to mediate an individual injury.[465] In situations of succession, it did not seem adequate to subject inhabitants completely to a new sovereign's will. The successor was supposed to become internationally bound to respect at least a certain *status quo*.

Acquired rights were therefore one of the rare examples of international law attempting to protect individual rights by regulating the domestic legal rules of a state, namely, the law of property. Certainly, this idea did not deviate much from the original idea of the law on the protection of foreigners, as it merely tried to protect individuals against their "new" home state. Moreover, as mentioned, no one argued for immortal, non-abrogable rights. Still, the doctrine of acquired rights did not merely represent a typical form of the law on the protection of aliens; it widened and deepened its scope. Crucially, it detached the protection of individual rights from its state-centric, reciprocal, and domestic nature and encapsulated the idea of a truly "international" protection of individuals' rights.[466] The doctrine of acquired rights hence took a middle position between foreigners as mere

463 Kaeckenbeeck, 'The Character and Work of the Arbitral Tribunal of Upper Silesia' (n 70), 36–37; cf. Conway, 'The Arbitral Tribunal for Upper Silesia: An Early Success in International Adjudication' (n 447) 107–110.

464 And constituted a remarkable deviation from the scope of jurisdiction of other judicial or quasi-judicial institutions of the time, cp. Frédéric Mégret, 'Mixed Claim Commissions and the Once Centrality of the Protection of Aliens' in: *La Rasilla/Viñuales Experiments in International Adjudication* (n 447) 127 127–149.

465 Cf. in this respect *Panevezys-Saldutiskis Railway Case,* 28 February 1939, Dissenting Opinion Judge Jonkheer Van Eysinga, Ser A/B No 76 30 30 (PCIJ).

466 Cf. similarly Craven, 'Colonial Fragments' (n 29) 115 "the principle of acquired rights came into prominence as a doctrine that provided the grounds for limiting the ability of states to legislate away rights formerly granted to aliens."

beneficiaries of rights of states and the concept of human rights, i.e. rights directly endowed upon the individual.[467] In some instances, this position could even be enforced by the individuals themselves through arbitral tribunals or mixed claims commissions set up after the First World War.[468] The doctrine of acquired rights was therefore one of the first examples of individual rights made individually enforceable against states.

Yet, for the content of the right, recourse had to be made to the domestic law of the person's home state as that was the only legal system that recognized individuals as full legal persons at that time. Were it not for the (state-installed) tribunals, individual rights would still have been enforceable only through diplomatic protection. However, the enforcement of rights by the predecessor state was routinely held to be legally impermissible due to the rule of "continuous nationality".[469] In some cases it was also implausible that the predecessor would endorse claims of its former subjects against their new sovereign because the typical national interest for such action would be missing. Thus, at a time when international individual rights were not a doctrinally conceivable option, it seemed natural that a rule of acquired rights would have to be based on super- or transnational interests such as the continuity and security of the legal order, equity, or even natural law approaches.

467 See similarly Mégret, 'Mixed Claim Commissions and the Once Centrality of the Protection of Aliens' (n 464) 138 "The figure of the 'alien' emerged as a sort of unique stepping stone between the citizen (as the beneficiary of human rights domestically) and the *citoyen du monde*" [italics in original].

468 Erpelding and Irurzun, 'Arbitral Tribunal for Upper Silesia (2019)' (n 68) paras. 17-19; Erpelding, 'Local International Adjudication' (n 70); Requejo Isidro and Hess, 'International Adjudication of Private Rights' (n 70); Conway, 'The Arbitral Tribunal for Upper Silesia: An Early Success in International Adjudication' (n 447); Mégret, 'Mixed Claim Commissions and the Once Centrality of the Protection of Aliens' (n 464) 136–138.

469 Cf. only *PCIJ Panevezys-Saldutiskis Railway Case* (n 130); Dugard, 'Diplomatic Protection (2009)' (n 454) para. 46. On the continuous nationality rule and its possible exceptions Erwin Loewenfeld, 'Der Schutz wohlerworbener Rechte von Individuen und der Wechsel der Staatsangehörigkeit im Völkerrecht' [1948/1949] Jahrbuch für Internationales und Ausländisches Öffentliches Recht 809. Arguing for a modification of the rule in cases of state succession Crawford *Brownlie's Principles of Public International Law* (n 3) 422. See also ILC, 'Draft Articles on Diplomatic Protection with Commentaries' (2006), 2006(II(2)) YbILC 26 Commentary to Art. 5, 31-33.

II) Where We Are – the Status of the Individual Today

Since the inception of the doctrine of acquired rights, the perception of the role and status of the individual under international law has changed considerably. While pioneers had started arguing against the state-centric vision of international law much earlier,[470] the end of the Second World War, with the imminent experience of the atrocities committed and the horror inflicted, propelled the implementation of these arguments into legal reality.[471] The denial of reason and basic notions of humanity arising from the mass-murder of civilians and the genocide of Jews during the Holocaust had forced the world to learn that nationality did not shield sufficiently against deprivation of life, liberty, and security of the person. Hence, basic rights of individuals, if sacred at all, had to be protected by the international community. Furthermore, the emergence of ideas about a right to democratic governance fueled the development of the status of the individual.[472]

1) Individuals as Subjects of International Law

Today, individuals are generally seen as being capable of holding direct rights under international law, be it under treaty, or customary international law.[473] Human rights treaties have proliferated, some of them installing

470 Dunn (n 439), 14; Hambro (n 444); also Jessup (n 437).

471 Buergenthal, 'Human Rights (2007)' (n 437) para. 8; Gorski, 'Individuals in International Law (2013)' (n 438) para. 20. On the colonial origins of international property rights Mieke van der Linden, 'The Neglected Colonial Root of the Fundamental Right to Property: African Natives' Property Rights in the Age of New Imperialism and in Times Thereafter' (2015), 75 ZaöRV 791 especially 815-822.

472 See Dunn (n 439), 18.

473 Cf. A. Clapham, 'The Role of the Individual in International Law' (2010), 21(1) EJIL 25 27, 29; Parlett (n 439), 69, 77; Walter, 'Subjects of International Law' (n 437) para. 16; Hofmann, 'The Protection of Individuals under Public International Law' (n 436) 50, para. 12; Peters *Beyond Human Rights* (n 436) 167–407, 436-471; Herdegen (n 255) § 12 para. 2; Thirlway (n 266) 22, footnote 64. Ground-breaking for individual rights under treaties *LaGrand (Germany v. United States of America),* 27 June 2001, ICJ Rep 2001 466 paras. 77, 89 (ICJ); cf. also *Avena and Other Mexican Nationals (Mexico v. United States of America),* 31 March 2004, ICJ Rep 2004 12 paras. 40, 62, 128 (ICJ). Both judgments, however, only concern the situation of *foreign* nationals; for diplomatic protection of a state's own nationals *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* 30 November 2010, Merits, ICJ Rep 2010 639 (ICJ).

international procedural mechanisms for supervision or remedies to rights violations directly accessible by the individual.[474] Concurrently, individuals have become bound by international obligations.[475] In consequence, individuals have acquired *a* status, often described as the status of an at least "partial" subject[476] of international law.[477]

474 For an overview Thomas Buergenthal, 'Human Rights: From San Francisco to The Hague' (2017), 77 ZaöRV 289; cf. also Oliver Dörr, '"Privatisierung" des Völkerrechts' (2005), 60(19) JZ 905 911–912.

475 Clapham (n 473), 30; Peters *Beyond Human Rights* (n 436) 60–114; Dörr, '"Privatisierung" des Völkerrechts' (n 474); Gorski, 'Individuals in International Law (2013)' (n 438) paras. 44-51; Hofmann, 'The Protection of Individuals under Public International Law' (n 436) 51-52, paras. 15, 16; Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 385), 292. With respect to legal entities see John Ruggie, 'Final Report: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc. A/HRC/17/31 ("Ruggie Principles").

476 The term "subject of international law" is vague and undefined, Menon (n 444), 128. It is therefore critizised and its utility questioned, e.g. Kjeldgaard-Pedersen (n 439), 277; Hafner (n 444), 283. Some authors therefore tend to use a functional definition (What functions and capabilities does a certain entity have in a certain situation?) and evaluate the capacity of the individual under international law on a case by case basis, Parlett (n 439), 69, 75-77; Gorski, 'Individuals in International Law (2013)' (n 438) para. 18; equating "legal personality" and "legal capacity" Walter, 'Subjects of International Law' (n 437) para. 21; Kjeldgaard-Pedersen (n 439), 275, 277, 283/284; arguably Gorski, 'Individuals in International Law (2013)' (n 438) para. 53. For international organizations *ICJ Reparation for Injuries Suffered* (n 449) 179-180. *Contra* Peters *Beyond Human Rights* (n 436) 417 "[T]he concept of legal personality is a general precondition for the ownership of specific rights and duties. The concept is unable to fulfil this task if legal capacity is determined only *ad hoc* from case to case" [italics in original].

477 Cf. Walter, 'Subjects of International Law' (n 437) para. 18; Volker Epping, '§ 9 Das Individuum als Völkerrechtssubjekt' in: *Epping/Heintschel von Heinegg Völkerrecht* (n 2) 357; Hofmann, 'The Protection of Individuals under Public International Law' (n 436) 47, para. 3, 50, paras. 10, 12; Parlett (n 439), 60–61; Kälin and Künzli (n 441) 14; Hafner (n 444), 441; Menon (n 444), 129 ("relative" subjectivity); Dörr, '"Privatisierung" des Völkerrechts' (n 474), 905–906; Bruno Simma, 'Human Rights Treaties' in: *Besson/d'Aspremont Handbook on the Sources of International Law* (n 432) 871 879 ("passive personality" or "personality light"); arguing for the status of a full subject of international law Pellet, 'Notes sur la "Fragmentation" du Droit International' (n 428) 779. Comprehensively on the debate Peters *Beyond Human Rights* (n 436) especially 35-59. On the Russian view on the subject see Lauri Mälksoo, 'International Legal Theory in Russia: A Civilizational Perspective, or Can Individuals be Subjects of International Law?' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016) 257 especially 268.

However, the significance of this development should not be overestimated. Undeniably, the gap between material entitlements of individuals and their limited means to enforce them on the international plane remains significant.[478] While individuals can turn to several institutions with cases of an allegation of violations of their rights, few of these institutions provide individuals with a legally enforceable redress, first and foremost regional human rights courts or arbitral tribunals in the field of investment law.[479] But their jurisdiction is regionally and/or substantively limited. Crucially, such supervisory mechanisms are based on inter-state agreements. To assert rights, individuals are, therefore, still very much dependent on their home states.[480] Until today, an individual does not seem to have a right against a state to accord diplomatic protection.[481] For several scholars, though, enforcement capability is a prerequisite of direct rights under international law;[482] while others maintain that the question of the existence of rights should be distinguished from their practical enforceability[483]. In

478 Gorski, 'Individuals in International Law (2013)' (n 438) para. 53; Clapham (n 473), 30 "individuals currently have obligations and rights but no remedies under general international law"; ILC, 'Draft Articles on Diplomatic Protection with Commentaries' (n 469), Commentary to Art. 1, 27 para. 4.

479 Hafner (n 444), 401.

480 Parlett (n 439), 70, 72; Hafner (n 444), 369, 371, 373; Peters *Beyond Human Rights* (n 436) 434–435; Simma, 'Human Rights Treaties' (n 477) 878; Kälin and Künzli (n 441) 14; cf. also *ICJ Barcelona Traction* (n 266) paras. 89-91.

481 Peters *Beyond Human Rights* (n 436) 396; Arnauld *Völkerrecht* (n 255) 375, para. 596; Salacuse (n 455) 63. Potentially, an international individual right not to be arbitrarily deprived of diplomatic protection, i.e. a duty of states to take into account the interests of the injured individual when making a decision about the espousal of rights, is emerging, cf. Peters *Beyond Human Rights* (n 436) 396, 404.

482 Verdross and Simma (n 23) § 424; Hafner (n 444), 369; Crawford *Brownlie's Principles of Public International Law* (n 3) 105; cf. Menon (n 444), 128, but differently at 149. For an intermediate position Arnauld *Völkerrecht* (n 255) 421, para. 593 "Jedenfalls dort, wo dem Einzelnen die Möglichkeit eröffnet ist, auf völkerrechtlicher Ebene seine Rechte selbst durchzusetzen, ist von völkerrechtlichen Individualrechten auszugehen" ("At least in those cases in which the individual is entitled to enforce claims on the international plane on its own, individual rights under public international law are to be assumed" [own translation from German]); similarly Herdegen (n 255) § 7 para. 1 and Epping, '§ 9 Das Individuum als Völkerrechtssubjekt' (n 477) § 9 paras. 4-5, 7.

483 Eckart Klein, 'Gutachten zur Rechtslage des im heutigen Polen entzogenen Privateigentums Deutscher' (15 February 2005/4 April 2005) 85 <https://www.uni-marburg.de/de/fb01/professuren/oeffrecht/emeriti-pensionaere-ehemalige/prof-dr-dr-h-c-mult-gilbert-gornig/studiengruppe-politik-und-voelkerrecht/publikationen/gutachtenprofklein-1.pdf>; Dörr, '"Privatisierung" des Völkerrechts' (n 474),

its commentary on Art. 1 of the 2006 Draft Articles on Diplomatic Protection[484], the ILC consciously did not decide the question whether the state, by using the channels of diplomatic protection, asserted own rights, individuals' rights, or potentially both, and views are divided on the issue.[485]

Also intimately connected with the role of the individual under international law is the possibility of individuals' reparation claims (or rights).[486] This possibility is a litmus test for the status of the individual as it is through state responsibility that states may effectively be held accountable for rights violations.[487] To pursue remedies for the violation of an individu-

906 with further references; Walter, 'Subjects of International Law' (n 437) para. 22; O'Connell *The Law of State Succession* (n 2) 86; see Peters *Beyond Human Rights* (n 436) 44–50 linking enforcement capability to the "principle of effectiveness" under international law; for civil rights *PCIJ Peter Pázmány University* (n 363) 231 "it is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself". Cp. for the question of obligations *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* 26 February 2007, ICJ Rep 2007 43 para. 148 (ICJ) "[T]he Court recalls the fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist"; endorsed by *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* 3 February 2015, Merits, ICJ Rep 2015 3 para. 86 (ICJ).

484 ILC, 'Draft Articles on Diplomatic Protection with Commentaries' (n 469), Commentary to Art. 1, 27, paras. 4-5.

485 Peters *Beyond Human Rights* (n 436) 169, 392 "The *lex lata* is therefore open in regard to who holds the substantive international legal positions underlying a request for protection." [italics in original]. In favor of the view that a state by exercising diplomatic protection is also acting on the individual's behalf Arnauld *Völkerrecht* (n 255) 375-376, para. 597. Cf. also Prayer for Relief by Croatia before the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* 18 November 2008, Preliminary Objections, ICJ Rep 2008 412 417 (ICJ) "the Federal Republic of Yugoslavia has an obligation to pay to the Republic of Croatia, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property" [italics in original].

486 Gärditz, 'Bridge of Varvarin' (n 442), 91.

487 Cf. Peters *Beyond Human Rights* (n 436) 191; with respect to the Chagos Islanders case Irini Papanicolopulu and Thomas Burri, 'Human Rights and the Chagos Advisory Opinion' in Thomas Burri and Jamie Trinidad (eds), *The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion* (CUP 2021) 187 199.

al right might even be seen as a special way of enforcing the right.[488] Few international treaties contain an explicit reparation mechanism for cases of violation.[489] Large parts of international legal opinion, and especially domestic courts, still do not accept these claims of individuals for reparation on the international plane, even for grave violations of human rights or humanitarian law.[490] Art. 33 para. 2 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[491] left the issue open.[492] However, recently, strong voices have argued against that traditional stream.[493] Also, in the *Wall Opinion* in 2005, the ICJ found "that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned"[494] and "also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal

488 Additionally, in cases of expropriation, the differentiation between "primary" and "secondary" rights becomes almost irrelevant as an appropriate compensation is generally seen as a prerequisite for the lawfulness of a taking by a state. Hence, a payment of compensation will either justify the original taking or become a reparation for an unlawful expropriation, see for further details Chapter III C) III) 1) b).

489 Cf. Peters *Beyond Human Rights* (n 436) 170–180.

490 Tomuschat, 'Die Vertreibung der Sudetendeutschen' (n 266), 22–23; *Kunduz,* III ZR 140/15, 6 October 2016, BGHZ 212 173 para. 16 (German Federal Court of Justice [BGH]) and following *Kunduz,* 2 BvR 477/17, 18 November 2020, NVwZ 2021 398 paras. 18-19 (German Federal Constitutional Court [BVerfG]); for humanitarian law *Bridge of Varvarin,* 2 BvR 2660/06, 2 BvR 487/07, 13 August 2013, ILDC 2238 (DE 2013) paras. 41-47 (German Federal Constitutional Court [BVerfG]) with comment by Gärditz, 'Bridge of Varvarin' (n 442).

491 UNGA, 'Responsibility of States for Internationally Wrongful Acts: Annex' (12 December 2001) UN Doc. A/RES/56/83.

492 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 352), Commentary to Art. 33, 94-95. On Art. 33 para. 2 and Art. 48(2)(b) ARSIWA Cannizzaro, 'Is There an Individual Right to Reparation? Some Thoughts on the ICJ Judgment in the Jurisdictional Immunities Case' (n 455) 496–497.

493 Klein, 'Gutachten zur Rechtslage des im heutigen Polen entzogenen Privateigentums Deutscher' (n 483) 80–86; cf. Cannizzaro, 'Is There an Individual Right to Reparation? Some Thoughts on the ICJ Judgment in the Jurisdictional Immunities Case' (n 455) 502; Peters *Beyond Human Rights* (n 436) 190–193; Dörr, '"Privatisierung" des Völkerrechts' (n 474), 909; UNGA, 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (16 December 2005) UN Doc. A/RES/60/147 para. 11(b); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* 6 December 2016, Order, Separate Opinion of Judge Trindade, ICJ Rep 2016 1137 para. 20 (ICJ).

494 Cf. *ICJ Wall Opinion* (n 367) para. 152.

persons having suffered any form of material damage"[495]. Nevertheless, in its *Jurisdictional Immunities Case,* the issue was explicitly left open by the ICJ with respect to war reparation claims.[496] In the face of the mentioned reluctance, an individual right to reparation seems not to have crystallized into positive law yet.[497]

The line of reasoning above clarifies that a complete emancipation of the individual from the state, something that would amount to a "significant paradigm shift",[498] has not taken place yet.[499] To a large extent, individuals are still excluded from the process of forming international law.[500] From this perspective, their legal role under international law is still derived from the state.[501]

> "Thus the way in which individuals may participate and exercise functions in the international legal system operates on a kind of dependency: it only occurs at the instigation and with the consent of other subjects of international law which control access to the international legal system. […] individuals remain subordinated in the international system, suspended between object and independent or autonomous subject."[502]

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495 ibid para. 153.

496 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening),* 3 February 2012, ICJ Rep 2012 99 145, para. 108 (ICJ).

497 Peters *Beyond Human Rights* (n 436) 186, 193.

498 ibid 408.

499 Kjeldgaard-Pedersen (n 439), 283; Oliver Dörr, 'Nationality (2019)' in: *MPEPIL* (n 2) para. 3 described "the legal bond of nationality" still as "the essential element of the individual's legal status under international law"; differently Peters *Beyond Human Rights* (n 436) 8.

500 Parlett (n 439), 71–72, 77-78; Epping, '§ 9 Das Individuum als Völkerrechtssubjekt' (n 477) para. 4.

501 Cf. Peters *Beyond Human Rights* (n 436) 409; Dörr, '"Privatisierung" des Völkerrechts' (n 474), 916; Joseph Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004), 64 ZaöRV 547 558; Epping, '§ 9 Das Individuum als Völkerrechtssubjekt' (n 477) para. 4. It should not be left unmentioned that several authors detected an independent status of the individual outside the traditional sources of international law. E.g. in one of the most extensive studies of the status of the individual under international law Peters *Beyond Human Rights* (n 436) 421–432 admitted that her final contention that the individual is a primary subject of international law is based on ideas of "common values" and natural law. Mälksoo, 'International Legal Theory in Russia' (n 477) 261 concluded that the status of individuals "is not primarily a matter of proof but of what one prefers to believe in; of what one's underlying political philosophy of the world is."

502 Parlett (n 439), 78.

On the other hand, the changes that have taken place are significant. Profoundly, the individual has found its way into the international discourse. Individuals can be direct holders of rights under international law. Bonds of nationality have become less important, and it is generally accepted that individuals can have rights against their home state as well. International law can and does regulate formerly "internal" relations of states towards their own citizens. Individual concerns and the democratic legitimacy of a state representing its citizens have become forceful arguments, also on the international plane. While not formally being part of the law creation process, individuals are recognized as being part of the law determination process.[503] Hence, irrespective of the declaration that they are "subjects" of international law, individuals have acquired an undeniable importance on the international plane, and their interests are a significant factor in how states behave. This development has not always taken place in a stringent, coherent and doctrinally pre-considered,[504] but international law itself, and hence the status of the individual, is in a permanent state of flux.[505]

503 Emmanuel Decaux, 'The Impact of Individuals and Other Non-State Actors on Contemporary International Law' in Riccardo Pisillo Mazzeschi and Pasquale de Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Springer International 2018) 3-16 10-11; cf. Thirlway (n 266) 22–24. Individuals take part in monitoring and deliberation processes of international committees or boards, cf. in detail Dörr, '"Privatisierung" des Völkerrechts' (n 474), 915–916. See also Art. 38. 1 lit. c) Statute of the International Court of Justice (24 October 1945).

504 Parlett (n 439), 67, 72-74. The significance of those developments is still controversial, see e.g. Kjeldgaard-Pedersen (n 439), 284 "The important change since 1945 lies neither in the number and nature of international legal persons nor in the formal relationship between international law and national law, but rather in the nature and number of the material issues perceived by States to demand international legal regulation. For better or worse, the framework of the international legal system, including its relationship with national legal systems, remains the same" and Peters *Beyond Human Rights* (n 436) 408 "The newness of the current legal situation does not consist in the fact that individuals (are able to) have international rights and duties at all, but rather that the quantity of these rights and duties has increased dramatically."

505 Cf. Thirlway (n 266) 21; Gorski, 'Individuals in International Law (2013)' (n 438) para. 1. Compare only the different forewords in Anne Peters, *Jenseits der Menschenrechte: Die Rechtsstellung des Individuums im Völkerrecht* (Mohr Siebeck 2014) and only two years later in Peters *Beyond Human Rights* (n 436).

2) The Enforcement of Individual Positions as Community Interests under International Law

Since the end of the 1960s, the international legal scenery has been enriched by two new concepts. First, Art. 53 and 64 of the Vienna Convention of the Law of Treaties (VCLT)[506] codified the concept of peremptory norms of international law (*jus cogens*). According to the generally accepted[507] definition in Art. 53, *jus cogens* is a "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". This term thus introduces a hierarchy in the international order. States cannot alter such a peremptory rule's content unilaterally but only by common and universal, qualified consent.[508] The acceptance of *jus cogens* is therefore often seen as an expression of the emergence of a constitutional system in international law.[509] Second, the concept of obligations *erga omnes*, i.e. obligations owed not only to an individual state but to the international community as a whole, came into life. It was early enunciated by the ICJ in its *Barcelona Traction* judgment,

> "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[510]

506 VCLT (n 291).

507 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 352), Commentary to Art. 40, 112, para. 2. On a comparable customary rule Thirlway (n 266) 163.

508 However, even if this consensus hast to be qualified, it does not have to be unanimous, Erika de Wet, 'Sources and the Hierarchy of International Law: The Place of Peremptory Norms and Article 103 of the UN Charter Within the Sources of International Law' in: *Besson/d'Aspremont Handbook on the Sources of International Law* (n 432) 625 633; Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 290–293.

509 Wet, 'Sources and the Hierarchy of International Law' (n 508) 632; cf. also Kadelbach and Kleinlein (n 280), 314, 315.

510 *ICJ Barcelona Traction* (n 266) para. 33 [italics in original].

Both concepts are inherently connected.[511] *Jus cogens* norms are of such importance that their protection is regularly in the interest of the international community as a whole; they are owed *erga omnes*.[512] While today the most fundamental norms protecting individuals are considered, at least, as being owed *erga omnes*,[513] some of them arguably even have acquired the status of peremptory norms of international law.[514]

511 Cf. Jochen A Frowein, 'Obligations Erga Omnes (2008)' in: *MPEPIL* (n 2) paras. 2,3; Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 385), 274; Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 300; also ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 352), 111-112, especially paras. 4, 7 ("at the very least substantial overlap").

512 Frowein, 'Obligations Erga Omnes (2008)' (n 511) para. 3; *The Obligations in Matters of Human Rights of a State that has Denounced the American Convention on Human Rights and the Charter of the Organization of American States,* OC-26/20, 9 November 2020, Advisory Opinion para. 109 (IACtHR); cf. Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 293/294 with further references. The reverse inference, that all duties owed *erga omnes* have *jus cogens* status, as arguably contended by James Crawford, 'State Responsibility (2006)' in: *MPEPIL* (n 2) para. 34; Kadelbach and Kleinlein (n 280), 316 and *IACtHR Denunciation of the ACHR* (n 512) para. 108, is not always correct, cf. Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 300. Cf. ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 352), 111/112, para. 7.

513 *ICJ Barcelona Traction* (n 266) para. 34; more comprehensively *IACtHR Denunciation of the ACHR* (n 512) paras. 105-106; with respect to the right to self-determination *East Timor (Portugal v. Australia),* 30 June 1995, ICJ Rep 1995 90 para. 29 (ICJ) and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* 25 February 2019, Advisory Opinion, ICJ Rep 2019 95 para. 180 (ICJ); for international humanitarian law *ICJ Wall Opinion* (n 367) para. 157; for the obligations under the Genocide Convention *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* 11 July 1996, Preliminary Objections, ICJ Rep 1996 595 para. 31 (ICJ); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda),* 3 February 2006, Jurisdiction and Admissibility, ICJ Rep 2006 6 para. 64 (ICJ); *ICJ Croatia v. Serbia (Merits)* (n 483) para. 87.

514 Cf. Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988/1989), 12 AustYbIL 82 103; Frowein, 'Ius Cogens (2013)' (n 352) para. 8; Pellet, 'Notes sur la "Fragmentation" du Droit International' (n 428) 763; Christian Tomuschat, 'General International Law: A New Source of International Law?' in: *Pisillo Mazzeschi/de Sena Global Justice* (n 503) 185-204 198; Maria I Torres Cazorla, 'Rights of Private Persons on State Succession: An Approach to the Most Recent Cases' in: *Eisemann/Koskenniemi State Succession* (n 282) 663 669, especially footnote 21; ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n

The exact consequences of a breach of a norm with an *erga omnes* status are not clearly defined. Art. 48 para. 2 ARSIWA stipulates that any state

> "may claim from the responsible State […] cessation of the internationally wrongful act, and assurances and guarantees of non-repetition […] and […] performance of the obligation of reparation […] in the interest of the injured State or of the beneficiaries of the obligation breached."[515]

In its case of *Belgium v. Senegal*, the ICJ accepted Belgium's standing before the court as a mere "interested" state under the Convention against Torture (CAT)[516] because the CAT's obligation to extradite or prosecute was found to be owed *erga omnes*.[517] And in July 2022, the ICJ confirmed its jurisdiction over a case brought by The Gambia against Myanmar for the alleged violation of the UN Genocide Convention[518].[519] It accepted the standing of The Gambia, which was neither alleging an own injury nor espousing claims of its own nationals but seeking redress for the violations of basic norms protecting the Rohingya people.[520]

> "The common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an

352), 11/112, para. 7; 112/113, paras. 4,5 and examples in ILC, 'Draft Articles on the Law of Treaties with Commentaries' (n 209), 248, para. 3 (on the former Art. 50 VCLT); ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (n 428), para. 374; cf. also list in *IACtHR Denunciation of the ACHR* (n 512) para. 106. For the prohibition of genocide *ICJ Armed Activities on the Territory of the Congo (New Application)* (n 513) para. 65; *ICJ Croatia v. Serbia (Merits)* (n 483) para. 87; for the prohibition of torture *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* 20 July 2012, ICJ Rep 2012 422 para. 99 (ICJ).

515 UNGA, 'Responsibility of States for Internationally Wrongful Acts' (n 491).

516 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) UNTS 1465 85.

517 *ICJ Obligation to Prosecute or Extradite* (n 514) paras. 68-69. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* 19 December 2005, Merits, Separate Opinion Judge Simma, ICJ Rep 2005 334 paras. 32-37 (ICJ) that had already underscored the possibility of states to bring violations of *erga omnes* norms before the ICJ.

518 Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) UNTS 78 277.

519 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* No. 178, 22 July 2022, Preliminary Objections (ICJ).

520 ibid paras. 93-114.

> alleged breach of its obligations *erga omnes partes*. […] If a special interest were required for that purpose, in many situations no State would be in a position to make a claim. […] the entitlement to invoke the responsibility of a State party to the Genocide Convention before the Court for alleged breaches of obligations *erga omnes partes* is distinct from any right that a State may have to exercise diplomatic protection in favour of its nationals. The aforementioned entitlement derives from the common interest of all States parties in compliance with these obligations, and it is therefore not limited to the State of nationality of the alleged victims. In this connection, the Court observes that victims of genocide are often nationals of the State allegedly in breach of its obligations *erga omnes partes*."[521]

Yet, neither the status of *erga omnes* nor the *jus cogens* character of a norm convey standing before an international tribunal.[522] Moreover, in cases of a "serious breach […] of an obligation arising under a peremptory norm of general international law", Art. 40 para. 1 ARSIWA, Art. 41 para. 1 ARSIWA sets out that "[s]tates shall cooperate to bring to an end through lawful means any serious breach". What is required is "a joint and coordinated effort by all States to counteract the effects of these breaches" irrespective of "whether or not they are individually affected".[523] Again, the exact consequences and powers of third states under this rule are not clear.[524] The ILC itself alluded to the broad scope of possible reactions and conceded that "[i]t may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law."[525] But at least

521 ibid paras. 108-109 [italics in original].

522 *ICJ Barcelona Traction* (n 266) 88; *ICJ Armed Activities on the Territory of the Congo (New Application)* (n 513) 32, para. 64 ; *ICJ Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)* (n 483) para. 147, endorsed by *ICJ Croatia v. Serbia (Merits)* (n 483) paras. 85, 88.

523 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 352), Commentary on Art. 41, 114, para. 3.

524 Concerning the question of countermeasures and reprisals Frowein, 'Obligations Erga Omnes (2008)' (n 511) paras. 13, 14 and Crawford, 'State Responsibility (2006)' (n 512) paras. 57, 58. For a duty of the home state to exercise diplomatic protection in such cases Peters *Beyond Human Rights* (n 436) 403. For the application of this rule with respect to the responsibility to protect Nadja Kunadt, 'The Responsibility to Protect as a General Principle of International Law' (2011), 11 AMDI 187 197–200.

525 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 352), Commentary on Art. 41, 114, para. 3.

the obligation not to "recognize as lawful a situation created by a serious breach […] nor render aid or assistance in maintaining that situation" in Art. 41 para. 2 ARSIWA is considered to reflect customary international law.[526]

In essence, *jus cogens* and *erga omnes* obligations are expressions of the fact that an international community with common values and goals seems to have developed.[527] Despite the vagueness of their effects, it seems to be common understanding that the violations of basic constitutive norms are against the interest of individual states. Crucially, in this way, while an individual's status has not become completely independent of states' will in general, it has become *partly* independent of their *home* state. Attribution of nationality has become less significant as the protection of basic human interests is considered to be an interest of the international community as a whole,[528] and even if individuals cannot always enforce their rights on their own, other states can do it on their behalf.

C) The Continuing Relevance of the Doctrine of Acquired Rights besides Human Rights and Investment Law

I) Preliminary Remarks

Since the doctrine of acquired rights acted in the 1950s to 1960s as a trailblazer of ideas of individual rights,[529] it seems only natural to inquire in how far the described recent developments of the individual's status, in

526 Crawford, 'State Responsibility (2006)' (n 512) para. 40. On this duty see also *supra*, Chapter II B) IV).

527 Andreas Paulus, 'International Community (2013)' in: *MPEPIL* (n 2) paras. 18, 31; elaborately Simma, 'From Bilateralism to Community Interest in International Law' (n 279), especially 285-321; cf. for *jus cogens* Frowein, 'Ius Cogens (2013)' (n 352) para. 3.

528 Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 385), 268. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* 11 July 1996, Preliminary Objections, Separate Opinion Judge Weeramantry, ICJ Rep 1996 640 641 (ICJ) "One of the principal concerns of the contemporary international legal system is the protection of the human rights and dignity of every individual."

529 See on the legacy of the jurisprudence of the Arbitral Tribunal for Upper Silesia Erpelding and Irurzun, 'Arbitral Tribunal for Upper Silesia (2019)' (n 68) para. 78 and for the Mixed Commission Erpelding, 'Mixed Commission for Upper Silesia (2017)' (n 70) para. 59.

turn, had an impact on the doctrine itself. The two most important material sub-fields of international law that have been at the forefront of emancipating the individual are human rights law and the law on the protection of cross-border investments. Both fields of law are concerned with the relationship between the individual and the state (as well as with inter-state relations)[530] and are the main points of reference for most authors[531] when talking about individual rights outside war situations. Especially in these two areas, by being enabled to enforce their rights before independent institutions, individuals have increasingly acquired an independent international position.[532]

In recent decades, human rights treaties, the most important of which have acquired virtually universal membership status,[533] and investment treaties[534] have proliferated.

> "Il ne fait aucun doute que l'irruption de l'un et de l'autre, avec un petit décalage dans le temps, dans la sphère du droit international a profondément marqué celui-ci - et en grande partie dans la même sens: il a cessé d'être exclusivement le droit entre les États pour devenir - aussi - celui de la communauté internationale; la qualité de sujet de droit des gens des personnes privées en est devenue indiscutable [...] et, dans ces domaines,

530 Pellet, 'Notes sur la "Fragmentation" du Droit International' (n 428) 761; Nicolas Klein, *Das Investitionsschutzrecht als völkerrechtliches Individualschutzrecht im Mehrebenensystem* (Nomos 2018) 132–134; Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights' (2011), 60(3) ICLQ 573 576; nuancedly Burkhard Schöbener, 'Der menschenrechtliche Schutz des privaten Eigentums im universellen Völkerrecht – eine Zwischenbemerkung' in Michael Sachs and Helmut Siekmann (eds), *Der grundrechtsgeprägte Verfassungsstaat: Festschrift für Klaus Stern zum 80. Geburtstag* (Duncker & Humblot 2012) 901 916.

531 Cf. e.g. Crawford, 'State Responsibility (2006)' (n 512) para. 61; Gorski, 'Individuals in International Law (2013)' (n 438) para. 42; Hofmann, 'The Protection of Individuals under Public International Law' (n 436) 51, para. 14; Klein (n 530).

532 Pellet, 'Notes sur la "Fragmentation" du Droit International' (n 428) 761; Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 131, 132; Klein (n 530) 131–132; Kriebaum *Eigentumsschutz im Völkerrecht* (n 428) 31.

533 For exact numbers please refer to the website of the UN Office of the High Commissioner for Human Rights (UN OHCHR), Status of Ratification of 18 International Human Rights Treaties, http://indicators.ohchr.org/.

534 For exact numbers please refer to ICSID database of bilateral investment treaties, available online at https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx and the ICSID database of other investment treaties, available online at https://icsid.worldbank.org/resources/databases/other-investment-treaties.

> le droit international s'en est trouvé 'juridictionnalisé', sans que les autres branches du droit international en soient guère contaminées."[535]

In particular, one of the most relevant fields of international law for our topic, the international protection of private property, is covered by both fields of law.[536] Both protect "immovable property and tangible assets" as well as "rights arising from contracts and other types of claims"[537] such as concession rights,[538] and therefore protect subjects that have been the focus of the traditional acquired rights doctrine. Even if human rights law and investment law have their roots in the law on the protection of foreigners, the protection of private property has developed independently and therefore differently in both legal fields.[539] This is not to say that both fields can or should be separated neatly,[540] and, within certain limits, developments in one field can influence developments in the other.[541]

II) Human Rights and Acquired Rights

The international law on the protection of human rights has been the most important promoter of change in how the individual is perceived under international law.[542] Human rights are "the central and entirely undisputed

535 Pellet, 'Notes sur la "Fragmentation" du Droit International' (n 428) 779 [footnotes omitted].

536 On the relationship Cotula (n 29), 237–238, 249, 252-257.

537 Ursula Kriebaum and Christoph Schreuer, 'The Concept of Property in Human Rights Law and International Investment Law' in Stephan Breitenmoser (ed), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (Dike-Verlag 2007) 743 747–752; cf. also Kriebaum *Eigentumsschutz im Völkerrecht* (n 428) 173–174. For contractual rights Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd ed. OUP 2012) 126–127.

538 Salacuse (n 455) 66/67, 71-72.

539 Kriebaum and Schreuer, 'The Concept of Property in Human Rights Law and International Investment Law' (n 537) 743; Klein (n 530) 138–140; see also Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 148.

540 Cf. Simma, 'Foreign Investment Arbitration: A Place for Human Rights' (n 530), 576; Pellet, 'Notes sur la "Fragmentation" du Droit International' (n 428) 760/761.

541 For the influence of human rights on investment law Mārtiņš Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 175–180 and the following analysis.

542 See Pellet, 'Notes sur la "Fragmentation" du Droit International' (n 428) 780; Hofmann, 'The Protection of Individuals under Public International Law' (n 436) 47, para. 3.

element of the international legal status of the individual".[543] What has made human rights a "game changer" is that they are deemed to be accorded to persons irrespective of their nationality solely due to their existence and dignity as a human being.[544]

After the First World War, a system of minority protection treaties was put in place to alleviate racial and ethnic tensions after the restructuration of nations, which partly separated ethnic communities along borders.[545] While individuals were mostly protected as members of a group, they were also given direct access to international dispute settlement procedures.[546] Admittedly, these treaties were enacted with the primary aim of securing the (fragile) peace by preventing ethnic tensions.[547] Yet, the rearrangement of territories and nations brought to light the need for a state to protect its inhabitants irrespective of their nationality. It was in this context that the PCIJ first relied on the doctrine of acquired rights.[548] But only a few years after the PCIJ's judgment, this minority protection system became victim to the violent overhauls caused by the Second World War and was not reinstalled afterwards. Instead, as mentioned, the experience of the Second World War sparked the human rights movement. The protection of the individual has today attained a scope and status not known before, thanks to the enactment of numerous treaties, e.g., the UN Charter, the International Covenant on Civil and Political Rights (ICCPR),[549] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[550] and

543 Peters *Beyond Human Rights* (n 436) 32.

544 See Buergenthal, 'Human Rights (2007)' (n 437) para. 7; Schöbener, 'Der menschenrechtliche Schutz des privaten Eigentums im universellen Völkerrecht – eine Zwischenbemerkung' (n 530) 906–907; Arnauld *Völkerrecht* (n 255) 382, para. 607; *Separate Opinion Weeramantry* (n 528) 657; *critical* Rein Müllerson, 'Human Rights Are Neither Universal Nor Natural' (2018), 17(4) Chinese JIL 925 929–930.

545 Verdross and Simma (n 23) §§ 1252-1253; see Buergenthal, 'Human Rights (2007)' (n 437) para. 4. Very critical about the minority protection system Angelika Nußberger, 'Der Weg zur Hölle ist mit guten Vorsätzen gepflastert: Selbstbestimmungsrecht und Minderheitenschutz' in Klaus Kreß (ed), *Paris 1919–1920: Frieden durch Recht?* (Nomos 2020) 45.

546 Gudmundur Alfredsson, 'German Minorities in Poland, Cases Concerning the (2010)' in: *MPEPIL* (n 2) paras. 11–13; Kälin and Künzli (n 441) 9.

547 ibid.

548 See *PCIJ German Settlers* (n 4).

549 International Covenant on Civil and Political Rights (16 December 1966) UNTS 999 171.

550 International Covenant on Economic, Social and Cultural Rights (16 December 1966) UNTS 993 3.

further universal UN human rights treaties.[551] The African, the American and the European regional human right systems are now even providing for a compulsory jurisdiction of an independent court accessible to the individual.[552]

While the concept of human rights was still in its infancy in 1945 and did not start to flourish until the end of the 1970s,[553] today it relates to and influences all other areas of law.[554] As a consequence, there is general consensus that international law may, in principle, also regulate the relationship of states and individuals, even nationals of that state.[555] Human rights have, therefore, led to a transcendence of the divide between the domestic and the international sphere.[556] Yet, even if the idea of human rights has had a "transformative"[557] effect on general international law, it remains part of it and subject to its rules, especially the respect for state sovereignty.[558] While human rights law has often been perceived as "special" or subject to its own regime, a complete detachment from general international law has not taken place. Neither is such a development desirable.[559]

551 For an overview of core human rights instruments cf. the website of the UN OHCHR, https://www.ohchr.org/en/instruments-listings.

552 For an overview Buergenthal, 'Human Rights: From San Francisco to The Hague' (n 474), 293–296.

553 Chinkin, 'Human Rights' (n 423) 510, 511; for the ECHR Angelika Nußberger, 'Die Europäische Menschenrechtskonvention – eine Verfassung für Europa?' (2019), 74(9) JZ 421 423–425.

554 On the reception of human rights law by the ICJ Bruno Simma, 'Human Rights in the International Court of Justice: Are We Witnessing a Sea Change?' in: *Alland/Chetail Unité et Diversité* (n 428) 711.

555 Pellet, 'Notes sur la "Fragmentation" du Droit International' (n 428) 758 ; Buergenthal, 'Human Rights (2007)' (n 437) para. 8.

556 Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 243; Simma and Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (n 428), 524; cf. Buergenthal, 'Human Rights (2007)' (n 437) para. 8.

557 Parlett (n 439), 73; Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 243 ("revolutionary"); cf. also Pellet, 'Notes sur la "Fragmentation" du Droit International' (n 428) 780.

558 ibid 780; on the "mainstreaming" of human rights law by the ICJ Simma, 'Human Rights in the International Court of Justice' (n 554) 717–718.

559 Pellet, 'Notes sur la "Fragmentation" du Droit International' (n 428) 782; Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 385), 275, 289; in general Simma and Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (n 428), 529.

The question now needs investigating as to whether and to what extent the concept of human rights is capable of displacing, and in fact has displaced, the doctrine of acquired rights. The investigation will proceed from the particular to the general. As the traditional doctrine of acquired rights was coupled to rights possessing a monetary value, the most relevant potential human right is the right of[560] property. The investigation will clarify how, as human rights, property rights are protected under the special circumstances of a change in sovereignty. Therefore, it first looks at whether there is a solid basis for the protection of a human right of property before, second, investigating whether a rule of succession to human rights treaties has emerged, protecting, besides others, a human right of property.

1) The Controversial Status of the Human Right of Property

One of the ideas most intricately linked to the doctrine of acquired rights is that of a human right of property. And obviously, if such an international right of property existed under general international law, it would cover a large part of the traditional acquired rights doctrine. Yet, the existence of such a right on the universal level is highly controversial.[561]

560 On the difference between a right "of" and "to" property, José E Alvarez, 'The Human Right of Property' (2018), 72(3) UMiami LRev 580-705 664–665.

561 In favor of such a right e.g. Pellet, 'Notes sur la "Fragmentation" du Droit International' (n 428) 765; Rein Müllerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (Routledge 1994) 156; Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 491; John G Sprankling, 'The Global Right to Property' (2014), 52(2) ColumJTransnat'l L 464 without, however, being clear on what source of international law such right would spring from; Burkhard Schöbener, 'Outlook on the Developments in Public International Law and the Law Relating to Aliens' in: *Bungenberg/Griebel International Investment Law* (n 436) 66, para. 4; for other than socialist countries Rudolf Dolzer, *Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht* (Springer 1985) 128; *contra* Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 133; Klein (n 530) 139; Drinhausen (n 2) 172–173; William Schabas, *The Customary International Law of Human Rights* (OUP 2021) 258–262; Ronen *Transition from Illegal Regimes* (n 14) 254.

a) A Human Right of Property under International Instruments

aa) Universal Instruments

While the right to own property under Art. 17 of the Universal Declaration of Human Rights (UDHR)[562] – as provision of a UNGA declaration – has no direct binding legal force,[563] such a right could potentially emanate from provisions in widely ratified international human rights conventions. However, besides the general problem of extracting *opinio juris* and/or state practice from international conventions,[564] the international conventional landscape presents a mixed picture on the topic: The ICCPR and the ICESCR, both with almost universal ratification status,[565] contain no provisions on the protection of property, a fact that, alone, is sometimes seen as a

562 UNGA, 'Universal Declaration of Human Rights: UDHR' (10 December 1948) UN Doc. A/RES/217(III) (1948) "(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property."

563 Kälin and Künzli (n 441) 13; cf. Eibe Riedel, 'Standards as Sources' (2022), 63(1) GYIL 369 380; differently Schöbener, 'Der menschenrechtliche Schutz des privaten Eigentums im universellen Völkerrecht – eine Zwischenbemerkung' (n 530) 912–913 but only by reference to following developments. See also Buergenthal, 'Human Rights (2007)' (n 437) para. 9 "Although the UDHR was adopted as a non-binding UN General Assembly resolution and was intended [...] to provide merely a common understanding of the human rights and fundamental freedoms mentioned in the UN Charter, the declaration has gradually been accepted by the international community as a normative instrument that, together with the UN Charter, spells out the general human rights obligations incumbent upon all UN Member States. Some of its provisions are also deemed to have become customary international law"; more critical Fernando R Téson, 'Fake Custom' in Brian D Lepard (ed), *Reexamining Customary International Law* (CUP 2018) 86 100. In certain circumstances, declarations of the UNGA can be evidence of *opinio juris*, cf. *Legality of the Threat or Use of Nuclear Weapons,* 8 July 1996, Advisory Opinion, ICJ Rep 1996 226 para. 70 (ICJ) "To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradua1 evolution of the *opinio juris* required for the establishment of a new rule." [italics in original]; Tullio Treves, 'Customary International Law (2006)' in: *MPEPIL* (n 2) para. 44; cf. also ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (2018) UN Doc. A/73/10 Draft Conclusion 12.

564 See Chapter V B) II) 3) b).

565 For exact numbers please refer to https://treaties.un.org/pages/ParticipationStatus.aspx?clang=_en.

major argument against property as a human right.[566] Nevertheless, several human rights conventions protect special vulnerable groups. Many of them outlaw discrimination in property protection, e.g., Art. 5 lit. d) nos. v and vi of the International Convention against Racial Discrimination (ICERD)[567] guarantee the right to own property alone and in association with others and the right to inherit "without distinction as to race, colour, or national or ethnic origin, to equality before the law". Similarly, Art. 15 para. 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[568] obliges state parties to "accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals". Art. 16 para. 1 lit. h) CEDAW stipulates that states shall guarantee "[t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration". Art. 12 of the Convention on the Rights of Persons with Disabilities[569] in para. 5 requires states parties to "take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property". All three conventions enjoy wide support and almost universal ratification status.[570] Yet, the named provisions mainly attempt to protect the enjoyment of property rights without discrimination on specific grounds. Instead of providing for a certain standard of property protection, they require equality in protection.[571]

566 Tomuschat, 'Die Vertreibung der Sudetendeutschen' (n 266), 28; *contra* Schöbener, 'Der menschenrechtliche Schutz des privaten Eigentums im universellen Völkerrecht – eine Zwischenbemerkung' (n 530) 918–919.

567 International Convention on the Elimination of All Forms of Racial Discrimination (7 March 1966) UNTS 660 195.

568 Convention on the Elimination of All Forms of Discrimination against Women (18 December 1979) UNTS 1249 13.

569 Convention on the Rights of Persons with Disabilities (13 December 2006) UNTS 2515 3.

570 For exact numbers please refer to https://indicators.ohchr.org/.

571 For CEDAW (n 568) and ICERD (n 567) Alvarez, 'The Human Right of Property' (n 560), 650; cf. Sprankling (n 561), 466, 480-484.

In comparison, the wording of Art. 15 of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[572]:

> "No migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others. Where, under the legislation in force in the State of employment, the assets of a migrant worker or a member of his or her family are expropriated in whole or in part, the person concerned shall have the right to fair and adequate compensation."

speaks more for a substantive understanding of property. However, the convention has only 58 state parties, not including any EU member state, the United States of America (USA), Canada, China or Russia, Brazil, India, or many other Asian countries[573] and therefore does not reflect a universal standard. Finally, the Convention on the Rights of the Child (CRC)[574] does not contain any clause protecting property.

bb) Regional Instruments

Several regional human rights instruments contain provisions guaranteeing property. Art. 1 of the First Protocol (P-I 1)[575] to the European Convention on Human Rights (ECHR)[576] contains the right to "protection of property", as do Art. 17 of the Charter of Fundamental Rights of the European Union (EU Rights Charter)[577], Art. 14 of the African Charter on Human and Peoples' Rights (Banjul Charter)[578], Art. 23 of the American

572 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18 December 1990) UNTS 2220 3.
573 As of 1 January 2024; for exact nos. please refer to https://indicators.ohchr.org/.
574 Convention on the Rights of the Child (20 November 1989) UNTS 1577 3.
575 Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (20 March 1952) ETS No. 9.
576 Convention for the Protection of Human Rights and Fundamental Freedoms (4 October 1950) ETS No. 5.
577 Charter of Fundamental Rights of the European Union (26 October 2012) OJ C 326, 391 (2012).
578 African Charter on Human and Peoples' Rights (27 June 1981) OAU Doc. CAB/LEG/67/3 rev. 5, 21(1) ILM 59.

Declaration of the Rights and Duties of Man,[579] and Art. 21 of the American Convention on Human Rights (ACHR)[580]. Yet even these three most effective regional protection systems (the African, American and European) have distinct perceptions of what is protected by property and in what circumstances,[581] e.g., P-I 1 protects property of legal and natural persons while Art. 21 ACHR excludes legal entities from its protection. As a further example, different understandings exist concerning the scope of property protection for indigenous peoples in the three systems.[582] Moreover, they are, at most, the expression of a *regional* consensus on property protection. They do not express the conviction of a major part of the international community. In particular, they cover almost no Asian or Arab country.[583]

cc) Interim Conclusion

In sum, an overview of relevant treaty law seems inconclusive.[584] On the one hand, the widespread and almost universal support of treaties that

579 American Declaration of the Rights and Duties of Man (8 October 1948) UN Doc. E/CN.4/122/Rev.1 (1948).

580 American Convention on Human Rights (22 November 1969) UNTS 17955 143.

581 Cotula (n 29), 238–239; for ECHR and IACtHR cf. Alvarez, 'The Human Right of Property' (n 560), 649; for all three systems but in a general manner cf. Buergenthal, 'Human Rights (2007)' (n 437) paras. 12, 17-18.

582 Cf. Dinah Shelton, 'The Rights of Indigenous Peoples' in Andreas v Arnauld, Kerstin von der Decken and Mart Susi (eds), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (CUP 2020) 217 221–223; Giovanna Gismondi, 'Denial of Justice: The Latest Indigenous Land Disputes Before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1' (2016), 18 Yale Human Rights and Development Law Journal 1 20-53, 12–13, 17-18; for ECtHR and IACtHR Alvarez, 'The Human Right of Property' (n 560), 606-611.

583 According to Buergenthal, 'Human Rights: From San Francisco to The Hague' (n 474), 302 this means that "A majority of the world's inhabitants […] lives in countries where they are effectively protected neither by regional human rights law nor by UN human rights treaty law." In 2008, the Arab Charter on Human Rights came into force, which in Art. 25 protects the right to private ownership of "every citizen"; see for criticism e.g. Humanists International, 'The Arab Charter on Human Rights is Incompatible with International Standards – Louise Arbour' (11 March 2008) <https://humanists.international/2008/03/arab-charter-human-rights-incompatible-international-standards-louise-arbour/>/.

584 Cf. Kriebaum *Eigentumsschutz im Völkerrecht* (n 428) 33 "Somit gibt es auf globaler Ebene keinen vertraglich verankerten Eigentumsschutz."

presuppose certain property-related rights cannot be meaningless.[585] On the other hand, the contours and limits of these property rights are not clear and are essentially left to individual state discretion. Hence, even if a certain core of property rights seems to be presupposed in many of these instruments, there is still no *universal* international convention protecting a *substantive* right to property. That such agreement is possible, albeit on a smaller scale, is exemplified by the regional human rights conventions.[586]

b) A Human Right of Property and Investment Law

Importantly, even if there is a panoply of investment treaties and also customary investment law protecting property rights of the investor,[587] they cannot be taken as evidence of a human right of property.[588] International investment law exclusively protects rights of *foreign* investors, not nationals.[589] A human right of property necessitates it being guaranteed to everyone.[590] Moreover, human rights law and investment law have developed separate concepts of property, protect different subjects, have partly disparate

585 Cf. also Alvarez, 'The Human Right of Property' (n 560), 653, 666/667.

586 Cf. Kriebaum *Eigentumsschutz im Völkerrecht* (n 428) 33–36; Cotula (n 29), 241 "[T]he right to property is primarily based on regional human rights systems".

587 See in detail *infra*, section III).

588 Apparently of different opinion Sprankling (n 561), 474; Schöbener, 'Der menschenrechtliche Schutz des privaten Eigentums im universellen Völkerrecht – eine Zwischenbemerkung' (n 530) 916–917.

589 Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 131/132 "Eigentum wird danach geschützt, weil es dem Ausländer zugeordnet ist, nicht etwa als Unterpfand würdigen Daseins oder freier Persönlichkeitsentfaltung."; Klein (n 530) 125–126; differently Schöbener, 'Der menschenrechtliche Schutz des privaten Eigentums im universellen Völkerrecht – eine Zwischenbemerkung' (n 530) 916–917. See *infra*, section III 1) a).

590 Kälin and Künzli (n 441) 6/7. E.g. under the ECtHR case law PI-1 in principle covers nationals as well as non-nationals. However, the court applies different compensation standards to both groups, cf. *James and Others v. the United Kingdom,* Appl. No. 8793/79, 21 February 1986 paras. 58-66 (ECtHR [Plenary]); followed by *Lithgow and Others v. the United Kingdom,* Appl. Nos. 9006/80, 9262/81, 9263/81 et. al, 8 July 1986 paras. 111-119 (ECtHR). On this case law Ursula Kriebaum, 'Nationality and the Protection of Property under the European Convention on Human Rights' in Isabelle Buffard (ed), *International Law Between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff 2008) 649 653–657 and Angelika Nußberger, 'Enteignung und Entschädigung nach der EMRK' in: *Depenheuer/Shirvani Die Enteignung* (n 427) 89 103.

goals, and provide for diverging consequences.[591] The so-called "minimum standard" of property protection has thus not evolved into a human rights guarantee.[592]

c) A Human Right of Property and Domestic Instruments

Some authors advocate the emergence of a universal right to property as a general principle of law,[593] often by inferring this conclusion from the finding that "almost every"[594] national constitution contains a right to property. And even beyond that, the assertion is that

> "because almost all nations recognize the right to property under domestic law and have expressed their belief that the right also exists under international law, it should be viewed as customary law, which all nations must follow."[595]

This quote is illustrative of much argumentation on the topic, which often suffers from oversimplification.[596] Even under the assumption that such numbers are correct,[597] the mere existence of a right named similarly in

591 For a detailed comparison see Kriebaum *Eigentumsschutz im Völkerrecht* (n 428) 30–33, 44-56, 172-173, 546-548; Klein (n 530) 120–140; Kriebaum and Schreuer, 'The Concept of Property in Human Rights Law and International Investment Law' (n 537); Cotula (n 29), 252–257. In particular on the diverging standard of compensation Alvarez, 'The Human Right of Property' (n 560), 665.

592 Kälin and Künzli (n 441) 6–7; *de lege lata* Knut Ipsen, '§ 38. Zum völkergewohnheitsrechtlichen Mindeststandard des Individualrechtsschutzes' in Knut Ipsen (ed), *Völkerrecht. Ein Studienbuch* (6th ed. Beck 2014) 854 858, Rn. 11; cf. Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 132-133; differently Schöbener, 'Der menschenrechtliche Schutz des privaten Eigentums im universellen Völkerrecht – eine Zwischenbemerkung' (n 530) 917 who even refers to the standard's ostensible *jus cogens* and *erga omnes* character, arguably also Riedel (n 563), 381.

593 Sprankling (n 561), 466, 491; see also Schöbener, 'Der menschenrechtliche Schutz des privaten Eigentums im universellen Völkerrecht – eine Zwischenbemerkung' (n 530) 905.

594 Sprankling (n 561), 488.

595 ibid 466.

596 Also critical with respect to a general principle protecting a human right of property Alvarez, 'The Human Right of Property' (n 560), footnote 475.

597 E.g. Sprankling (n 561), 484 does not substantiate this assertion beyond claiming that 95% of all constitutions contained such a right. Alvarez, 'The Human Right of Property' (n 560), 585/586 relies on (referenced) numbers of 85% as „nearly all" constitutions. Also without proof but only with respect to "national legal

domestic constitutions does not mean that all these countries agree on a common definition.[598] Nor would it mean that any such definition could be simply transposed to the international level for establishing an internationally enforceable right of property.[599] To constitutionally protect property rights, which in most states are defined by the domestic legal system, is significantly different from accepting an abstract international standard. Property is a theoretical, social construct. Its existence is contingent on a legal and social predetermination.[600] As a consequence, the property of a state's own nationals was, for a long time, seen as a purely domestic con-

systems" Schöbener, 'Enteignung und Entschädigung im Systemvergleich' (n 427) 53 and for "all modern constitutional states" Schöbener, 'Der menschenrechtliche Schutz des privaten Eigentums im universellen Völkerrecht – eine Zwischenbemerkung' (n 530) 901.

598 Alvarez, 'The Human Right of Property' (n 560), 596 "even those who might be willing to concede that property rights should ideally be recognized at the national and international levels differ considerably as to the nature of the 'right' in question". See in this respect also the overview of more than 20 jurisdictions by Wenhua Shan, 'Property Rights, Expropriation and Compensation' in Wenhua Shan (ed), *The Legal Protection of Foreign Investment: A Comparative Study* (Hart Publishing 2012) 47.

599 *See* ILC, 'Second Report on General Principles of Law (Special Rapporteur Vázquez-Bermúdez)' (9 April 2020) UN Doc. A/CN.4/741 para. 73 "municipal law and international law have unique features and differ in many important aspects, and the principles existing in the former cannot be presumed to be always capable of operating in the former. Transposition, therefore, does not occur automatically." See in detail *infra*, Chapter IV B) III) 1).

600 Schöbener, 'Der menschenrechtliche Schutz des privaten Eigentums im universellen Völkerrecht – eine Zwischenbemerkung' (n 530) 903; Schöbener, 'Enteignung und Entschädigung im Systemvergleich' (n 427) 59; Fabian Michl, *Unionsgrundrechte aus der Hand des Gesetzgebers* (Mohr Siebeck 2018) 85–86.

cern not regulated by international law.[601] Many national courts continue to reject a universal human right of property.[602]

d) Interim Conclusions

While it is held that a common, independent notion of "property" has emerged under international law,[603] it does not mean that that property is also protected as a human right outside treaties. Even if existing, such a right to property would not be anything other than

601 E.g. Sik (n 8), 127–128; Stern, 'La Succession d'États' (n 283), 31 "Si l'on considère le problème de la répartition des biens, droits et intérêts, l'insertion du droit international dans l'Etat successeur concerne aussi bien les droits et les obligations que l'ordre interne confère à l'Etat lui-même sur le patrimoine de l'Etat que les droits que l'ordre interne confère aux particuliers. Bien qu'extrêmement important au niveau du vécu — parfois douloureux comme l'illustre tristement la dissolution de l'ex-Yougoslavie — des individus qui subissent un processus successoral, ce dernier thème ne sera pas traité dans cette étude, parce que le droit international n'intervient en réalité que de façon relativement marginale dans le domaine des relations entre un Etat successeur et les particuliers."; Schöbener, 'Der menschenrechtliche Schutz des privaten Eigentums im universellen Völkerrecht – eine Zwischenbemerkung' (n 530) 903 "Die Aufgabe der Ausgestaltung des Eigentums fällt allein in den Kompetenzbereich der Staaten, das Völkerrecht enthält keine Vorgaben zu den Erwerbs- und Übertragungstatbeständen des Eigentums" (insofar contradictory to his assertion that there was an independent notion of property under public international law).

602 E.g. *Bodenreform III,* 2 BvR 955/00, 26 October 2004, BVerfGE 112 1 para. 121 (German Federal Constitutional Court [BVerfG]); *Mezerhane v. República Bolivariana de Venezuela,* No. 13–14953, 7 May 2015 (U.S. Court of Appeals Eleventh Circuit); *US Supreme Court Germany v. Philipp* (n 443); differently *On the Restoration of the Ownership Rights of Citizens to Land,* Case No. 12/93, 27 May 1994 https://lrkt.lt/en/court-acts/search/170/ta973/content (Constitutional Court of the Republic of Lithuania); see also Mitbestimmung, 1 BvR 532, 533/77, 419/78, 1 BvL 21/78, 1 March 1979, BVerfGE 50, 290 344 (German Federal Constitutional Court [BVerfG]).

603 Dolzer (n 561) 170–171 (who is, however, not sure whether to include claims against a state); following him Kriebaum *Eigentumsschutz im Völkerrecht* (n 428) 43–44; Schöbener, 'Enteignung und Entschädigung im Systemvergleich' (n 427) 59–60; see also references in Schöbener, 'Der menschenrechtliche Schutz des privaten Eigentums im universellen Völkerrecht – eine Zwischenbemerkung' (n 530) 905 footnote 15; *contra* Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 131, 136; arguably Douglas (n 455), 197 "Customary international law contains no substantive rules of property law. They cannot be a source of rights in property."

> "a primitive or rudimentary conception of what the ostensible universal right of property would entail. A universal right grounded in either custom or general principles presumably would not go further than the wording in the original Universal Declaration of Human Rights, which leaves the parameters of such a property right, along with the definition of property owed protection, undefined and presumptively subject to considerable state discretion."[604]

It seems questionable whether such a malleable, under-defined term would lead to any practical improvement.[605]

A reason for states' reticence to agree on a common notion of protected property is the issue's inherent implications for states' sovereign discretion over their economic system. As a consequence, "[t]here is no such thing as a single global regime for property protection"[606] and "[t]he human right of property is not one idea but many."[607] While an impressive and almost global network of international instruments protecting property has developed in some sense and probably most states' constitutions acknowledge a right of property, no universal human right of property has emerged.[608]

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604 Alvarez, 'The Human Right of Property' (n 560), 686/687 [footnote omitted].

605 Cf. Markus Perkams, 'Eigentumsschutz' in Burkhard Schöbener (ed), *Völkerrecht: Lexikon zentraler Begriffe und Themen* (Müller 2014) 74 78; but see also Lisa Mardikian, 'In-Between an Economic Freedom and a Human Right: A Hybrid Right to Private Property' (2021), 81(2) HJIL 341 379 "What the example of property illustrates […] is that its inbuilt flexibility and capacity to support an inter-systemic level of discourse render it a viable framework for conceptualising the coordination of its different functions"; Alvarez, 'The Human Right of Property' (n 560), 588 "the human right of property, admittedly a product of the West, will remain a viable proposition in the West and beyond only to the extent that it remains subject to distinct contextualized interpretations in international regimes and diverse international adjudicative forums".

606 ibid 650; also Klein (n 530) 126; Paparinskis (n 541) 228 "The human right to property is internationally protected on the regional, rather than universal level."

607 Alvarez, 'The Human Right of Property' (n 560), 653; cf. also Mardikian (n 605) speaking of the "hybridity" of the right to property.

608 Cf. also Schabas (n 561) 260 "the evidence the materials provide that the right to property is a norm of customary law is far from overwhelming".

2) (Non-)Succession to Human Rights Treaties

The question of succession[609] to treaties has been recurrently and intensely studied. Within that discussion, the dominant view is that a general rule of continuity of treaties, especially bilateral treaties,[610] is not part of international law.[611] Hence, the rule of succession contained in Art. 34 VCSST for cases of "separation of parts of a State" (encompassing dissolution and separation) is said not to reflect customary law,[612] at least with respect to separa-

609 It is acknowledged here that the use of the term "succession" with respect to this topic deviates from the definition developed in Chapter II as it connotes a legal consequence – the bindingness of the predecessor's treaties for the successor state. However, since the terminology of "succession to treaties" is continuously used in practice and academic writings, it will be used here as well.

610 Cf. ILA, 'Resolution No 3/2008' (n 306) para. 8; Shaw, 'State Succession Revisited' (n 259), 67; Delbrück and Wolfrum (n 266) 160/161; Müllerson, 'New Developments in the Former USSR and Yugoslavia' (n 371), 317; Degan (n 2), 158; cf. Hanna Bokor-Szego, 'Continuation et Succession en Matière des Traités Internationaux' in Geneviève Burdeau and Brigitte Stern (eds), *Dissolution, Continuation et Succession en Europe de l'Est: Succession d'États et Relations Économiques Internationales* (Montchrestien 1994) 48 55; Aust *Modern Treaty Law and Practice* (n 294) 322. But see also August Reinisch, 'Das Schicksal des österreichisch-sowjetischen Investitionsschutzabkommens in den Wirren der Staatensukzession: Völkerrechtliche Theorie und zwischenstaatliche Praxis' (1996), 36 Der Donauraum 13 22 arguing for the continuity of the Soviet-Austrian BIT.

611 Jennings (n 326), 446; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 407/408; Aust *Modern Treaty Law and Practice* (n 294) 322–324; cf. Shaw, 'State Succession Revisited' (n 259), 73; Menno T Kamminga, 'Impact on State Succession in Respect of Treaties' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009) 99 99. Whether this also applies to state contracts is a matter of ongoing dispute. In favor Dumberry *Guide to State Succession in International Investment Law* (n 14) paras. 12.07-12.08. Differently Reinisch and Hafner (n 2) 54–59, who include state-contracts (and even "quasi-international" contracts) into the category of protected acquired rights. Arguing for the survival of the contract by "way of subrogation" Bismuth, 'Customary Principles Regarding Public Contracts Concluded with Foreigners' (n 2) 333–334 but without any reference to a recent source which would support such supposition. See also Torres Cazorla, 'Rights of Private Persons on State Succession: An Approach to the Most Recent Cases' (n 514) 709 who deals more with employment and social security contracts.

612 Arnauld *Völkerrecht* (n 255) § 2 para. 112 (even if calling it an "appropriate" solution); Craven *Decolonization of International Law* (n 17) 15-16; cf. Hafner and Kornfeind (n 27), 3; Kay Hailbronner, 'Legal Aspects of the Unification of the Two German States' (1991), 2(1) EJIL 18 37; Dumberry, 'State Succession to Bilateral Treaties' (n 295), 22; Dumberry *Guide to State Succession in International Investment Law* (n 14) para. 5.88; Müllerson, 'The Continuity and Succession of States, by

tions,[613] because state practice in recent decades has not been homogeneous enough to amount to a settled practice.[614] The same is assumed for the rule of continuity in Art. 31 VCSST for cases of a "uniting of states" (merger and absorption).[615] One exception to this rule is territorial agreements, which according to almost unanimous opinion continue after a change in sovereignty over the respective territory, cf. Art. 11 and 12 VCSST.[616] But

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Reference to the Former USSR and Yugoslavia' (n 26), 488; Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 334 "Yet, as noted above, the better view is that Article 34 does not reflect customary international law and that it certainly does not reflect customary international law as far as bilateral treaties are concerned"; differently Reinisch, 'Das Schicksal des österreichisch-sowjetischen Investitionsschutzabkommens in den Wirren der Staatensukzession' (n 610), 20.

613 Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294) 860–861; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 525, 528, 530; Shaw, 'State Succession Revisited' (n 259), 71, 72, 77-78; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 399, 416; Devaney, 'What Happens Next? The Law of State Succession' (n 283).

614 Crawford *Brownlie's Principles of Public International Law* (n 3) 423–424 who rejects the differentiation between dissolution and separation; cf. summary by ILA, 'Resolution No 3/2008' (n 306) para. 5.

615 Crawford *Brownlie's Principles of Public International Law* (n 3) 423–424; Herdegen (n 255) § 29 para. 6; Arnauld *Völkerrecht* (n 255) 68, para. 112; Hailbronner (n 612), 37; Delbrück and Wolfrum (n 266) 164; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 399; Heinz-Peter Mansel, 'Staatsverträge und autonomes internationales Privat- und Verfahrensrecht nach der Wiedervereinigung' [1990] JR 441, 441 (limiting the scope of Art. 31 to mergers); doubting the customary character Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 521–524; only for cases of mergers Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294) 861 and Raymond Goy, 'La Réunification du Yémen' (1990), 36 AFDI 249 264/265. Cf. for cases of absorption Shaw, 'State Succession Revisited' (n 259), 68–69. Especially the example of the absorption of the GDR into the FRG militates against such a rule, see for details *infra*, Chapter IV B) II) 2). In general critical on Art. 31 VCSST Oeter, 'German Unification and State Succession' (n 283), 355–359. More in favor of its customary status Reinisch, 'Das Schicksal des österreichisch-sowjetischen Investitionsschutzabkommens in den Wirren der Staatensukzession' (n 610), 20.

616 Cf. *ICJ Frontier Dispute (Burkina Faso v. Mali)* (n 371) para. 24; Badinter Commission, 'Opinion No. 9' (1992), 31(6) ILM 1523; Vagts (n 295), 289; Stern, 'La Succession d'États' (n 283), 308, 421; Crawford *Brownlie's Principles of Public International Law* (n 3) 424 (but sceptical towards the idea of localized treaties); Shaw, 'State Succession Revisited' (n 259), 63. For Art. 11 VCSST in particular Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 399; Müllerson, 'New Developments in the Former USSR and Yugoslavia' (n 371), 313, footnote 53; Stern, 'La Succession d'États' (n 283), 421; Degan (n 2), 137–139; Kamminga, 'Impact on State Succession in Respect of Treaties' (n 611) 100; Aust *Modern Treaty Law and Practice* (n 294) 322; Roda Mushkat, 'Hong Kong and Succession of Treaties' (1997), 46(1) ICLQ 181

in light of the described "human turn" in international law, forces are gathering behind a view contending that treaties protecting humanitarian values are also subject to "automatic" succession,[617] i.e. that successor states would become bound by the treaties of their predecessors irrespective of the successor's will.[618]

The ICJ has not yet conclusively adjudged on the issue. In 1996, it did not seize the opportunity in its case on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, when Bosnia and Herzegovina advocated for automatic succession into the Genocide Convention,[619] and left the question open.[620] In its 2008 judgment on preliminary objections in *Croatia v. Serbia*, the Court again eschewed the question of automatic succession and relied on a declaration by Serbia

189. For Art. 12 VCSST in particular ILA, 'Aspects of the Law of State Succession: Draft Final Report (Rio de Janeiro Conference)' (2008) 29 <https://www.ila-hq.org/en_GB/documents/draft-conference-report-rio-2008>; Arnauld *Völkerrecht* (n 255) § 2, para. 108; Herdegen (n 255) § 29 para. 3; Delbrück and Wolfrum (n 266) 167–168; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 532–533; Czaplinski (n 306), 99; Schachter (n 325), 255–256; Oeter, 'German Unification and State Succession' (n 283), 363–364; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 419, 426-427; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),* 25 September 1997, ICJ Rep 1997 7 paras. 119, 123 (ICJ), endorsed by *Prisoners of War - Eritrea's Claim 17,* Partial Award of 1 July 2003, UNRIAA XXVI 23 para. 33 (EECC).

617 On the term "automatic succession" Akbar Rasulov, 'Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?' (2003), 14(1) EJIL 141 149/150. In *ICJ Croatia v. Serbia (Preliminary Objections)* (n 485) para. 101 the court uses the term *ipso jure* succession.

618 E.g. Stern, 'La Succession d'États' (n 283), 297-310, 421; Arnauld *Völkerrecht* (n 255) 68, para. 111; Menno T Kamminga, 'State Succession in Respect of Human Rights Treaties' (1996), 7(4) EJIL 469 482–483; Kamminga, 'Impact on State Succession in Respect of Treaties' (n 611) 100; Fifth Meeting of Persons Chairing the Human Rights Treaty Bodies, 'Report' (19 October 1994). Annex to Note of the Secretary General, UN Doc. A/49/537 para. 32; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* 3 February 2015, Merits, Dissenting Opinion Judge Trindade, ICJ Rep 2015 202 paras. 26, 33 (ICJ); Müllerson *Developments in Eastern Europe and the CIS* (n 561) 155–156 "strong argument in favour" of succession in cases of secession and dismemberment; *also* Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 490; cf. Mushkat (n 616), 186, 190-191.

619 *ICJ Application of the Genocide Convention (Preliminary Objections)* (n 513) para. 21.

620 ibid para. 23; this was criticized in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* 11 July 1996, Preliminary Objections, Separate Opinion Judge Parra-Aranguren, ICJ Rep 1996 656 (ICJ).

from which it inferred an "intention to be bound".[621] Finally, at the merits stage of the case, it briefly came back to the issue when considering if acts committed before the date of the declaration fell into its jurisdiction:

> "Logic, as well as the presumption against retroactivity of treaty obligations enshrined in Article 28 of the Vienna Convention on the Law of Treaties, […] points clearly to the conclusion that the obligation to prevent genocide can be applicable only to acts that might occur after the Convention has entered into force for the State in question."[622]

This conclusion is self-evident. But the crucial question there was from what date the Genocide Convention had entered into force for Serbia. Because of the particularities of the case, besides others, the fact that the court considered Serbia to have come into existence on the same day it issued the declaration and Serbia's insistence of being the continuator state of the Socialist Federal Republic of Yugoslavia (SFRY), it is not clear whether the court ruled out the possibility of automatic succession or whether it felt bound by its own preliminary ruling basing its jurisdiction on Serbia's declaration.[623] Either way, the ICJ did not seem prepared to openly endorse a rule of automatic succession.

If such a rule of automatic succession could be substantiated, the scope of application of the acquired rights doctrine would be severely diminished. Human rights law now has an influence on the national legal system. Moreover, several treaties of almost universal scope are protecting a panoply of rights, amongt them property. A succession into treaty rights could therefore lead to the survival of rights formerly protected as acquired rights.[624] However, as will be seen, such a rule of automatic succession has not yet crystallized into positive international law.

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621 *ICJ Croatia v. Serbia (Preliminary Objections)* (n 485) paras. 105-117.

622 *ICJ Croatia v. Serbia (Merits)* (n 483) para. 95; see also para. 100.

623 See also ibid para. 104 "In the present case, the FRY was not bound by the obligations contained in the Genocide Convention until it became party to that Convention. In its 2008 Judgment, the Court held that succession resulted from the declaration made by the FRY on 27 April 1992 and its Note of the same date […]. The date on which the notification of succession was made coincided with the date on which the new State came into existence. The Court has already found, in its 2008 Judgment, that the effect of the declaration and Note of 27 April 1992 was 'that *from that date onwards* the FRY would be bound by the obligations of a party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution' (I.C.J. Reports 2008, pp. 454-455, para. 117; emphasis added)."

624 Cf. e.g. the argument by Wittich, 'Art. 70' (n 2) 1207, para. 30 for the ICCPR.

a) Reliance on Rules Outside the Specific Treaty

In an extensive and influential separate opinion on the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judge *Weeramantry* laid out his main reasons why automatic succession into the Genocide Convention ought to take place.[625] His arguments, *mutatis mutandis*, can be applied to other treaties of humanitarian character as well.[626] They are worth of recapitulation in some detail here.

- He starts from the point that "[o]ne of the principal concerns of the contemporary international legal system is the protection of the human rights and dignity of every individual."[627] Because atrocities were committed in times of turbulences induced by the demise and birth of new states and populations and individuals were especially vulnerable to an abuse of their most fundamental rights, those individuals should be protected and no gap in the protection should occur.[628]
- *Weeramantry* contends that fundamental human rights are not granted to human beings by their sovereign but are incumbent upon them by virtue of their existence.[629] Therefore, the dependence of the protection of such fundamental rights on political decisions of states would not be in line with humans' new status under international law.[630]

625 *Separate Opinion Weeramantry* (n 528). Interestingly enough, *Weeramantry* at ibid 652, although considering it "not necessary for the determination of the present matter" briefly mentioned the doctrine of acquired rights: "Perhaps in comparable fashion, human rights, once granted, become vested in the persons enjoying them in a manner comparable, in their irrevocable character, to vested rights in a dispositive treaty" [footnotes omitted]. Almost 20 years later judge Trindade also argued for automatic succession to humanitarian treaties in *ICJ Croatia v. Serbia (Merits) Dissenting Opinion Trindade* (n 618).

626 It is, however, important to notice that Weeramantry did not argue for automatic succession to all human rights treaties. He was especially cautious with respect to human rights treaties involving economic burdens for the state, cf. *Separate Opinion Weeramantry* (n 528) 645.

627 ibid 641.

628 ibid., 650, 651, 653; also *Application of the Convention on the Prevention and Punishment of the Crime of Genocid (Bosnia and Herzegovina v. Serbia and Montenegro),* 11 July 1996, Preliminary Objections, Separate Opinion Judge Shahabuddeen, ICJ Rep 1996 634 635 (ICJ); Kamminga, 'State Succession in Respect of Human Rights Treaties' (n 618), 470, 483; *ICJ Croatia v. Serbia (Merits) Dissenting Opinion Trindade* (n 618) paras. 45, 57, 60, 62-63.

629 *Separate Opinion Weeramantry* (n 528) 646, 647.

630 ibid 649.

– Furthermore, "[h]uman rights and humanitarian treaties do not represent an exchange of interests and benefits between contracting States in the conventional sense" but "rather, a commitment of the participating States to certain norms and values recognized by the international community".[631] As the protection of these fundamental values "is a matter of universal concern and interest",[632] the principle of *res inter alios acta* is not applicable and the obligation is not "external".[633]
– *Weeramantry* underlined the fact that "[t]he human rights and humanitarian principles contained in the Genocide Convention are principles of customary international law" and would therefore oblige the successor state.[634] This obligation would be the case for "all treaties concerning basic human rights".[635] "The rights and obligations guaranteed by the Genocide Convention are non-derogable".[636]

What has to be underlined, and is often overlooked in the reception of this opinion, is that its consistency and persuasiveness hinge on the particularities of the case. First of all, when speaking about the rights and obligations contained in the Genocide Convention, Judge *Weeramantry* focuses on some of the few obligations of states that undisputedly have acquired the status of *erga omnes* and *jus cogens*.[637] They are of concern to all states and are obligatory for all states. The argument of the third-party rule therefore, in fact, becomes less relevant. The crucial question remains as to which "fundamental human rights norms" are comparable to this example. Strictly speaking, only norms of the same status, and therefore very few, would qualify for succession. Furthermore, the principles underlying the Genocide Convention, also undisputedly, are of customary character[638] and *therefore* binding on new states.[639] Thus, in the formal sense, succession was irrelevant in Weeramantry's case.

631 ibid 646.
632 ibid 648.
633 ibid 651.
634 ibid 648.
635 ibid 647.
636 ibid 651.
637 Cf. *supra*, footnotes 513 and 514.
638 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* 28 May 1951, Advisory Opinion, ICJ Rep 1951 15 23 (ICJ); *ICJ Croatia v. Serbia (Merits)* (n 483) para. 87.
639 Cf. Art. 38 VCLT. See on the binding force of customary law for new states *infra*, Chapter V B) II) 2).

Many authors advocating an automatic succession to human rights treaties consider many human rights as protected under customary international law.[640] Yet, treaty law that has not acquired this status is not binding upon third parties,[641] also in the case of human rights law. In fact, many authors advocating the bindingness of treaty provisions for third parties refer to new ways to discern customary law but not to a genuine exception from the third-party rule contained in Art. 34 VCLT.[642]

> "The question of whether a predecessor State's human rights obligations devolve to the successor has no independence from an examination of which human rights obligations bind States in an *erga omnes* fashion or, in the language of State responsibility, what the international *minimum standard* is in respect of the protection of human rights and humanitarian norms. […] But this is no longer a matter of State succession and to describe it in terms of a 'devolution of obligations' contains a perspectival error."[643]

Moreover, in 2001, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) apparently supported a customary rule to automatic succession to multilateral humanitarian treaties, in this case the Geneva Conventions.[644] It, however, did not fail to underline the "customary nature" of the conventions' provisions and opined, somewhat contradictory to its forgoing words, "that State succession has no impact

640 Cf. e.g. Müllerson *Developments in Eastern Europe and the CIS* (n 561) 154; Kamminga, 'State Succession in Respect of Human Rights Treaties' (n 618), 483; *ICJ Croatia v. Serbia (Merits) Dissenting Opinion Trindade* (n 618) paras. 61, 73-76. This is probably also the rationale behind declaring humanitarian treaties to be "law-making treaties" (critical on that term Jennings (n 326), 444) and therefore subject to automatic succession, cf. Schachter (n 325), 259; Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff 2006) 213; Oeter, 'State Succession and the Struggle over Equity' (n 283), 74; expressly admitting this background Vagts (n 295), 290.

641 Cf. Art. 34-37 VCLT.

642 Cf. e.g. the examples referenced by Chinkin, 'Human Rights' (n 423) 531/532.

643 Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 111 [footnote omitted, emphasis in original]. Also alluding to the customary basis of some persisting human rights Aust *Modern Treaty Law and Practice* (n 294) 324.

644 *Delalic et al.* IT-96-21-A, 20 February 2001, Appeals Judgment paras. 111, 112 (ICTY).

on obligations arising out from these fundamental humanitarian conventions".[645]

Second, Judge *Weeramantry's* separate opinion obviously relies on some kind of natural law theory in which human rights belong to the individual due to its mere existence and dignity as a human being.[646] Again, under this assumption, succession into this treaty becomes irrelevant as the rights are protected irrespective of the conventional obligation.[647] This idea of "ownership" of human rights by the individual can also be detected in the General Comments of the Human Rights Committee, the monitoring body of the ICCPR. In its General Comment No. 26, it maintains

> "[t]he rights enshrined in the Covenant belong to the people living in the territory of the State party. [...] once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant."[648]

645 ibid para. 113. Additionally, the chamber mentioned that Bosnia and Herzegovina itself in the proceedings before the ICJ had pleaded in favor of automatic succession, ibid para. 111. This "estoppel" argument would not be important if the rule in fact existed. Cf. also *Kordić & Čerkez*, IT-95-14/2-A, 17 December 2004, Appeals Judgment paras. 41-46 (ICTY).

646 Similarly *ICJ Croatia v. Serbia (Merits) Dissenting Opinion Trindade* (n 618) para. 58 "The rights protected thereunder, in any circumstances, are not reduced to those 'granted' by the State: they are *inherent to the human person*, and ought thus to be respected by the State. The protected rights are *superior and anterior to the State*, and must thus be respected by this latter, by all States, even in the occurrence of State disruption and succession" [emphasis in original]; Arnauld *Völkerrecht* (n 255) 116, para. 111 alluding to the new status of the individual under international law.

647 Cf. Eckart Klein, 'Denunciation of Human Rights Treaties and the Principle of Reciprocity' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011) 477 480.

648 Human Rights Committee, 'General Comment No. 26 (61): General Comment on Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights' (8 December 1997) UN Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 para. 4; but cf. Bruno Simma, 'Commissions and Treaty bodies of the UN System' in Rüdiger Wolfrum and Volker Röben (eds), *Developments of International Law in Treaty Making* (Springer 2005) 581 585 who considers this conclusion "plainly wrong".

While this logic has a certain appeal for international conventions not containing any denunciation clause,[649] such as the ICCPR, in which states might be assumed, by implication, to have accepted the impossibility of withdrawal,[650] it becomes hardly tenable if human rights treaties themselves explicitly provide for their own denunciation.[651] In such a case, to bind the successor state, the crystallization of these rules into law outside the relevant treaty would have to be proven.

The argument that human beings would be ripped of their most basic rights when they need them most[652] is a morally, but not legally, compelling one. It is to be wished that such "legal vacuum" situations will not appear, but as long as states do not live up to their commitment to protect human rights in all situations, there do not seem to be enough reasons to impose treaty obligations upon a successor.

b) The Argument of "Objective Regime"

A further argument brought forward for automatic succesion is that human rights treaties constitute an "objective regime".[653] This term originally connoted the idea that a treaty would be binding for non-member states as well.[654] Typical examples were "localized treaties" such as border agreements or treaties of cession.[655] Outside the realm of territorial treaties,

649 Cf. Kamminga, 'State Succession in Respect of Human Rights Treaties' (n 618), 472.

650 Also Human Rights Committee, 'General Comment No. 26 (61)' (n 648) paras. 1-3.

651 Such as. e.g. Art. 52 of the CRC (n 574) and Art. 21 of the ICERD (n 567). Thus, denunciation of these treaties cannot be seen as state practice arguing against the acceptance of acquired rights, but see in such a way Ascensio, 'Art. 70' (n 435) para. 24.

652 *ICJ Application of the Genocide Convention, Preliminary Objections, Separate Opinion Parra-Aranguren* (n 620) para. 2, referring to *ICJ South West Africa (Advisory Opinion)* (n 363) para. 122; also Shaw, 'State Succession Revisited' (n 259), 80.

653 Arnauld *Völkerrecht* (n 255) 116, para. 111 "ordre public international"; Stern, 'La Succession d'États' (n 283), 308; cf. Kamminga, 'State Succession in Respect of Human Rights Treaties' (n 618), 473, 484 "The international community has an obvious interest in the continuity of obligations contained in human rights treaties."

654 Michael Waibel, 'The Principle of Privity' in: *Kritsiotis/Bowman Modern Law of Treaties* (n 339) 201 211; Fernández de Casadevante Romani, Carlos, 'Objective Regime (2010)' in: *MPEPIL* (n 2) para. 1; Andreas Witte, *Der pacta-tertiis-Grundsatz im Völkerrecht: Scheinbare und tatsächliche Ausnahmen* (e-book, Mohr Siebeck 2019) 202.

655 Cf. Waibel, 'The Principle of Privity' (n 654) 211; see also Fernández de Casadevante Romani, Carlos, 'Objective Regime (2010)' (n 654) para. 2; Crawford *Brownlie's*

their existence is still controversial and the legal basis not clear.[656] Most explanations either ground "objective regimes" in territorial competence, in customary law developing from a treaty or in variants of expressions of implicit consent and therefore do not divert from the logic of the *pacta-tertiis* rule.[657] What is meant by the term "objective" with respect to human rights treaties is manifold and often not spelled out explicitly. In essence, the term "objective regime" relies on the fact that human rights treaties do not encapsulate reciprocal (relative) rights reigned by the principle of *do ut des* but that they build an autonomous system for the benefit of human beings, protecting common goods, morals, and values such as peace and security.[658]

However, even if human rights treaties protect common values and rights of individuals, they nevertheless do that, in principle, still on the basis of a reciprocal engagement of states, which owe this protection *as well* to the other states:[659]

Principles of Public International Law (n 3) 424–425; especially on cessions Witte (n 654) 208–212.

656 Waibel, 'The Principle of Privity' (n 654) 211–215; Fernández de Casadevante Romani, Carlos, 'Objective Regime (2010)' (n 654) para. 17.

657 Waibel, 'The Principle of Privity' (n 654) 212-215; Fernández de Casadevante Romani, Carlos, 'Objective Regime (2010)' (n 654) paras. 2-3, 5, 15-17; Witte (n 654) 206–212.

658 Stern, 'La Succession d'États' (n 283), 308–309; speaking of a "horizontal" and a "vertical" perspective Chinkin, 'Human Rights' (n 423) 515–516; cf. Shaw, 'State Succession Revisited' (n 259), 80; Simma and Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (n 428), 511; Wouter G Werner, 'State Consent as Foundational Myth' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 13 17 referring to the ICCPR as a "world order treaty" that establishes "a communal regime 'towards the world rather than towards particular parties'" but without explicit reference to succession; *The Effect of Reservations o the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75),* OC-2/82, 24 September 1982, Advisory Opinion para. 29 (IACtHR) "modern human rights treaties in general […] are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States."

659 Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 369–370 with reference to *Ireland v. the United Kingdom,* Appl. No. 5310/71, 18 January 1978 para. 239 (ECtHR [Plenary]) "Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral

> "While human rights have an objective, public-law-like, perhaps even constitutional, character, technically, they nonetheless formally remain 'reciprocal engagements between contracting States'. A distinction between the reciprocal nature of the treaty itself and or the obligations encapsulated in it has to be drawn."[660]

Even if some regional human rights protection systems might have acquired a status beyond that of a reciprocal engagement, this cannot be said about other, more universal, treaties, especially under the UN system.[661] Norms creating a border or a certain territorial regime derive their rationale from this territorial link. They do not exist independently of it. In fact, such treaties "running with the land" are prerequisites of succession, as the definition of succession depends on the change of sovereignty over a *certain defined* territory. The same, however, cannot be said about obligations from human rights treaties, which are relative in character.[662]

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undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'"; Simma, 'Human Rights Treaties' (n 477) 872–876 with reference to Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc. CCPR/C/21/Rev.1/Add.13 para. 2; Klein, 'Denunciation of Human Rights Treaties and the Principle of Reciprocity' (n 647) 481–482; cf. also Riedel (n 563), 376 "But that difference is accepted because the States as such also accept obligations vis-à-vis each other, particularly when it comes to monitoring treaty interpretation." Decidedly different on this point *IACtHR The Effect of Reservations* (n 658) para. 29 "In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, *not* in relation to other States, but towards all individuals within their jurisdiction." [emphasis added]; also *IACtHR Denunciation of the ACHR* (n 512) para. 48; for the genocide Convention *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* 11 July 1996, Preliminary Objections, Declaration of Judge Oda, ICJ Rep 1996 625 paras. 4, 6, 9 (ICJ).

660 Simma and Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (n 428), 527 [footnotes omitted, italics in original].

661 Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 374–375; Simma, 'Human Rights Treaties' (n 477) 875.

662 Cf. Waibel, 'The Principle of Privity' (n 654) 227 "third states have no obligation under human rights treaties".

c) Practice of Human Rights Organs

Especially UN human rights organs have, maybe not unsurprisingly, taken a lead in pushing for a rule of automatic succession.[663] As mentioned above, the Human Rights Committee has taken a proactive stand on the issue, supporting a rule of automatic succession to the ICCPR,[664] and hence requesting all successor states to submit their reports under Art. 49 ICCPR.[665] It has to be borne in mind, though, that UN human rights treaty bodies' decisions are not strictly legally binding.[666] Even if those bodies' interpretations of a certain treaty provision are of a highly persuasive value, they cannot create state practice. Nevertheless, the Human Rights Committee's opinion has been widely cited and was also the basis of the decision on jurisdiction of a chamber of the European Court of Human Rights (ECtHR) in the case of *Bijelić v. Montenegro and Serbia*[667].

> "[G]iven the practical requirements of Article 46 of the Convention, as well as the principle that fundamental rights protected by international human rights treaties should indeed belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession, the Court considers that both the Convention and Protocol No. 1 should be deemed as having continuously been in force in respect of Montenegro as of 3 March 2004, between 3 March 2004 and 5 June 2006 as well as thereafter"[668].

Furthermore, in an *amicus curiae* brief to the court, the European Commission for Democracy through Law (Venice Commission) had taken up the argumentation of General Comment No. 26.[669] This was a remarkable

663 Critical about the role of UN treaty bodies in this respect Pergantis (n 283) 326–329.

664 Human Rights Committee, 'General Comment No. 26 (61)' (n 648) para. 4; cf. Human Rights Committee, 'Annual Report to the U.N. General Assembly' (21 September 1994) UN Doc. A/49/40 vol. I paras. 48, 49.

665 Cf. ibid.

666 Kälin and Künzli (n 441) 14, 214; Hofmann, 'The Protection of Individuals under Public International Law' (n 436) 54, para. 19; Ed Bates, 'Avoiding Legal Obligations Created by Human Rights Treaties' (2008), 57 ICLQ 751 755; Riedel (n 563), 378.

667 *Bijelić v. Montenegro and Serbia,* Appl. No. 11890/05, 28 April 2009 para. 59 (ECtHR).

668 ibid para. 69.

669 Venice Commission, 'Amicus Curiae Brief in the case of Bijelić against Montenegro and Serbia (Application N°11890/05): Opinion No. 495/2008' (20 October 2008) CDL-AD(2008)021 para. 24 but also para. 36.

endorsement.[670] Yet, as pointed out by the ECtHR,[671] Montenegro had, in Art. 5 of its constitutional law implementing its new constitution, stipulated that "[p]rovisions of international treaties on human rights and freedoms, to which Montenegro acceded before 3 June 2006, shall be applied to legal relations which have arisen after their signature".[672] Montenegro, before separation, held independent sovereign powers with respect to international affairs, in particular to conclude international treaties,[673] and had in general deliberately taken over most of its predecessors obligations.[674] The precedential value of *Bijelić* for a rule of automatic succession is therefore limited.[675]

Similar conclusions have been reached by other bodies. In 1994, the Meeting of Persons Chairing the Human Rights Treaty Bodies was fairly forthright and came to the conclusion that

> "successor States are automatically bound by obligations under international human rights instruments from their respective date of independence and that the respect of their obligations should not depend on a declaration of confirmation made by the new Government of the successor State".[676]

But it still urged "all successor States, if they have not already done so, to confirm as soon as possible their succession to those treaties".[677] In 1993, the (former) UN Human Rights Commission also formulated that "successor States […] shall succeed to international human rights treaties to which the predecessor States have been parties" and encouraged "successor

670 Especially given the fact that Art. 56 ECHR, differently from the ICCPR, contains a denunciation clause.

671 *ECtHR Bijelić v. Montenegro and Serbia* (n 667) para. 68 lit. (i).

672 See ibid para. 42. On the "obscure" wording of the provision *Venice Commission Amicus Curiae Brief* (n 669) para. 21.

673 Helmut Tuerk, 'Montenegro (2007)' in: *MPEPIL* (n 2) paras. 15-18.

674 For more details on the succession process of Montenegro cf. *infra*, Chapter IV B) IV) 4) b).

675 The court in *ECtHR Bijelić v. Montenegro and Serbia* (n 667) para. 68(iii), in order to substantiate the argument, referred to cases against the Czech Republic (*Konečný v. the Czech Republic,* Appl. Nos. 47269/99, 64656/01 and 65002/01, 26 October 2004 para. 62 (ECtHR)). Yet, the Czech Republic had deliberately succeeded to the former Czechoslovak Republic's obligations and declared relevant treaties retroactively applicable. Nevertheless supporting such analogy *Venice Commission Amicus Curiae Brief* (n 669) para. 31.

676 *Human Rights Treaty Bodies' Report* (n 618) para. 32.

677 ibid para. 31.

States to confirm to appropriate depositaries that they continue to be bound by obligations under relevant international human rights treaties".[678] In 1994 and 1995, it reiterated "its call to successor States [...] to confirm to appropriate depositories that they continue to be bound by obligations under international human rights treaties", and requested "the human rights treaty bodies to consider further the continuing applicability of the respective international human rights treaties to successor States" and the Secretary General "to encourage successor States to confirm their obligations under the international human rights treaties to which their predecessors were a party, as from the date of their independence".[679] This insistence on formal approval of succession by the new states is sometimes seen as contradictory to automatic succession.[680] But the wording that new states shall *confirm* (instead of declare) that they *continue* to be (instead of are) bound and the *date of independence* as the relevant date (instead of the date of confirmation or declaration) tends to support automatic succession.[681]

The calls of treaty bodies have not always been unambiguous and have sometimes asked for (probably declaratory) notification of succession, even if generally supporting a rule of automatic succession.[682] The institutional side does also not appear to have naturally opted for automatic succession: Even if states notified their succession, they were still registered as successors only from the date of their notification, not from the date of their independence.[683]

678 Human Rights Commission, 'Resolution 1993/23: Succession of States in Respect of International Human Rights Treaties' (5 March 1993) UN Doc. E/CN.4/RES/1993/23.

679 Human Rights Committee, 'Succession of States in Respect of International Human Rights Treaties' (25 February 1994) UN Doc. 1994/16; Human Rights Committee, 'Succession of States in Respect of International Human Rights Treaties: 24 February 1995' (24 February 1995) UN Doc. E/CN.4/RES/1995/18.

680 Rasulov (n 617), 157.

681 Similarly Kamminga, 'Impact on State Succession in Respect of Treaties' (n 611) 108.

682 Cf. e.g. *Human Rights Treaty Bodies' Report* (n 618) paras. 31, 32.

683 E.g. for the Czech Republic "succession" to the ICCPR was registered on 22 February 1993, for Slovakia on 28 May 1993, even if both states already evolved on 1 January 1993. Slovenia became independent on 25 June 1991 but is listed as a party to the ICCPR only since 6 July 1992, cf. https://treaties.un.org/. Cf. ILA, 'Aspects of the Law of State Succession' (n 616) 33; Pergantis (n 283) 217.

d) State Practice

States' answers to calls from human rights organs have been mixed.[684] According to its general policy, the unified *Yemen* maintained all international treaties concluded by one of its constituent parts.[685] Conversely, in the case of *German unification*, the Federal Republic of Germany (FRG) did not opt for succession to all treaties of the German Democratic Republic (GDR) but preferred consultations about their fates, without differentiating between human rights treaties and other treaties.[686]

After their independence, most of the successor states of the *Soviet Union* (SU) and the *Socialist Federal Republic of Yugoslavia* (SFRY) became parties to the human rights treaties of their predecessor states,[687] although some states did not continue some of the obligations.[688] Yet, at a closer look, this continuation does not generally support a rule of automatic succession.[689] First of all, depositary practice[690] does not unambiguously speak in favor of automatic succession: In particular in the case of the demise of the SU, successor states did not notify their "succession" to these treaties but their "accession".[691] Even if the exact use of words should not be

684 Cf. Rasulov (n 617), 158–170; UNSG, 'Succession of States in Respect of International Human Rights Treaties, Report' (28 November 1994) UN Doc. E/CN.4/1995/80.

685 See YAR/PDRY, 'Letter to the Secretary-General' (19 May 1990) <https://treaties.un.org/pages/HistoricalInfo.aspx?clang=_en#Yemen>.

686 For details cf. *infra*, Chapter IV) B) II) 2).

687 Cf. ratification tables at https://treaties.un.org/ and for an overview. UNSG, 'Succession of States in Respect of International Human Rights Treaties, Report' (n 684) and Rasulov (n 617), 159–165. Belarus and Ukraine had become parties to major human rights conventions even before their formal independence as they had been granted far-reaching autonomy with respect to international affairs, cf. Torres Cazorla, 'Rights of Private Persons on State Succession: An Approach to the Most Recent Cases' (n 514) 673; see also Zimmermann, 'Continuity of States (2006)' (n 308) para. 12.

688 Cf. e.g. Kazakhstan, that did not accede to the ICCPR and the ICESCR until 2006.

689 Meron (n 640) 214; Rasulov (n 617), 167; differently Schachter (n 325), 259 "The experience thus far with respect to the cases of the former Soviet Union and the former Yugoslavia supports a general presumption of continuity"; cp. also Kamminga, 'State Succession in Respect of Human Rights Treaties' (n 618), 482 "State practice during the 1990s strongly supports the view that obligations arising from a human rights treaty are not affected by a succession of States".

690 On the importance of depositary practice as evidence for custom Rasulov (n 617), 154–157.

691 Cf. on this point Kamminga, 'State Succession in Respect of Human Rights Treaties' (n 618), 483. See also ILA, 'Aspects of the Law of State Succession' (n 616) 33.

attributed too much importance,[692] this wording does at least not support a rule of automatic succession.[693] In comparison, apparently all[694] successor states of the SFRY declared their "succession" to humanitarian treaties of the SFRY. Furthermore, Croatia, Bosnia-Herzegovina and the Federal Republic of Yugoslavia (FRY) reported back to the Human Rights Committee immediately after their independence.[695] Yet, succession into those treaties was the outcome of negotiations, and it is not clear whether there was a "general rule of negotiation (…) on the basis of a principle of continuity" or if continuity itself was the "rule which to make reference to".[696]

Serbia, continuing the state union of Serbia and Montenegro, pledged to fully honor all treaty commitments undertaken by Serbia-Montenegro.[697] *Montenegro* declared to honor all human rights agreements concluded by the state union of Serbia-Montenegro before its independence.[698] But these pledges are not an unambiguous example of a rule of *automatic* succession. First, as mentioned, even before separation, Montenegro held independent sovereign powers with respect to international affairs, in particular to conclude international treaties.[699] Second, Montenegro seems to have deliberately decided to continue these obligations, the status as successor, not continuator, state already having been included in the "Constitutional Charter" with Serbia.[700]

692 Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 79; Kamminga, 'State Succession in Respect of Human Rights Treaties' (n 618), 483; Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 493.

693 Cf. Rasulov (n 617), 156.

694 Slovenia did not declare its succession, but accession, to the CAT (cf. https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en). Yet, at the time the SFRY ratified the CAT, 10.09.1991 (https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en#4), Slovenia had already declared its independence.

695 Pergantis (n 283) 213.

696 ILA, 'Aspects of the Law of State Succession' (n 616) 610; cf. also Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 325–328. Interpreting the Yugoslav practice as supporting a rule of automatic succession Stefan Oeter, 'Yugoslavia, Dissolution of (2011)' in: *MPEPIL* (n 2) paras. 110-111.

697 See documents cited in *ICJ Croatia v. Serbia (Preliminary Objections)* (n 485) para. 24.

698 See https://treaties.un.org/pages/HistoricalInfo.aspx?clang=_en#Montenegro. In more detail see *infra*, Chapter IV B) IV) 4) b) aa).

699 Tuerk, 'Montenegro (2007)' (n 673) paras. 15-18.

700 ibid para. 18.

Kosovo, in its Declaration of Independence in no. 9 declared that it would

> "undertake the international obligations of Kosovo, including those concluded [...] by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia *to which we are bound as a former constituent part*".[701]

On first sight, this declaration can be seen as a relatively straightforward endorsement of the Kosovar opinion of being automatically bound by way of succession to the obligations undertaken by its predecessors in territorial responsibility. Yet, an obvious caveat in this view is introduced by the omission of Serbia, an omission that, nonetheless, aligns with the general perception of Serbia as an illegal occupier.[702] The status of Kosovo as a sovereign state is not settled. Since it has not yet become a UN member, Kosovo is not a party to any of the UN human rights covenants, and the issue has not been tested in practice.

The dissolution of *Czechoslovakia* happened consensually, and both states declared that they would retroactively apply the multilateral treaties of Czechoslovakia as of the date of their independence.[703] Hence, Slovakia and the Czech Republic, as the successor states of Czechoslovakia, took over most of the human rights treaties explicitly as "successors". Notably,

701 Declaration of Independence (17 February 2008) https://www.refworld.org/docid/47d685632.html or http://news.bbc.co.uk/1/hi/world/europe/7249677.stm (Kosovo) [emphasis added]. Cf. on the legal bindingness the declaration for Kosovo Qerim Qerimi and Suzana Krasniqi, 'Theories and Practice of State Succession to Bilateral Treaties: The Recent Experience of Kosovo' (2013), 14(9) German Law Journal 1639 1652–1655.

702 For more details on the background of Kosovo and Serbia see *infra*, Chapter IV B) IV) 5).

703 See https://treaties.un.org/pages/HistoricalInfo.aspx?clang=_en#Czechoslovakia. See with respect to the ECHR Mahulena Hošková, 'Die Selbstauflösung der ČSFR. Ausgewählte rechtliche Aspekte' (1993), 53 ZaöRV 689 722–723; Kamminga, 'Impact on State Succession in Respect of Treaties' (n 611) 102–103.

they found it useful to *declare*[704] such *retroactive*[705] applicability. Moreover, it should not go unnoticed that both the SFRY and Czechoslovakia had been parties to the VCSST before their demise.[706]

Eritrea, after its independence from Ethiopia, formally only acceded to most of the human rights treaties Ethiopia was bound to at that time, often years after its independence, which is in line with its general attitude towards Ethiopia's international commitments.[707]

To take the practice surrounding the (re-) *transfer of Hong Kong* and *Macau* to China as evidence for a customary rule[708] is delicate, first, because the genuine transfer of sovereignty is already unclear and, second, because both cases were regulated by special agreements between the respective states.[709] The solution chosen, opting for a (temporarily limited) protection of the international human rights treaties implemented in Hong Kong and Macau,[710] could point towards automatic succession. However,

704 But *see* ILA, 'Resolution No 3/2008' (n 306) para. 4, "As with regard to treaties, recent practice shows that in case of continuity to the legal personality, the State prefers to make a general declaration of continuity, although this is not a condition for the maintenance of the existing conventional links. This practice reflects the need of legal certainty by affirming the existence of a situation of continuity on the one hand, and by the clarification of the consequences thereof." Similar for German unity Papenfuß (n 306), 486. Differently Pergantis (n 283) 214–216 who maintains that "Automatic succession and notification of succession are […] mutually exclusive".

705 In case of automatic succession, strictly speaking, there is no retroactive application.

706 However, the convention only entered into force in 1996, i.e. after the respective successions took place.

707 The UN database on depositary notifications by the UN Secretary-General (https://treaties.un.org/pages/CNs.aspx?cnTab=tab2&clang=_en) does not contain one case of succession to a multilateral convention by Eritrea. Furthermore, there was no accession e.g. to the International Convention on the Suppression and Punishment of the Crime of Apartheid or even the Genocide Convention to which Ethiopia at the time of independence had been a party. For details cf. Chapter IV B) VI).

708 Mushkat (n 616), 200; cf. Kamminga, 'State Succession in Respect of Human Rights Treaties' (n 618), 481; *contra* Meron (n 640) 216; Kamminga, 'Impact on State Succession in Respect of Treaties' (n 611) 108.

709 Joint Declaration on the Question of Hong Kong (with Annexes) (19 December 1984) UNTS 1399 33 (PRC/UK); Joint Declaration on the Question of Macau (with Annexes) (13 April 1987) UNTS 1498 195 (PRC/Portugal). For more details see *infra*, Chapter IV B) VIII).

710 Sino-British Joint Declaration (n 709) 69, Annex I part XI "International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may remain implemented in the Hong Kong Special Administrative Region" and Sino-Portuguese Joint Declaration (n 709) 235 Annex I part VIII

the Joint Declarations do not mention the word succession but speak of "[i]nternational agreements [...] which [...] may remain implemented"[711] or "shall remain in force".[712] Furthermore, in both cases, China introduced new reservations to some of these treaties.[713] Nevertheless, the cases are remarkable as they do not align with the generally held view that, in principle, the rule of "moving treaty frontiers" (Art. 15 VCSST) is to be applied in cases of cession as was the case when *Walvis Bay* was tranferred to Namibia in 1994. While one can easily draw the conclusion that, without the special agreements, the citizens of Macau or Hong Kong would simply have lost the rights they formerly enjoyed, these cases indicate clearly states' changed perceptions of the significance of individual rights.[714] The Periodic Reports under Art. 40 ICCPR were submitted separately to the Human Rights Committee on behalf of Hong Kong, China or Macau, China, not on behalf of the whole republic.[715]

For the most recent new state, *South Sudan*, the picture is even less clear. The country is currently listed as party to 26 treaties by the UN.[716] However, it is not listed as party to all the human rights treaties of its predecessor, the Sudan. South Sudan is, e.g., not listed as a party to such major conventions as the Genocide Convention, CERD, ICESCR, ICCPR, or the Disability Convention.[717] However, it contends to have become a

"International agreements to which the Government of the People's Republic of China is not a party but which are implemented in Macau may continue to be implemented.".

711 Sino-British Joint Declaration (n 709) 69, Annex I part XI; Sino-Portuguese Joint Declaration (n 709) 235 Annex I part VIII.

712 Sino-British Joint Declaration (n 709) 70, Annex X part XIII.

713 Cf. e.g. PRC and UK, 'Notifications Relating to Hong Kong' (22 August 1997) UN Doc. C.N.277.1997.TREATIES; Communication Relating to Macau (21 December 1999) UN Doc. C.N.1156.1999.TREATIES-11(x) (China).

714 *See* also Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 340 who considers this a special case because the states would "purposefully avoid the full integration of the ceded territory".

715 E.g. Hong Kong, China, 'Fourth Periodic Report under Article 40 of the Covenant' (14 February 2020) UN Doc. CCPR/C/CHN-HKG/4; Macao, China, 'Second Periodic Report under Article 40 of the Covenant' (14 February 2020) UN Doc. CCPR/C/CHN-MAC/2.

716 See https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en.

717 However, South Sudan became a party to CEDAW (n 568), the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women New York (6 October 1999) UNTS 2131 83, as well as to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (18 December 2002) UNTS 2375 237, which Sudan has not yet ratified.

party to the ICCPR and its first Optional Protocol (OP)[718], the IESCR and its OP, ICERD, and the Disability Convention,[719] which would substantially diminish the gap in ratified treaties between both states. Importantly, when South Sudan became a party to treaties already ratified by Sudan (e.g. the CAT as well as the CRC and its Optional Protocols on the involvement of children in armed conflict[720] and on the sale of children, child prostitution and child pornography[721]), it did so explicitly by *accession*, not succession. Consequentially, the respective treaties entered into force for South Sudan only *after* this act of accession.

Therefore, state practice with respect to succession in human rights treaties remains in a relatively diffuse state with no clear preference for one view or the other. There is a remarkable tendency towards continuance.[722] As would have been expected, states, with the notable exception of the successor states of the former Czechoslovakia and almost all successor states of the SFRY, have often preferred the flexible but also more definite approach of accession to international agreements. While in cases of the complete dismemberment of a state (e.g., SFRY and Czechoslovakia), the tendency was one of succession, when states separated from a country that, itself, continued to exist, the tendency was to adopt a more autonomous approach and opt for accession (e.g., SU, Sudan). Rather unsurprisingly, no new state seems to have explicitly opted for a rule of automatic succession. This incomplete picture allows the conclusion that, even if the tendency might be towards continuity, state practice is not uniform enough to support a customary rule of automatic succession.[723]

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718 Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) UNTS 999 171.

719 Human Rights Council, 'South Sudan, National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21' (23 May 2016) UN Doc. A/HRC/WG.6/26/SSD/1 paras. 16, 17.

720 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (25 May 2000) UNTS 2173 222.

721 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (25 May 2000) UNTS 2171 227.

722 Cf. Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294) 854-855, 862; Dumberry *Guide to State Succession in International Investment Law* (n 14) para. 7.06.

723 Also ILA, 'Aspects of the Law of State Succession' (n 616) 33; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 536; Rasulov (n 617), 167; Pergantis (n 283) 230; Dumberry *Guide to State Succession in International Investment Law* (n 14) para. 7.06; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia*

e) The (Im-)Possibility of Termination of a Human Rights Treaty

aa) Preliminary Remarks

A field that could give us further information on the fate of human rights treaties in succession cases is the law on terminating human rights treaties. Both issues are intrinsically connected as they cover whether and how treaty rights can be withdrawn.[724] In fact, many authors supporting the idea of an automatic succession to human rights treaties do so on the assumption that those rights were non-derogable.[725] Nevertheless, a simple transposition of arguments is not possible as both alternatives operate under different precepts. In the case of a termination, at least one treaty party intends to withdraw from incumbent obligations, i.e. a state that once deliberately accepted these obligations changes its mind. In the case of succession, normally the new state has not consented in the first place because it did not exist as an independent sovereign entity at the time the treaty was concluded. To bind the successor state to another sovereign's decision in principle constitutes a more severe intrusion into its sovereignty than that of holding states to their own decisions. Hence, limits to termination derived, e.g., from the principle of abuse of rights,[726] cannot be transferred to succession scenarios. However, as mentioned, some cases that are

and Herzegovina v. Serbia and Montenegro), 11 July 1996, Preliminary Objections, Separate Opinion Judge Kreca, ICJ Rep 1996 658 781, para. 111 (ICJ); cf. Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 357, para. 108; Meron (n 640) 214, 217; differently with respect to the cases of the SU and Yugoslavia Schachter (n 325), 259.

724 Chinkin, 'Human Rights' (n 423) 533–536 deals with both together. In fact, many current discussions on treaty law focus on the basic question whether states are allowed to take away or modify individual rights once conferred by a treaty. E.g. for the related discussion concerning treaty modification by subsequent agreement or practice José E Alvarez, 'Limits of Change by Way of Subsequent Agreements and Practice' in Georg Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 123 especially 126-132. For the permissibility of reservations to human rights conventions see Chinkin, 'Human Rights' (n 423) 526–530, 532-533. A comprehensive discussion of all related issues is beyond the scope of this book, but they essentially rely on similar arguments as the ones advanced in the following section.

725 Cf. e.g. *Separate Opinion Weeramantry* (n 528) 651/652; Kamminga, 'State Succession in Respect of Human Rights Treaties' (n 618), 472; *ICJ Croatia v. Serbia (Merits) Dissenting Opinion Trindade* (n 618) para. 63; Human Rights Committee, 'General Comment No. 26 (61)' (n 648).

726 E.g. Klein, 'Denunciation of Human Rights Treaties and the Principle of Reciprocity' (n 647) 485–486.

commonly understood as examples of state succession, such as the willful cession of a territory, do not concern a new state.[727] These particularities must be borne in mind.

While, in principle, the VCLT also applies to human rights treaties,[728] Art. 73 VCLT explicitly stipulates that "[t]he provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States". Yet, that the VCLT does not prejudice the rules of succession does not mean that one cannot infer certain principles for succession situations from it.[729]

bb) Termination Pursuant to Art. 54 and 56 VCLT

The termination of treaties is regulated, in particular, in Art. 54 and 56 VCLT. The termination of a treaty is therefore allowed if it either takes place according to a procedure provided for in the treaty, Art. 54 lit. a), or by consent of all parties, Art. 54 lit. b).[730] Art. 54 VCLT is an expression of the general conviction that states are the "masters of their treaty",[731] the principle of *pacta sunt servanda*,[732] and of customary nature.[733] Thus, from

727 *Supra*, Chapter II C) III).

728 Chinkin, 'Human Rights' (n 423) 510; Simma, 'Human Rights Treaties' (n 477) 882; Gino J Naldi and Konstantinos d. Magliveras, 'Human Rights and the Denunciation of Treaties and Withdrawal from International Organisations' (2013), 33 Polish YBInt'l L 95 98–99.

729 Art. 73 VCLT was inserted because the ILC found it more appropriate to leave the analysis of succession into treaties to a separate working group, see ILC, 'Second Report on the Law of Treaties (Special Rapporteur Waldock)' (n 291), 38, para. 3, not because it considered the solutions chosen in the VCLT convention generally as inadequate for succession cases.

730 The additional requirement that all other contracting states ought to be consulted, is not considered as customary law, Vincent Chapaux, 'Art. 54' in: *Corten/Klein VCLT Commentary (Vol. II)* (n 435) para. 5, and not relevant for the following discussion.

731 Thomas Giegerich, 'Art. 54' in: *Dörr/Schmalenbach VCLT Commentary* (n 2) paras. 10-11; for Art. 54 lit. b) ibid para. 37; for Art. 54 lit. b) Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill, Nijhoff 2009) Art. 54, paras. 6, 12.

732 For Art. 54 lit. a) Chapaux, 'Art. 54' (n 730) para. 4; for Art. 54 lit. b) Villiger (n 731) Art. 54, para. 7.

733 Chapaux, 'Art. 54' (n 730) paras. 3-5; for lit. b) Tania Voon, Andrew Mitchell and James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014), 29(2) ICSID Review 451 461; Tania Voon and Andrew D Mitchell, 'Denunciation, Termination and Survival: The Interplay of

the outset, for the (many) human rights treaties containing a termination clause,[734] the case against withdrawal is weak as this possibility was inherent in the treaty from the beginning (one could also speak of a conferral of rights "contingent" on the termination).[735] Thus, the majority of human rights conferred by a treaty are not immune from parties' retreat, as long as these rights are not protected outside the treaty as well.[736] However, the Human Rights Committee's claim with respect to the ICCPR, which does not contain a denunciation clause, is much more forceful.[737] In principle, if a treaty does *not* provide for denunciation or withdrawal,[738] according to Art. 56 para. 1 VCLT[739] members can only terminate it unilaterally if it is (a) established that the parties intended to admit the possibility of denunciation or withdrawal or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. Both options are relatively remote for universal human rights covenants such as the ICCPR.[740]

Treaty Law and International Investment Law' (2016), 31(2) ICSID Review 413 426; also Villiger (n 731) Art. 54 para. 12 who considers lit. a) a "self-evident proposition".

734 E.g. Art. 52 CRC (n 574); Art. 21 ICERD (n 567); Article 58 ECHR (n 576); Art. 78 ACHR (n 580); Art. XIV and XV Genocide Convention (n 518).

735 Therefore, the denunciation of those treaties is no argument against acquired rights, but differently Ascensio, 'Art. 70' (n 435) para. 24.

736 Cf. Yogesh Tyagi, 'The Denunciation of Human Rights Treaties' (2009), 79(1) BYbIL 86 184.

737 Cf. Aust *Modern Treaty Law and Practice* (n 294) 256–257; arguably Pergantis (n 283) 178–179.

738 On the relationship between both terms and the terminological inconsistency in the VCLT Giegerich, 'Art. 54' (n 731) paras. 18-19; Anthony Aust, 'Treaties, Termination (2006)' in: *MPEPIL* (n 2) para. 1. Often, the terms are used interchangeably, e.g. by Laurence R Helfer, 'Terminating Treaties' in: *Hollis Oxford Guide to Treaties* (n 294) 634 635.

739 Cf. Villiger (n 731) Art. 56, para. 16 "On the whole, the provision seems to have generated a new rule of customary law" [footnote omitted]; but also Thomas Giegerich, 'Art. 56' in: *Dörr/Schmalenbach VCLT Commentary* (n 2) paras. 52–53 and Theodore Christakis, 'Art. 56' in: *Corten/Klein VCLT Commentary (Vol. II)* (n 435) paras. 10-16, both asserting the customary nature of lit. a) but raising doubts about the same status for lit. b). Very critical about the practical utility of the provision Pergantis (n 283) 163–167.

740 *See* Giegerich, 'Art. 56' (n 739) paras. 3, 33, 36, 46; UNSG, 'Aide-Memoire' (23 September 1997). Annex to UN Doc. C.N.467.1997.TREATIES-10 paras. 4, 7, 8. For lit. (a) see Aust, 'Treaties, Termination (2006)' (n 738) para. 18; Pergantis (n 283) 176. For lit. (b) see Naldi and Magliveras (n 728), 113; and in general Villiger (n 731) Art. 56, para. 9.

cc) Termination by Consensus

Nevertheless, with respect to human rights treaties without denunciation or withdrawal clauses, the common assumption is that they can still be terminated by consent among all parties.[741] For a supporting argument, many authors turn to the most notorious example of the more than scarce[742] state practice in this field, i.e. to North Korea's attempted withdrawal from the ICCPR in 1997.[743] The UN Secretary-General sent an *aide-memoire* in which he asserted that North Korea "could withdraw from the ICCPR [only] with the consent of all the parties thereto after consultations with the other contracting States".[744] In the following, North Korea abstained from its withdrawal, is still listed as a party to the ICCPR and, in 1999, submitted its second Periodic Report on the Implementation of the Covenant.[745]

A second example of attempted withdrawal from a treaty without a denunciation clause can be found in the *Ivcher-Bronstein v. Peru* decision of the Inter-American Court of Human Rights (IACtHR).[746] In July 1999,

741 Verdross and Simma (n 23) § 428; Klein (n 530) 256-257; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 245; Klein, 'Denunciation of Human Rights Treaties and the Principle of Reciprocity' (n 647) 485, 487. Cf. for treaties in general ILC, 'Draft Articles on the Law of Treaties with Commentaries' (n 209), 251/252 "Whether or not a treaty contains such a clause, it is clear that the operation of the treaty or of some of its provisions may be suspended at any time by consent of all the parties."; Villiger (n 731) Art. 54, para 6; ibid Art. 65, para. 4; Helfer, 'Terminating Treaties' (n 738) 644; cf. Pergantis (n 283) 177.

742 See e.g. Helfer, 'Terminating Treaties' (n 738) 638-639 especially footnotes 27-29 mentioning, besides the North-Korean example, almost exclusively cases of withdrawal from international organizations or terminations without due regard to the period foreseen in Art. 56 para. 2 VCLT. There is, obviously, considerably more practice with respect to withdrawal from international agreements containing a denunciation or withdrawal clause, cf. for examples Natalia Schiffrin, 'Jamaica Withdraws the Right of Individual Petition under the International Covenant on Civil and Political Rights' (1998), 92(3) AJIL 563; Bates (n 666), 754–761; Naldi and Magliveras (n 728), 98–110. However, as mentioned, these withdrawals do not pose the same essential questions with respect to acquired rights.

743 It was in reaction to North Korea's announcement to withdraw from the ICCPR that Human Rights Committee, 'General Comment No. 26 (61)' (n 648) was issued.

744 UNSG, 'Aide-Memoire' (n 740) para. 13.

745 Human Rights Committee, 'Second Periodic Report of the Democratic People's Republic of Korea on its Implementation of the International Covenant on Civil and Political Rights' (4 May 2000). UN Doc. CCPR/C/PRK/2000/2.

746 *Ivcher-Bronstein v. Peru,* 24 September 1999, Judgment on Competence, Series C No 54 (IACtHR).

after the Inter-American Commission had submitted the respective application to the Court, Peru had passed a law intending to withdraw from the optional clause concerning the contentious jurisdiction of the court.[747] The IACtHR held that this withdrawal was inadmissible, and it was therefore called upon to decide the case. Denunciation of the optional clause could only be effected by withdrawing from the whole convention.[748] Yet, it conceded that, according to the rule in Art. 44 para. 1 VCLT, denunciation was only possible "vis-à-vis the treaty as a whole, *unless* the treaty provides or *the Parties thereto agree otherwise*".[749] Due to lack of relevance in the case at hand, the court did not go further into this alternative. It remains doubtful if such a singular, case-specific practice and case law can furnish conclusive evidence for either assertion.

dd) Third-Party Rights

Furthermore, what is often neglected, is that the possibility of consensual termination of the treaty by all parties is not unqualified but subject to the provisions of Art. 36 para. 1 and 37 para. 2 VCLT.[750] Art. 36 para. 1 reads "A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides." Such right(s), according to Art. 37 para. 2 VCLT "may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State." That paragraph connotes the general rule that a right once conferred on a third party may not be taken away without the beneficiary's consent and hence constitutes a particular expression of the already mentioned rule contained in Art. 34 VCLT. Obviously, however, all these provisions only

747 ibid paras. 23, 28.
748 ibid para. 40.
749 ibid para. 50 [emphasis added].
750 Aust, 'Treaties, Termination (2006)' (n 738) para. 23; Aust *Modern Treaty Law and Practice* (n 294) 254; Giegerich, 'Art. 54' (n 731) para. 39; cf. Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 250; *contra* Andrea Gattini, 'Jurisdiction ratione temporis in International Investment Arbitration' (2017), 16(1) Law Pract Int Courts Trib 139 157.

concern third "State[s]".[751] An analogous application to individuals is often discarded as states would be free to bestow rights and obligations upon individuals without their consent, making the situations incomparable.[752] However, this dissimilarity does not have to mean that the provision cannot lend guidance on the treatment of individuals as third-party *beneficiaries*.[753]

For example, the IACtHR's advisory opinion from November 2020[754] can be seen as an attempt to take individuals' positions more into account when human rights treaties are denounced. In answering the question in how far ACHR member states are still bound by human rights obligations after its denunciation, the court, beyond the standard requirements mentioned above,[755] alluded to a further prerequisite derived from the "special nature" of human rights treaties.[756] As "the denunciation of a human right treaty - particularly one that establishes a jurisdictional system for the protection of human rights [...] implies a possible curtailment of rights and, in turn, of access to international justice" it "must be subject to a pluralistic, public and transparent debate within the States, as it is a matter of great public interest".[757] To withdraw individual rights was understood as a matter of public concern and therefore required specific democratic

751 Alexander Proelss, 'Art. 36' in: *Dörr/Schmalenbach VCLT Commentary* (n 2) para. 13; Alexander Proelss, 'Art. 37' in: *Dörr/Schmalenbach VCLT Commentary* (n 2) para. 13; Alexander Proelss, 'Art. 34' in: *Dörr/Schmalenbach VCLT Commentary* (n 2) para. 12; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 250.

752 Waibel, 'The Principle of Privity' (n 654) 208; Anthea Roberts, 'Triangular Treaties: The Nature and Limits of Investment Treaty Rights' (2015), 56(2) Harv Int'l LJ 353 374 with respect to investment treaties. Doubting the applicability to individuals Klein (n 530) 173. Gattini (n 750), 157–158 as well as Christina Binder, 'A Treaty Law Perspective on Intra-EU BITs' [2016] The Journal of World Investment & Trade 964, 979 rely on the fact that individuals cannot "consent" to the referral of rights. However, according to the wording of Art. 36 para. 1 sentence 2 VCLT, absent contradicting evidence, such consent can be "presumed".

753 Roberts, 'Triangular Treaties' (n 752), 375 with respect to investment treaties.

754 *IACtHR Denunciation of the ACHR* (n 512); on this Mariela M Antoniazzi, 'Advisory Opinion OC-26/20, Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the Consequences for State Human Rights Obligations' (2022), 116(2) AJIL 409.

755 *IACtHR Denunciation of the ACHR* (n 512) para. 47. The decision did not mention the possibility of Art. 54 lit. b) VCLT, i.e. the termination of treaty relations by consent of all parties.

756 ibid para. 48.

757 ibid para. 64.

legitimization[758] – a requirement touching upon domestic constitutional procedures. It can be understood as kind of a retreat from this rather bold assumption (for which no textual basis in the ACHR is cited) when the court then referred to the more "objective" principle of "parallelism of forms, which implies that if a State has established a constitutional procedure for assuming international obligations it would it [sic] be appropriate to follow a similar procedure when it seeks to extricate itself from those obligations"[759]. Furthermore, the court found it necessary of the withdrawing state to act in good faith, which needs special justification if the withdrawal takes place in certain situations of internal turmoil.[760] According to the court, the remaining state parties to the ACHR are even obliged to object to any denunciation not undertaken in good faith during the transition period after the announcement of the denunciation.[761] This finding is justified by the fact that all state parties are said to have an interest in the integrity and effectiveness of the convention system and are under an obligation to protect it, an obligation derived from the *jus cogens* and *erga omnes* character of the provisions.[762]

ee) Interim Conclusions

The foregoing makes it clear that the allegation of a "non-derogability" of human rights treaties, even the most fundamental ones, cannot be upheld. Even if the possibility of their termination is not explicitly provided for, according to widespread opinion, such treaties can be brought to an end by all parties consenting. While this threshold is high and hardly feasible in practice, it shows that the rights of individuals contained in these treaties are no bar to termination. Continuous attempts have been undertaken in international practice to limit states' freedom to withdraw from humanitari-

758 ibid para. 72; see Antoniazzi (n 754), 416 "The Advisory Opinion [...] reflects a paradigm shift".

759 *IACtHR Denunciation of the ACHR* (n 512) para. 64. Rather critical on those extra requirements Silvia Steininger, 'Don't Leave Me This Way: Regulating Treaty Withdrawal in the Inter-American Human Rights System' *EJIL Talk!* (5 March 2021) <https://www.ejiltalk.org/dont-leave-me-this-way-regulating-treaty-withdrawal-in-the-inter-american-human-rights-system/>.

760 *IACtHR Denunciation of the ACHR* (n 512) para. 73.

761 ibid paras. 71, 173.

762 ibid paras. 109, 164, 170.

an treaties. However, until now, they have remained insolated and too rare to lead to a general change in law.

f) The (Im-) Persistence of Treaty Rights after Withdrawal, Art. 70 para. 1 lit. b) VCLT

aa) General Remarks

Under the assumption that all human rights treaties can be terminated, a further question that arises is whether the rights acquired under them may nevertheless persist. The core underlying issue is, again, who is the real "owner" of rights once vested, i.e. in how far individual rights can become independent of a treaty. A pivotal provision for this analysis is Art. 70 para. 1 lit. b) VCLT stipulating that "[u]nless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention […] [d]oes not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination." This provision "makes clear that any form of termination has *no retroactive effect*."[763]

Thus, at first glance, Art. 70 para. 1 lit. b) VCLT represents a description of a rule autonomous of a treaty itself, preserving rights acquired under the treaty even after its termination.[764] This rule has an obvious similarity to acquired rights as rights surviving the lapse of a domestic legal order.[765] Several scholars have, in fact, referred to an "acquired rights analogy" when

763 Wittich, 'Art. 70' (n 2) 24 [emphasis in original]. Cf. for non-retroactivity also Ascensio, 'Art. 70' (n 435) paras. 7, 10; Villiger (n 731) Art. 70 para. 8.

764 Wittich (n 4) para. 25; see also ILC, 'Second Report on the Law of Treaties (Special Rapporteur Fitzmaurice)' (1957), 1957(II) YbILC 16 67, para. 205 "The treaty may be terminated, but not the legal force of the situation it has created. […] the rights, status or situations resulting therefrom are complete, in the sense of being acquired, established or stabilized. Their juridical validity and force is not affected by the termination of the treaty in which they are contained, or from which they resulted. They persist, although the treaty which gave them life may not." An earlier draft of that article included the term "acquired rights" which was later replaced by "situation", Ascensio, 'Art. 70' (n 435) para. 19.

765 In fact, the later Special Rapporteur on the topic, Fitzmaurice, had directly linked the issue of persisting rights under a treaty to the doctrine of acquired rights in Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (CUP 1986) 403.

trying to substantiate their claim to a survival of human rights treaties in cases of state succession.[766] Yet, importantly, Art. 70 VCLT contains a double caveat. First, it applies under the reservation of differing agreement by the parties to the treaty. Second, it is exclusively concerned with rights "of the parties", i.e. the states members to the treaty, cf. Art. 1 VCLT.[767] In fact, in its commentary on the by-then (Draft) Art. 66 VCLT, the ILC spelled out clearly that "paragraph l (b) relates only to the right, obligation or legal situation of the States parties to the treaties [...] and is not in any way concerned with the question of the 'vested interests' of individuals".[768] Some authors argue that, with this expression, the ILC merely tried to exclude the traditional scope of acquired rights, namely "private contractual or property rights/interests under the national law of a party" and hence not rights acquired directly under the treaty.[769] While this interpretation can draw some support from writings of *Fitzmaurice*, Special Rapporteur on the topic,[770] it is difficult to reconcile with the wording of Art. 70 VCLT.[771]

Be that as it may, even if Art. 70 VCLT does not apply to individuals, it does not mean that it forecloses the persistence of individual rights when a

766 See, albeit without reference to Art. 70 VCLT, Kamminga, 'State Succession in Respect of Human Rights Treaties' (n 618), 472–473, 481; Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 490–491; on this Schachter (n 325), 260. Against the application of the principle in those cases Stern, 'La Succession d'États' (n 283), 309; and also critical Pergantis (n 283) 209–212.

767 Wittich, 'Art. 70' (n 2) para. 29; Villiger (n 731) para. 9; differently, excluding only domestic rights and "dynamically interpreting" Art. 70 Minnerop and Roeben (n 429), 480.

768 ILC, 'Draft Articles on the Law of Treaties with Commentaries' (n 209), 265. A former draft version contained the term "acquired rights", which, however, met with considerable opposition within the ILC. The term was therefore replaced by "situation", Ascensio, 'Art. 70' (n 435) para. 19.

769 Minnerop and Roeben (n 429), 479–480.

770 Fitzmaurice clearly distinguished between "acquired rights" under the treaty and "executed clauses" of the treaty, cf. Fitzmaurice (n 765) 403.

771 Additionally, at the time the discussion on Art. 70 VCLT took place (May-July 1966), the ICCPR or the ICESCR had not been adopted yet. In light of the preponderant doctrine of the 1950s and 1960s according to which individuals were mostly mere beneficiaries of inter-state rules, such interpretation does not seem natural. Furthermore, Art. 70 para. 1 lit. b) VCLT speaks of rights "created through the execution of the treaty". This wording seems not to include domestic rights.

treaty is terminated.[772] Arguably, Art. 70 VCLT can be seen as an expression of a general rule in international law of fairness or legal security providing that the termination of a treaty only creates effects *ex nunc* and not *ex tunc*.[773] This inference is supported by Art. 70 VCLT not only being widely considered a rule of customary international law[774] but its underlying rationale also being "dictated by legal logic" [775]. Therefore, such a rule may be widened to encompass situations not regulated by the VCLT.[776]

> "[T]he rules of the VCLT do not represent a complete codification of rules of customary law, but rather approximations of the applicable rules, subject to modified application whenever the specific characteristics of the treaty so require."[777]

bb) Executed and Executory Rights

What is important is that such a customary rule does not provide for eternal rights once acquired but *only* for the *non-retroactivity* of the effects of withdrawal. Consequentially, determining what qualifies as a "situation" protected after termination is complex. A common distinction is that between "executory" and "executed" rights in a treaty.[778]

> "Lorsqu'un traité tendant à créer ou à transférer des droits relatifs aux biens ou se rapportant au statut personnel a été appliqué ou lorsqu'un

772 Also Ascensio, 'Art. 70' (n 435) para. 20 „pushing aside the problem does not necessarily mean denying the existence of such rights".

773 Similarly Nollkaemper, 'Some Observations on the Consequences of the Termination of Treaties and the Reach of Article 70 of the Vienna Convention on the Law of Treaties' (n 2) 187, 189-192; Villiger (n 731) Art. 70, para. 13 (referring to custom); Ascensio, 'Art. 70' (n 435) para. 10 (considering legal security as a "general principle").

774 Cf. ibid para. 8; Villiger (n 731) Art. 70 para. 14; for Art. 70 para. 1 Waibel, 'Brexit and Acquired Rights' (n 8), 441.

775 Wittich, 'Art. 70' (n 2) paras. 8, 38-39; cf. Ascensio, 'Art. 70' (n 435) para. 7 "fruit of simplicity and common sense".

776 Proposing such widening e.g. for "consequences of terminations of treaties for causes not envisaged by the Convention" ibid para. 10.

777 Martin Scheinin, 'Impact on the Law of Treaties' in: *Kamminga/Scheinin The Impact of Human Rights* (n 611) 23 32.

778 Ascensio, 'Art. 70' (n 435) para. 12; Fitzmaurice (n 765) 403–404 ILC, 'Second Report on the Law of Treaties (Special Rapporteur Fitzmaurice)' (n 764), 67, para. 204.

> traité tendant à la reconnaissance de l'existence de tels droits est dûment entré en vigueur, il est considéré comme 'exécuté'; c'est-à-dire qu'il a établi ou reconnu un état de fait permanent; son objet est réalisé et aucune rupture ultérieure des relations entre les parties contractantes ne peut avoir pour conséquence de défaire ce qu'il a fait."[779]

Rights contained in such "executed" treaties will continue after termination of the treaty,[780] whereas rights contained in "executory" treaties, i.e. treaties containing permanent obligations to do or refrain to do something,[781] will cease after termination.[782] Hence, an ongoing obligation will cease with the termination of the treaty while a *faits accomplis* in which the vesting of a certain status is included will remain intact. Such a distinction is also reflected in the ICJ's decision in *Northern Cameroons*, in which the underlying situation was the termination of the trusteeship agreement.

> "Looking at the situation brought about by the termination of the Trusteeship Agreement [...] it is clear that any rights which may have been granted by the Articles of the Trusteeship Agreement to other Members of the United Nations or their nationals came to an end. *This is not to say that, for example, property rights which might have been obtained in accordance with certain Articles of the Trusteeship Agreement and which might have vested before the termination of the Agreement, would have been divested by the termination.*"[783]

Yet, it has to be borne in mind that the ILC did not pin down this distinction in the final draft of the VCLT and, despite appreciating "that different opinions are expressed concerning the exact legal basis, after a treaty has been terminated, of rights, obligations or situations resulting from executed

779 Arnold D McNair, 'La Terminaison et la Dissolution des Traités' (1928), 22 RdC 459 496/497; also Ascensio, 'Art. 70' (n 435) para. 12.

780 Examples given for "executed rights" in ILC, 'Second Report on the Law of Treaties (Special Rapporteur Fitzmaurice)' (n 764), 67, para. 204 are "transfers of territory effected under a treaty, boundary agreements or delimitations, and territorial settlements of all kinds; payments of any kind effected under a treaty; renunciations of sovereignty or of any other [...] recognitions of any kind".

781 McNair, 'La Terminaison et la Dissolution des Traités' (n 779), 498 who also maintains that those represent "la très grande majorité des traités".

782 Ascensio, 'Art. 70' (n 435) para. 12.

783 *Case concerning the Northern Cameroons (Cameroon v. United Kingdom),* 2 December 1963, Preliminary Objections, ICJ Rep 1963, 15 34 (ICJ) [emphasis added]. Cp. also Art. 58 para. 2 ECHR (n 576), Art. 78 para. 2 ACHR (n 580) or Art. 12 para. 2 OP I to the ICCPR (n 718) .

provisions of the treaty", it "did not find it necessary to take a position on this theoretical point".[784]

cc) Judicial Claims as Executed Rights

Finally, according to widespread practice of international adjudicatory and monitoring bodies "situations" under Art. 70 VCLT continuing after a treaty termination encompass judicial disputes already commenced before an international tribunal.[785] The ICJ has repeatedly held that factual changes after an application has been filed will not bereave it of jurisdiction established at the moment of the submission of claims:

> "the removal, after an application has been filed, of an element on which the Court's jurisdiction is dependent does not and *cannot have any retroactive effect. What is at stake is legal certainty, respect for the principle of equality and the right of a State which has properly seised the Court to see its claims decided*, when it has taken all the necessary precautions to submit the act instituting proceedings in time."[786]

This rule has been followed in cases brought before human rights monitoring mechanisms as well.[787]

Beyond that practice, some authors even contend that dispute settlement provisions remain in force after denunciation and, therefore, claims could be raised even after a termination. "[K]eeping compulsory dispute settlement mechanisms intact" is seen as being "in the interest of the international community as a whole".[788] In its 2020 advisory opinion, the IACtHR

784 ILC, 'Draft Articles on the Law of Treaties with Commentaries' (n 209), Comment on Article 66, 265, para. 3

785 Cf. for details Ascensio, 'Art. 70' (n 435) paras. 33-41.

786 *ICJ Croatia v. Serbia (Preliminary Objections)* (n 485) para. 80 [emphasis added].

787 Naldi and Magliveras (n 728), 107–109; cf. Christina M Czerna, 'Denunciation of the American Convention on Human Rights: The Trinidad &Tobago Death Penalty Cases' <https://www.corteidh.or.cr/tablas/r31601.pdf>. But see also, critical on the practical effects of such procedures, Ascensio, 'Art. 70' (n 435) para. 41.

788 Giegerich, 'Art. 56' (n 739) para. 42, who, however, favors the possibility of unilateral withdrawal from dispute settlement agreements because states would otherwise simply disregard final decisions, cf. ibid para. 45. See also Wittich, 'Art. 70' (n 2) para. 17 who rather seems to focus on disputes about the validity of the termination; see in this respect also Art. 65 VCLT and the respective comment by Ascensio, 'Art. 70' (n 435) para. 42.

stated unequivocally that a denunciation of the ACHR will not (retroactively) release the respective state from its responsibility for violations that took place before the withdrawal came into effect and that both the court and the commission will therefore remain competent to hear these cases.[789] Also, according to Art. 58 para. 2 of the ECHR,

> "a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective."

However, outside regional mechanisms, this position is not uncontested. It seems that it can, at the most, relate to disputes concerning the termination of the treaty containing the clause, but not to substantive rights acquired under the treaty.[790]

dd) Interim Conclusions

This overview of rules concerning the termination of human rights treaties does not militate for a vigorous protection of rights contained in them as individual assets but rather underlines the dependence of those rights on the will of states. Yet, a solid boundary for a state's leeway is that the retroactive effect of terminating the rights is generally prohibited. In this way, the VCLT indirectly opens the door for the conclusion that termination of a treaty will not touch upon "executed" rights of individuals accorded by the treaty. Yet, the exact scope of "executed" rights remains obscure.

789 *IACtHR Denunciation of the ACHR* (n 512) paras. 68-70, 76-77, 115. This shall also include acts of a "continuous nature" which commenced before that point in time, ibid para. 77.

790 Ascensio, 'Art. 70' (n 435) paras. 37-38, 42-44 considers this narrow application „delicate to justify". In general against the subsistence of compromissory clauses Aust *Modern Treaty Law and Practice* (n 294) 257; differently Wittich, 'Art. 70' (n 2) para. 17 „While in theory there is a difference between disputes concerning the substantive application of the treaty and those relating to its effective termination, the consequences are the same for either case."

g) Interim Conclusions

To sum up, international law has not developed as far as providing for automatic succession into human rights treaties.[791] Relevant state practice and the pertaining *opinio juris* are not widespread and consistent enough. This conclusion has generally been supported by the insights from the law and practice surrounding termination of human rights treaties. Since, in principle, states are not barred from consciously terminating their human rights commitments under treaties, any allegation of a bindingness of such instruments to new states cannot be considered persuasive.

Arguably, there are good reasons for a rule of automatic succession of universal and fundamental human rights conventions not containing a denunciation clause, such as the ICCPR. Human rights law is a field known for its transformative effect, and especially human rights courts are known for their evolutive interpretation. Moreover, the synopsis here has shown that there is a strong commitment – in theory and in practice – to keep human rights treaties alive. However, a rule of automatic succession has not become part of universal customary international law, yet, since states have routinely reserved their right to decide on a case-by-case basis. The state of the law still favors the consensual theory over the underlying values.

3) The Argument of Self-Determination

Against the bakground of a purported "human right to democracy"[792] and the "right to self-determination" has led to the emergence of a legal discourse arguing that, for cases where human rights might be lost, territorial transfers ought not to be possible without the approval of the territory's

791 Also against the emergence of such a rule Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283); Devaney, 'What Happens Next? The Law of State Succession' (n 283) Rasulov (n 617); ILA, 'Resolution No 3/2008' (n 306) para. 11; Aust *Modern Treaty Law and Practice* (n 294) 323; Mehdi Belkahla, 'La Succession d'États en Matière de traités multilatéraux Relatifs aux Droits de l'Homme' in: *La Convention de Vienne sur la Succession d'États en Matière de Traités - Commentaire* (n 332) para. 50; with respect to the Geneva Conventions, *EECC - Award on Prisoners of War* (n 616) paras. 33-35; *sceptical* Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 357; Crawford *Brownlie's Principles of Public International Law* (n 3) 425–426.

792 For an overview of the current discourse but dismissive of a human right to democracy Sigrid Boysen, 'Remnants of a Constitutional Moment' in: *Arnauld/von der Decken Handbook of New Human Rights* (n 582) 465.

population.[793] This argument was fueled by the ICJ's recent finding in its *Chagos Advisory Opinion* that "heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony."[794]

It has already been refuted that rights under a treaty "belong" to the individuals benefitting them,[795] but perhaps as importantly, the often-cited right to self-determination, although having been named by the ICJ a "fundamental human right" owed *erga omnes*,[796] in practice still lacks a specific dimension outside the colonial context.[797] Additionally, the right to self-determination constitutes a collective right, which can only be asserted by a people, not by individuals.[798] It is therefore questionable what would happen to the rights of individuals not voting with the majority of the referendum or generally not feeling represented by the leaders of a group.[799]

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793 Pierre Thielbörger and Timeela Manandhar, 'Una-Fjord-able: Why Trump cannot buy Greenland' *Völkerrechtsblog* (26 August 2019) <https://voelkerrechtsblog.org/una-fjord-able-why-trump-cannot-buy-greenland/>, with critical comment by Nadja Reimold, 'Not for Sale? : Some Thoughts on Human Rights in Cases of Cession of Territory' *Völkerrechtsblog* (3 October 2019) <https://voelkerrechtsblog.org/not-for-sale/>. Against a requirement of approval by the population for cessions Dörr, 'Cession (2019)' (n 400) para. 17. Also critical on referenda as a means to "perfect an imperfect title" Sze H Lam, 'To Perfect the Imperfect Title: How Referenda were Historically Manipulated to Justify Territorial Conquest by Nations' *EJIL Talk!* (21 October 2022) <https://www.ejiltalk.org/to-perfect-the-imperfect-title-how-referenda-were-historically-manipulated-to-justify-territorial-conquest-by-nations/>. See on the issue of approval by the population also the „Czech and Slovak Pension Cases", *infra*, Chapter IV B) V) 3). Cp. with respect to the exeptional Chagossian case Papanicolopulu and Burri, 'Human Rights and the Chagos Advisory Opinion' (n 487) 197.

794 *ICJ Chagos Opinion* (n 513) para. 172. On this Mohor Fajdiga and others, 'Heightened Scrutiny of Colonial Consent According to the Chagos Advisory Opinion: Pandora's Box Reopened?' in: *Burri/Trinidad ICJ and Decolonisation* (n 487) 207 110–115.

795 *Supra*, section C) II) 2) g).

796 Lately *ICJ Chagos Opinion* (n 513) paras. 144, 180 with further references; *ICJ Wall Opinion* (n 367) paras. 155-156.

797 Cf. Peter Hilpold, ''Humanizing' the Law of Self-Determination – the Chagos Island Case' (2022), 91(2) Nord J Intl L 189 191. Apparently applying the concept also outside the colonial context Kohen and Hébié, 'Territory, Acquisition (2021)' (n 286) para. 48.

798 Thomas Burri and Daniel Thürer, 'Self-Determination (2008)' in: *MPEPIL* (n 2) para. 18; Papanicolopulu and Burri, 'Human Rights and the Chagos Advisory Opinion' (n 487) 195.

799 See the critique echoed towards the ECtHR's treatment of the Chagos Islanders' complaint Gismondi (n 582), 41–42.

Since it constitutes a protection of the individual regardless of its belonging to a certain group (even if having a strong link to minority protection), the doctrine of acquired rights would encompass each individual subject to succession. Furthermore, the doctrine does not purport to secure eternal rights but only the protection of a factual *status quo*. Its scope and goal are therefore different from above-mentioned rights and cannot be substituted by them.

4) The Implementation Gap

A huge difference is still evident between a state's international commitment to individual rights and their actual and practical enforcement within the domestic legal order – often the only avenue for individuals to assert their claims.

a) International Treaties

The mere counting of formal "accessions" or "successions" to international treaties will not always do justice to an analysis of the extent to which individuals rights are in fact kept intact after succession. For example, even if Croatia formally acceded to its predecessor's international treaties,[800] domestically it reserved the right to only apply them if in line with its constitution, thereby introducing a far-reaching, indeterminate reservation. In Yemen, the commitments under CEDAW were officially accepted only with inner reservations and the effective interpretation and application of women's rights was tainted by Shari'a principles.[801]

Even for many states in principle honoring their international commitments, a dualist approach is followed in which international treaties have to be incorporated into national law to become domestically applicable. Internally, treaties may only enjoy the status of statutory laws and are therefore easy to overrule.[802] An illustrative example of this difficulty is

800 See in detail *infra*, Chapter IV B) IV) c) aa).

801 Cf. Laila Al-Zwaini, 'The Rule of Law in Yemen: Prospects and Challenges' (The Hague 2012). HiiL Rule of Law Quick Scan Series 47.

802 Pointing to these issues Simma and Alston (n 514), 85–86; Kälin and Künzli (n 441) 14; see also *Treaty Override,* 2 BvL 1/12, 15 December 2015, BVerfGE 141, 1 (German Federal Constitutional Court [BVerfG]), English version available at

Hong Kong.[803] While the[804] United Kingdom of Great Britain and Northern Ireland (UK) and China had agreed that the ICCPR and the ICESCR "as applied to Hong Kong shall remain in force",[805] the agreement did not mean that individuals living in Hong Kong were able to enforce those rights before national courts.[806] The British government initiated the enactment of the "Bill of Rights Ordinance"[807] by the Hong Kong authorities, entrenching the ICCPR into national law.[808] However, every attempt to give this law a status superior to the ordinary laws in Hong Kong[809] was not accepted by the Chinese side, which considers Hong Kong as a purely internal matter,[810] and repealed after the transfer.

But also in states following a monist theory, the domestic application of international obligations may vary. An example in place here is the situation in Macau. Although Macau, in principle, adheres to the Portuguese traditional monist approach, deeming international law directly applicable within its own domestic legal system, the wording of Art. 40 of the Macau Basic Law declaring that the ICCPR, ICESR, and international labor con-

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http://www.bverfg.de/e/ls20151215_2bvl000112en.html. Additionally, many national judges do not apply international conventions, even if implemented, cf. Hannah Birkenkötter and Sinthiou Buszewski, 'Das Spiel hat gerade erst begonnen: Zur Kritik am Migrationspakt' (22 December 2018) <https://verfassungsblog.de/das-spiel-hat-gerade-erst-begonnen-zur-kritik-am-migrationspakt/>.

803 Stefan H C Lo, Kevin K-y Cheng and Wing H Chui, *The Hong Kong Legal System* (2nd ed. CUP 2020) 372–373.

804 Registrar of the Court, *Press Release ECHR 197 (2022): The European Court Grants Urgent Interim Measure in Case Concerning Asylum-Seeker's Imminent Removal from the UK to Rwanda (K.N. v. the United Kingdom, Application no. 28774/22))* (2022)

805 Sino-British Joint Declaration (n 709).

806 Neither the Sino-British Joint Declaration nor the ICCPR or the ICESCR were directly enforceable under Hong-Kong's domestic law, Peter Malanczuk, 'Hong Kong (2010)' in: *MPEPIL* (n 2) paras. 79, 82 with further references; Richard Swede, 'One Territory: Three Systems? The Hong Kong Bill of Rights' (1995), 44(2) ICLQ 358 359–361.

807 An Ordinance to Provide for the Incorporation into the Law of Hong Kong of Provisions of the International Covenant on Civil and Political Rights as Applied to Hong Kong; and for Ancillary and Connected Matters (8 June 1991) https://www.elegislation.gov.hk/hk/cap383 (Hong Kong, UK).

808 Cf. Swede (n 806), 359–361; see Malanczuk, 'Hong Kong (2010)' (n 806) para. 63.

809 E.g. the UK amended the so called Patent Law in order to declare law coming into existence afterwards and not being in conformity with the ICCPR to be invalid, cf. Swede (n 806), 358, 362.

810 Lorenz Langer, 'Out of Joint? - Hong Kong's International Status from the Sino-British Joint Declaration to the Present' (2008), 46(3) AVR 309 332–333.

ventions "shall remain in force and shall be implemented through the laws of the Macao Special Administrative Region" is interpreted domestically as requiring additional adoption by national legislation to become binding.[811] As there is no such legislation, national authorities are left with wide discretion, apparently denying some of the rights to non-nationals.[812]

b) Customary Law

Customary law does not suffer from most of these drawbacks as it is mostly automatically incorporated into domestic law.[813] However, it does not provide for judicial organs with compulsory jurisdiction - the avenue through which rights can be legally enforced. Neither the status of *erga omnes* nor the *jus cogens* character of a norm convey standing before an international tribunal.[814] That two states will deliberately agree on the *ad-hoc* submitting of a dispute surrounding human rights to the jurisdiction of an independent tribunal is unlikely. This lack of practical enforcement makes it hard for customary rights to be accepted at all or to be enforced and implemented in specific cases. The existence and scope of many human rights are more often contended than agreed on, which holds especially true for the right of property. The universality of human rights today is still an aspiration for many of those rights and the respect for human rights varies greatly throughout the world.

811 Chao Wang, 'Implementation of the ICCPR in Macao Since 1999: The Position of Aliens as an Illustration' (2021), 20(3) Chinese JIL 561 566. On the historical legal background ibid 568, 571.

812 ibid 562, 576.

813 Antonio Cassese, *International Law* (2nd ed. OUP 2005) 224; Bing B Jia, 'The Relations Between Treaties and Custom' in Pierre-Marie Dupuy (ed), *Customary International Law* (Edward Elgar 2021) 728 730.

814 *ICJ Armed Activities on the Territory of the Congo (New Application)* (n 513) 32, para. 64; *ICJ Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)* (n 483) para. 147; endorsed by *ICJ Croatia v. Serbia (Merits)* (n 483) paras. 85, 88. But see also *ICJ Armed Activities on the Territory of the Congo, Separate Opinion Simma* (n 517) paras. 32-37.

c) Political Resistance to Human Rights

On a general note, after a certain climax in human rights enthusiasm at the end of the 1990s, skepticism towards human rights now seems rampant.[815] State sovereignty has gained more support than the individualistic approach, also in light of the violation of basic tenets of the international legal order and hypocritical attitudes of some of the world's superpowers.[816] As a legal argument, human rights have suffered a moral devaluation. They are more often perceived as a means of "lawfare"[817] than as a legitimate legal argument. The perception of many states is that the argument was used too often for purely domestic political reasons, allowing a meddling in the sovereign concerns of other states, and applied with double standards.[818] But even within "western" states, the argument of human rights protection is politically used to disqualify or curtail other rights.[819] As a consequence, there has been a "backlash" towards international human rights courts.[820] Some even speak of a "crisis of liberal democracy" leading to a decline in protecting human rights.[821]

815 See, on a general note, Philip Alston, 'The Populist Challenge to Human Rights' (2017), 9(1) Journal of Human Rights Practice 1. For an overview of the different critiques see Anne Peters, 'The Importance of Having Rights' (2021), 81(1) HJIL 7 15–18.

816 See Xue Hanqin, *Chinese Contemporary Perspectives on International Law: History, Culture and International Law* (Brill 2012) 160–167; Alston (n 815), 6–7; Bruno Simma, 'Der Westen ist scheinheilig' *Der Spiegel* (7 April 2014) <https://www.spiegel.de/spiegel/print/d-126393766.html>; Peters *Beyond Human Rights* (n 436) 3–6.

817 Orde F Kittrie, *Lawfare: Law as a Weapon of War* (OUP 2016) 36–38.

818 E.g. Hanqin (n 816) 161–162; see for the "manipulative" use of human rights arguments in investment law Miles (n 28) 83.

819 See e.g. for the US "Unalienable Rights Commission" Fujimura-Fanselow, Aya, Huckerby, Jayne and Sarah Knuckey, 'An Exercise in Doublespeak: Pompeo's Flawed "Unalienable Rights" Commission' *Just Security* (27 September 2020) <https://www.justsecurity.org/71705/an-exercise-in-doublespeak-pompeos-flawed-unalienable-rights-commission/>; and for the UK Marko Milanović, 'The Sad and Cynical Spectacle of the Draft British Bill of Rights' *EJIL Talk!* (23 June 2022) <https://www.ejiltalk.org/the-sad-and-cynical-spectacle-of-the-draft-british-bill-of-rights/>.

820 Erik Voeten, 'Populism and Backlashes against International Courts' (2020), 18(2) Perspectives on Politics 407; Anne Orford, 'The Crisis of Liberal Internationalism and the Future of International Law' (2020), 38 Aust YBIL 3 9–10.

821 Müllerson, 'Human Rights Are Neither Universal Nor Natural' (n 544), 936–938.

d) Interim Conclusions

Human rights are still the first and foremost vehicle to empower the individual under international law. However, when it comes to protecting property rights in cases of state succession, this field of law shows significant gaps in its protection. Due to the lack of a universally accepted definition, a customary human right of property encompassing individuals irrespective of their nationality has not evolved. Property rights are still dependent on definition by national law. Human rights treaties will not automatically survive a change in sovereignty but are dependent on the successor state's will to acknowledge a commitment. The general "backlash" against human rights has meant that their protection is fragile and will vary from succession case to succession case.

III) Investor Rights and Acquired Rights

The law on the protection of foreign investment is another field of international law protecting private property, one that recently has experienced exponential growth and intensive scholarly attention. Because of its distinctive features and history, that legal field was also often perceived as own system,[822] but it is equally embedded in general international law,[823] which it also influences[824] and, thus, influences the idea of acquired rights.

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822 Cf. Andrea Gattini, Attila Tanzi and Filippo Fontanelli, 'Under the Hood of Investment Arbitration: General Principles of Law' in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill, Nijhoff 2018) 1 2.

823 Bruno Simma and Dirk Pulkowski, 'Two Worlds, but Not Apart: International Investment Law and General International Law' in: *Bungenberg/Griebel International Investment Law* (n 436) 361 361, para. 1; McLachlan (n 39), 257, 262; Pellet, 'Notes sur la "Fragmentation" du Droit International' (n 428) 780, 782; elaborately Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd ed. OUP 2017) paras. 1.63-1.72; Gattini (n 750), 139; cf. *Phoenix Action, Ltd. v. The Czech Republic,* ICSID Case No. ARB/06/5, Award of 15 April 2009 paras. 75-78; Gattini, Tanzi and Fontanelli, 'Under the Hood of Investment Arbitration' (n 822) 2.

824 Simma and Pulkowski, 'Two Worlds, but Not Apart: International Investment Law and General International Law' (n 823) 362, 368, paras. 3, 18; Christina Binder, 'Sanum Investments Limited v the Government of the Lao People's Democratic Republic' (2016), 17 Journal of World Investment & Trade 280 294 "application [of

Due to the aforementioned indeterminacies in human rights law, the law relating to aliens as the historical basis of investment law has retained its significance especially for the protection of property.[825] And it is in this niche that the law on the protection of foreign investment retains an eminent significance besides human right law. Although a neat delimitation between the protection of property as a human right or as an "investment", i.e. "an embodiment of property rights"[826], may not be possible in all cases, it is often held that the intensity and scope of property protection under investment law have exceeded the protection under human rights law.[827] This conclusion is mainly due to international investment treaties offering private investors several fora in which they can enforce their claims irrespective of a possible support by their home state.[828] Even if investment law might also, or even primarily, aim to protect state interests such as economic prosperity and growth,[829] this protection is achieved by elevating the individual investor's status.[830] Investment courts and arbitral tribunals have produced a panoply of jurisprudence on the issue, fleshing out the scope of an "investment", which in turn led to a much more enforceable position for the individual investor. This evolution is also considered one of the

general international law to investment cases] also keeps general international law 'alive', it details and further specifies it."

825 Griebel (n 440) 14/15, 16.

826 Douglas (n 455), 195, 197 „Investment disputes are about investments, investments are about property, and property is about specific rights over things cognisable by the municipal law of the host state."

827 Alvarez, 'The Human Right of Property' (n 560), 663 [footnote omitted] "a foreign investor's right to property is the most enforceable 'human right'"; similar Pellet, 'Notes sur la "Fragmentation" du Droit International' (n 428) 764; Klein (n 530) 139–140.

828 ibid 123–124.

829 Cf. Roberts, 'Triangular Treaties' (n 752), 375; Klein (n 530) 131.

830 ibid 132/133; Parlett (n 439), 74 "The ensuing structural transformation was a by-product, not a cause"; cf. Kriebaum *Eigentumsschutz im Völkerrecht* (n 428) 31 "the law on the protection of international investment aims at encouraging economic development of the treaty parties as well as to protect the economic interests of investors" [own translation from German]; cf. also *Saluka Investments B.V. v. The Czech Republic,* Partial Award of 17 March 2006, https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf para. 300 (PCA) "The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations."

catalysators of the shift in the status of the individual under international law.[831]

1) The Limited Scope of Protection of Investor Rights Outside Investment Treaties

Yet, despite these advantages, international investment law shows obvious gaps in its protection of private property interests, especially in cases of state succession. Compared to human rights law, its customary scope is limited. While the protection under treaties is forceful, the existence of those treaties in cases of a change of sovereignty is fragile.

a) Customary Investment Law as Inter-State Law Protecting Commercial Interests of Foreigners

International investment treaties are understood to overcome the typical mediatization of the individual by according individual investors with the standing to sue their host state before an independent international tribunal. Yet, irrespective of the ongoing debate whether these treaties confer genuine substantive individual rights or merely allow the individual to espouse states' rights,[832] that understanding is not the state of customary law,

831 Salacuse (n 455) 51; Douglas (n 455), 154; Karsten Nowrot, 'Kommentar: Völkerrechtlicher Umgang mit ambivalenten Regressionsphänomenen im internationalen Investitionsrecht' in Isabella Risini and others (eds), *Zeit und Internationales Recht: Fortschritt - Wandel - Kontinuität* (Mohr Siebeck 2019) 111 114; Klein (n 530) 139–140 "a new quality of individual rights under public international law" [own translation from German]; cf. Yun-i Kim, 'Investment Law and the Individual' in: *Bungenberg/Griebel International Investment Law* (n 436) 1585 1585–1588.

832 For an overview of the discussion Klein (n 530) 164–192; Douglas (n 455), 169–181. In favour of the espousal theory *Loewen Group, Inc. and Raymond L. Loewen v. United States of America,* ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003 para. 233; *Archer Daniels Midland Company v. Mexico,* ICSID Case No. ARB(AF)/04/5, Award of 21 November 2007 para. 17; arguably also Kim, 'Investment Law and the Individual' (n 831) 1601, para. 71. For substantive individual rights *Corn Products International, Inc. v. United Mexican States,* ICSID Case No. ARB (AF)/04/1, 15 January 2008, Decision on Responsibility (Redacted Version) para. 174; Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 132; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 245; Roberts, 'Triangular Treaties' (n 752), 372; Douglas (n 455), 181–184, 191; following him Alexander Reuter, 'Taking Investors' Rights Seriously: The Achmea

which is still based on the protection of the home state's interests enforced by way of diplomatic protection.[833] The procedural right to arbitrate against a host state can only be conferred by treaty agreement between two states or by state contract between investor and host state, i.e. it is dependent on the latter's goodwill.[834] Additionally, while human rights law, in principle, protects individuals without regard to their nationality,[835] investment law solely protects foreigners' investments.[836] Nationality is still a determinant in today's investment law.[837] In so far, it has not emancipated itself from its origins in the law of aliens in the 17th century.[838] It thus does not offer protection to stateless persons within a state, too.[839] This reliance on nationality is an especially unfortunate feature when sovereignty changes, a situation that routinely calls into question links of citizenship. States still possess a considerable leeway in restricting the acquisition of or imposing their nationality on legal or natural persons. Furthermore, investment law takes less account of the moral value of certain possessions as it primarily protects their economic value. The scope of protection under investment law is therefore significantly limited from the outset.

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and CETA Rulings of the European Court of Justice Do Not Bar Intra-EU Investment Arbitration' (2020), 80 HJIL 379 384–388; McLachlan, Shore and Weiniger (n 823) paras. 3.114–3.126; Voon, Mitchell and Munro (n 733), 455.

833 Douglas (n 455), 163; Roberts, 'Triangular Treaties' (n 752), 363.

834 Cf. McLachlan (n 39), 264; Salacuse (n 455) 59; Schöbener, 'Outlook on the Developments in Public International Law and the Law Relating to Aliens' (n 561) 68, 74, paras. 12, 33, 34; *ICJ Barcelona Traction* (n 266) paras. 88-90.

835 But see with respect to certain exceptions from this rule such as the "right to vote" Pasquale de Sena, 'Still Three Different Status for Aliens, Citizens and Human Persons?' in: *Pisillo Mazzeschi/de Sena Global Justice* (n 503) 239-254 240-241.

836 Dolzer and Schreuer (n 537) 44, 46; Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 131–133; Klein (n 530) 125–126; Kriebaum *Eigentumsschutz im Völkerrecht* (n 428) 31; Lucy F Reed and Jonathan E Davis, 'Who is a Protected Investor?' in: *Bungenberg/Griebel International Investment Law* (n 436) 614 614/615, para. 1. Suggesting to overcome this distinction in the future but clearly acknowledging its current crucial status Christoph Schreuer, 'The Future of International Investment Law' in: *Bungenberg/Griebel International Investment Law* (n 436) 1904 1911, paras. 32-34.

837 Dolzer and Schreuer (n 537) 44–49; Sena, 'Still Three Different Status for Aliens, Citizens and Human Persons?' (n 835) 240; Reed and Davis, 'Who is a Protected Investor?' (n 836) 614/615, para. 1.

838 Miles (n 28) 2, 19; Klein (n 530) 125–126.

839 Cf. Hailbronner and Gogolin, 'Aliens (2013)' (n 441) para. 28 "The minimum standard does not, however, apply to stateless persons, although it may be extended to them by treaty."

b) The Vagueness of Protection of Individual Property Rights

Generally, the law of aliens is a matter of customary international law.[840] Yet, the exact scope of customary property protection under this legal regime is not settled.[841] Even those arguing for a generally agreed notion of property do not deviate significantly from the definition of acquired rights put forward by *O'Connell* some 50 years ago as "any rights, corporeal and incorporeal, properly vested in a natural or juristic person, and of an assessable monetary value."[842] The specific focus on the term of "investment" and its "taking", carved out on a case-by-case basis by the investment tribunals, has left the definition of "property" underdeveloped. This interdependency leads to grey areas in determining expropriations.[843] In general

> "[i]t is [...] the municipal law of the host state that determines whether a particular right *in rem* exists, the scope of that right, and in whom it vests. It is the investment treaty, however, that supplies the classification of an investment and thus prescribes whether the right *in rem* recognised by the municipal law is subject to the protection afforded by the investment treaty."[844]

It is generally accepted that the right to expropriate foreigners is a part of a state's sovereignty,[845] a circumstance reflected in provisions of invest-

840 Hobe, 'The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law' (n 440) 14, para. 23; Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 25; Hollin Dickerson, 'Minimum Standards (2010)' in: *MPEPIL* (n 2) paras. 1, 23; differently Hailbronner and Gogolin, 'Aliens (2013)' (n 441) para. 4; Schöbener, 'Outlook on the Developments in Public International Law and the Law Relating to Aliens' (n 561) 66, para. 5.

841 Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 131; also against the evolution of a general customary definition Douglas (n 455), 197; cf. Schöbener, 'Der menschenrechtliche Schutz des privaten Eigentums im universellen Völkerrecht – eine Zwischenbemerkung' (n 530) 906.

842 O'Connell *The Law of State Succession* (n 2) 81; see almost identical definitions in Schöbener, 'Enteignung und Entschädigung im Systemvergleich' (n 427) 60–61; Schöbener, 'Der menschenrechtliche Schutz des privaten Eigentums im universellen Völkerrecht – eine Zwischenbemerkung' (n 530) 905; Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 136; Dolzer (n 561) 170.

843 Cf. for an example McLachlan, Shore and Weiniger (n 823) paras. 8.65–8.66.

844 Douglas (n 455), 198 [italics in original] who calls this "an acquired rights paradigm" ibid 200; similar McLachlan, Shore and Weiniger (n 823) para. 8.64.

845 Kriebaum *Eigentumsschutz im Völkerrecht* (n 428) 23; Salacuse (n 455) 64; Markus Krajewski, *Wirtschaftsvölkerrecht* (4th ed. C.F. Müller 2017) para. 547.

ment treaties that only confine but do not exclude this right of a state.[846] Furthermore, today, an internationally lawful taking of property has three commonly accepted prerequisites: The taking has to be in the public interest, must not be discriminatory, and compensation must be paid for it.[847] Yet, the precise standard for this compensation remains unsettled outside specific agreements.[848] For a right that is more often protected by compensation of its value than by its physical persistence,[849] this lack of a standard seems to be a serious loophole.

aa) State Practice

That it has been so hard to agree on a standard of compensation can, at least partly, be explained by the history of expropriation law. At its very beginning, the law protecting aliens was based on the idea that aliens were to be protected by being accorded the same rights as a state's nationals under its domestic law, i.e. a standard of "national treatment".[850] This

846 Dolzer and Schreuer (n 537) 98.

847 ibid 99; Kriebaum, 'Expropriation' (n 443) 962, para. 2; Kriebaum *Eigentumsschutz im Völkerrecht* (n 428) 24; Griebel (n 440) 17; Deniz H Deren, *Internationales Enteignungsrecht: Kollisionsrechtliche Grundlagen und Investitionsschutzfragen* (Mohr Siebeck 2015) 16. Those tree requirements seem to be accepted by Asian and African countries as well, see Idriss P-A Fofana, 'Afro-Asian Jurists and the Quest to Modernise the International Protection of Foreign-Owned Property, 1955–1975' (2021), 23(1) JHistIntLaw 80 99-101. Salacuse (n 455) 64–65, 349-357 adds a fourth requirement of "due process of law".

848 Cf. for an early account Arthur K Kuhn, 'Nationalization of Foreign-Owned Property in Its Impact on International Law' (1951), 45(4) AJIL 709 710; for more recent accounts Hobe, 'The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law' (n 440) 15, para. 25; Krajewski (n 845) para. 551; Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 131; McLachlan, Shore and Weiniger (n 823) para. 9.09; cf. Hailbronner and Gogolin, 'Aliens (2013)' (n 441) para. 29. Very critical about a customary standard, especially before 1945, Jean d'Aspremont, 'International Customary Investment Law: Story of a Paradox' in Tarcisio Gazzini and Eric d Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff 2012) 5 10–17.

849 See Salacuse (n 455) 68–69; Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 140 "Essentially, the protection of property under international law does not prohibit expropriation, but, as a secondary remedy, is activated by expropriation" [own translation from German].

850 Dolzer and Schreuer (n 537) 1.

system worked well as long as it was based on a European community of states and the US having fairly similar legal systems and global power relations remained untouched.[851] However, the reliance on such a relative standard found its limits when, by the beginning of the 20th century, states that had become independent and/or sided with socialist ideas challenged those long held ideals.[852] The basic controversy at the beginning of the 20th century went along the lines of the capital exporting states arguing for a material international ("minimum") standard of protection for their nationals and the capital importing states rejecting any more favorable treatment of aliens as compared to their own nationals.[853] The so-called *Calvo-Doctrine*,[854] denying the possibility of foreign states to intervene on behalf of their nationals and endorsing a national treatment standard, was especially popular in Latin American states[855] but never became a universal standard.[856] According to the opposite position, famously advocated by US Secretary of State *Hull*,[857] expropriation must be followed by prompt (meaning without undue delay[858]), effective (meaning being made in convertible currency[859]) and adequate compensation (the *Hull* formula).

851 Cf. Miles (n 28) 47-48 with specific examples of oppressive assertion of purported rights at 56-69; Salacuse (n 455) 58. Tracing the evolution of the "minimum standard" as a project of Western, especially British, jurists Leiter (n 31).

852 For an overview of nationalization measures in the 20th century see Kriebaum *Eigentumsschutz im Völkerrecht* (n 428) 24–25; on the "Soviet" and the "Latin American" challenges Salacuse (n 455) 73–78; see also Miles (n 28) 71–82.

853 See Hobe, 'The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law' (n 440) 9, paras. 5-8; Miles (n 28) 49–52; Salacuse (n 455) 58.

854 Named after the Argentinian jurist Carlos Calvo, see Dolzer and Schreuer (n 537) 1, footnote 3.

855 Salacuse (n 455) 59.

856 Dolzer and Schreuer (n 537) 2; Hobe, 'The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law' (n 440) 9, para. 8; Miles (n 28) 51; Arnauld *Völkerrecht* (n 255) 422, para. 594; Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 141/142; Schöbener, 'Enteignung und Entschädigung im Systemvergleich' (n 427) 80.

857 US/Mexico, 'Exchange of Letters between US Secretary of State Cordell Hull and the Mexican Government (1938)' in José E Alvarez (ed), *International Investment Law* (Brill, Nijhoff 2017) 235.

858 Dolzer and Schreuer (n 537) 101; Salacuse (n 455) 353.

859 Dolzer and Schreuer (n 537) 101; cf. Salacuse (n 455) 353.

While since around 1945 it seems to be agreed that in principle compensation should be paid when private foreign property is taken,[860] what is still in doubt, however, is the appropriate standard of compensation.[861] Weighing against the assertion that the compensation of a property's full value was owed was the policy of paying many compensations after the Second World War as lump sums agreed on between the expropriating state and the home state of the expropriated individuals.[862] But it is difficult to infer from these special, particular instances a rule in either direction.[863] Moreover, the opposition of many "newly independent states" emerging from decolonization to traditional standards of compensation severely di-

860 Cf. Alexander N Makarov, 'Die Nationalisierungsmassnahmen und die Entschädigung der durch sie betroffenen Ausländer in der internationalen Praxis der letzten Jahre', *Um Recht und Gerechtigkeit: Festgabe für Erich Kaufmann* (W. Kohlhammer Verlag 1950) 249 249–250. Very critical about the existence of a customary minimum standard of treatment before 1945 d'Aspremont, 'International Customary Investment Law' (n 848) 10–12.

861 Hobe, 'The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law' (n 440) 11, para. 13; Salacuse (n 455) 68 „Generally speaking, almost all of the nations in the world today would claim to recognize the principle that a state which has expropriated the property of a foreign investor has the obligation to pay compensation to that investor. However, all nations do not agree on the appropriate standard of compensation for expropriation or on its application in specific cases."

862 Cf. Makarov, 'Die Nationalisierungsmassnahmen und die Entschädigung der durch sie betroffenen Ausländer in der internationalen Praxis der letzten Jahre' (n 860) 263; Tomuschat, 'Die Vertreibung der Sudetendeutschen' (n 266), 19, 22, 23; Cannizzaro, 'Is There an Individual Right to Reparation? Some Thoughts on the ICJ Judgment in the Jurisdictional Immunities Case' (n 455) 498.

863 *ICJ Barcelona Traction* (n 266) para. 62 was rather cautious to infer from such agreements a general rule of international law "It should be clear that the developments in question have to be viewed as distinctive processes, arising out of circumstances peculiar to the respective situations. To seek to draw from them analogies or conclusions held to be valid in other fields is to ignore their specific character as *lex specialis* and hence to court error" [italics in original]; yet, some 40 years later in *ICJ Jurisdictional Immunities* (n 496) 141, para. 94 the ICJ pondered that "against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs" a "rule requiring the payment of full compensation to each and every individual victim" had not reached the status of a peremptory norm of general international law. Also against drawing general conclusions from such lump sum agreements Schöbener, 'Enteignung und Entschädigung im Systemvergleich' (n 427) 82.

minished the persuasiveness of the *Hull* formula as a global standard.[864] Ideological fights were taken up in the UNGA forum, where the majority had shifted in favor of the newly independent states.[865] The re-emergence of these states from colonial rule brought questions of sovereignty over natural resources and concessions of former colonial states to the table.[866] For the new, often economically weak, states a duty to compensate promptly, fully, and effectively would have made it impossible for the countries to expropriate investors and hence to (re-)nationalize their own resources.[867] And while GA Resolution 1803 (XVII) on "Permanent Sovereignty Over Natural Resources" in 1962 tried to find some middle ground by proclaiming that

> "4. […] the owner shall be paid *appropriate* compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty *and* in accordance with international law",[868]

thereby not unambiguously endorsing the *Hull* formula or the national treatment standard,[869] its preamble made clear

> "that nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of *successor States* and Governments in respect of *property acquired before the accession to complete sovereignty* of countries formerly under colonial rule".

Only shortly after the ILC had to close the topic of acquired rights within the law of state succession, the UNGA proposed a "New International

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864 On the "post-colonial challenge" Salacuse (n 455) 78–84; cf. also Fofana (n 847), 89–108.

865 For an overview of the discussion in the UNGA Kriebaum *Eigentumsschutz im Völkerrecht* (n 428) 25–27.

866 Cf. Hobe, 'The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law' (n 440) 12, Rn. 16.

867 Cf. Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 141; Crawford *Brownlie's Principles of Public International Law* (n 3) 415.

868 UNGA, 'Resolution A/RES/1803 (XVII): Permanent Sovereignty Over Natural Resources' (14 December 1962) UN Doc. A/RES/1803 (XVII) para. 4 [emphasis added]. Calling the resolution "a tentative compromise" d'Aspremont, 'International Customary Investment Law' (n 848) 13.

869 Dolzer and Schreuer (n 537) 4; Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 142; cf. Schöbener, 'Enteignung und Entschädigung im Systemvergleich' (n 427) 81.

Economic Order" (NIEO).[870] The "Charter on Economic Rights and Duties of States" from 1974 even intensified the conflict by insisting that expropriation of foreign investments should be subject to purely national standards.[871]

bb) Investment Treaties

Inter alia because of these uncertainties about the correct standard of compensation in the 1960s to 1980s,[872] states started concluding bilateral investment agreements (BITs) covering the protection of their investors in a foreign state.[873] In particular since the 1980s, such BITs have been enormously popular and have proliferated. Today there are almost 3000 of them,[874] many concluded with developing states and also between developing states.[875] Most BITs contain a compensation clause incorporating the

870 UNGA, 'Declaration on the Establishment of a New International Economic Order' (1 May 1974) UN Doc. A/RES/3201(S-VI); cf. in depth Miles (n 28) 93–100.

871 Art. 2 UNGA, 'Charter of Economic Rights and Duties of States' (12 December 1974) UN Doc. A/RES/3281 (XXIX); cf. also UNGA, 'Permanent Sovereignty over Natural Resources' (17 December 1973) UN Doc. A/RES/3171 (XXVIII), especially no. 3.

872 Very sceptical about customary norms in this field Walter Rudolf, 'Neue Staaten und das Völkerrecht' (1978), 17(1) AVR 1 37; also d'Aspremont, 'International Customary Investment Law' (n 848) 14, 16 "And even if there could have been customary international rules back then, the uncompromising 1974 UN General Assembly resolutions must be read as having ditched the little customary international law that existed at that time."; Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 138; Schöbener, 'Der menschenrechtliche Schutz des privaten Eigentums im universellen Völkerrecht – eine Zwischenbemerkung' (n 530) 914.

873 Salacuse (n 455) 87, 125, 352; d'Aspremont, 'International Customary Investment Law' (n 848) 16/17. On the general evolution Dolzer and Schreuer (n 537) 6–8.

874 For exact numbers please refer to https://investmentpolicy.unctad.org/international-investment-agreements.

875 One should not forget that, in the beginning, BITs were regularly concluded between developing states and industrialized countries. It is important to remain conscious of BIT's colonial history, and their potential to be used as a means of the powerful to impose standards on the weaker, economically less potent states leading to a perpetuation of imperial diplomacy; cf. Miles (n 28) 88–91 and, concerning the modern "backlash" against the investment system, Kanad Bagchi, 'A BIT of Resistance: A Response to Prof. Prabhash Ranjan's Plea for Embedded Liberalism' *Völkerrechtsblog* (26 January 2019) <https://voelkerrechtsblog.org/a-bit-of-resistance/>.

Hull formula.[876] Thanks to the similarity of protection standards in BITs, which have been equated through the most-favored nation standard, and their interpretation and application by investment tribunals, investment law has become "multilateralized"[877]. That multilateralization has arguably gone far enough and has developed to such a depth that reference can now be made to an overarching system of investment law governed at least by some general principles.[878]

However, the fact that these BITs were concluded especially because of the uncertainties with respect to the general standard of compensation tends to militate against inferring customary rules from them.[879] Additionally, there is a noticeable caution against reading general rules into the multitude of these similar, but in detail often diverging, agreements.[880]

876 Dolzer and Schreuer (n 537) 5; Salacuse (n 455) 352–353; Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 142; Schöbener, 'Enteignung und Entschädigung im Systemvergleich' (n 427) 82; McLachlan, Shore and Weiniger (n 823) para. 9.09. Cf. e.g. Art. 5 para. 1, 2 US Model BIT (2012), reproduced in José E Alvarez (ed), *International Investment Law* (Brill, Nijhoff 2017) 486.

877 Schill *The Multilateralization of International Investment Law* (n 840).

878 Cf. in particular ibid 17; Stephan W Schill, 'Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law' in: *Besson/d'Aspremont Handbook on the Sources of International Law* (n 432) 1095 1100–1103; see Roberts, 'Triangular Treaties' (n 752), 359 "the investment treaty system is often bilateral in form but somewhat multilateral in substance"; d'Aspremont, 'International Customary Investment Law' (n 848) 18-19 "There is indeed little doubt that bilateral treaties were meant to pursue the same objective as the endeavours to create a multilateral framework of investment protection. And that network was judicialized with the more systematic inclusion of provisions for investor-State arbitration. […] BITs came to constitute another path to the multilateralization of investment law" [footnote omitted].

879 Elaborately Griebel (n 440) 109–111; Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 138, 142; differently Schöbener, 'Enteignung und Entschädigung im Systemvergleich' (n 427) 82.

880 Cf. Andrea K Bjorklund, 'Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is not Working' (2007-2008), 59 Hastings LJ 241 272, footnote 129; Bismuth, 'Customary Principles Regarding Public Contracts Concluded with Foreigners' (n 2) 326; Schöbener, 'Outlook on the Developments in Public International Law and the Law Relating to Aliens' (n 561) 70-74, paras. 21-31, especially para. 31 "the customary international legal validity of BITs is, *in toto*, unthinkable" [emphasis in original]; see also *ICJ Diallo (Preliminary Objections)* (n 452) para. 90. But differently *Chemtura Corp. v. Canada,* Award of 2 August 2010 paras. 121-122, 236 by reference to *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002 paras. 116-117, 125. Also open to the inference of customary law from BITs Aust *Modern Treaty Law and Practice* (n 294) 10.

Until today, and despite fierce initiatives in this direction, there has been no universal multilateral investment agreement containing substantive investment protection provisions.[881] Nevertheless, important regional or subject-specific multilateral agreements containing provisions incorporating the *Hull* formula have been signed, such as Art. 14.8 of the United States-Mexico-Canada Agreement[882] and Art. 13 para. 1 lit. d) of the Energy Charter Treaty[883]. The standard of full, effective, and prompt compensation is used by international arbitral tribunals, but always based on explicit agreements and particular cases.[884] Taking these developments into account, it seems fair to argue that international practice since the 1970s has moved towards the *Hull* formula,[885] and several eminent authorities in fact sustain the view that it has become the relevant international standard.[886]

The common treaty standard of fair and equitable treatment (FET) used to fill gaps in the investment treaty[887] can influence the customary

881 Hobe, 'The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law' (n 440) 14, paras 20, 21. Generally on the efforts to conclude such agreements Dolzer and Schreuer (n 537) 8–11; McLachlan, Shore and Weiniger (n 823) paras. 7.73-7.77; Krajewski (n 845) paras. 575-579.

882 Text available online https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/14.aspx?lang=eng; it replaced the former North American Free Trade Agreement (NAFTA).

883 Final Act of the Conference on the European Energy Charter - Annex 1: The Energy Charter Treaty (31 December 1994) OJEC L 380/24 (1994). Also Art. 13 para. 1 lit. d) of the revised version of the Treaty (not yet in force) contains a reference to the Hull-Formula, cf. https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf.

884 Cf. Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 142.

885 See also the overview of domestic and BIT standards in Shan, 'Property Rights, Expropriation and Compensation' (n 598) and the stance of China in Cai Congyan, 'China (Country Report)' in: *Shan Legal Protection of Foreign Investment* (n 598) 274–275.

886 Dolzer and Schreuer (n 537) 99/100; Griebel (n 440) 18; Hobe, 'The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law' (n 440) 22, para. 46; Schöbener, 'Enteignung und Entschädigung im Systemvergleich' (n 427) 78; also *CME Czech Republic B.V. v. The Czech Republic,* Final Award of 14 March 2003 paras. 497-499 with reference to *Mondev International* (n 880); cf. Salacuse (n 455) 70 mentioning a "just compensation" standard with reference to the Restatement (Third) of the Foreign Relations Law of the US.

887 See generally on the FET Dolzer and Schreuer (n 537) 130–160.

minimum standard.[888] Arbitral tribunals have held FET to contain the protection of "legitimate expectations".[889] The final result will depend on a weighting exercise between "the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other".[890] Yet, this vague standard is unlikely to lead to any clarification.[891] Often, it is even seen as a mere reference to the minimum standard.[892] Finally, neither the "national-treatment" nor the "most-favored nation" standard, both contained in many BITs, are of customary status.[893]

888 ibid 138; McLachlan (n 39), 266–267. Against the possibility of such influence (with very narrow exceptions) Paparinskis (n 541) 166, 171-172. On the controversial customary status of the standard itself d'Aspremont, 'International Customary Investment Law' (n 848) 24.

889 *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award of 8 October 2009 para. 216; *Saluka Investments* (n 830) para. 302; *Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/1, 27 December 2010, Decision on Liability paras. 113-124; McLachlan, Shore and Weiniger (n 823) paras. 7.176, 7.179; Salacuse (n 455) 253–259; Schöbener, 'Outlook on the Developments in Public International Law and the Law Relating to Aliens' (n 561) 77, para. 43 with case-law in footnote.

890 Cf. *Saluka Investments* (n 830) paras. 306-307, endorsed by *EDF Services Limited* (n 889) para. 219. On the recent reluctance of arbitral tribunals to accord investors protection on basis of their "legitimate expectations" Schreuer, 'The Future of International Investment Law' (n 836) 190, paras. 11, 12.

891 Cf. Schöbener, 'Outlook on the Developments in Public International Law and the Law Relating to Aliens' (n 561) 78, paras. 47-48.

892 Paparinskis (n 541) 160–166; such understanding is e.g. explicitly stipulated in Art. 5 para. 2 sentence 2 in combination with Annex A US Model BIT (2012), reproduced in Alvarez (ed) *International Investment Law* (n 876) 486; see Salacuse (n 455) 245–251; Schöbener, 'Outlook on the Developments in Public International Law and the Law Relating to Aliens' (n 561) 78, paras. 45-46. On the problem of "freezing" the FET treaty standard in time Thirlway (n 266) 151.

893 McLachlan (n 39), 264 "Many of the promises found in investment treaties are inherently capable of being made only by treaty. That is the whole point of them. Obvious examples are the national treatment and most-favoured-nation provisions, which are included in treaties precisely because they contain bilateral commitments that States would not otherwise be obliged to accord to other States as a matter of general international law"; McLachlan, Shore and Weiniger (n 823) para. 7.55; Schöbener, 'Outlook on the Developments in Public International Law and the Law Relating to Aliens' (n 561) 76-77, paras. 40-42. Cf. for national treatment Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 143; Hobe, 'The Development of the Law of Aliens and the Emergence of General Principles of Protection under Public International Law' (n 440) 15, para. 26 with reference to *Methanex Corporation v. United States of America,* 3 August 2005, Final Award on Jurisdiction and Merits, https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf Part IV - Chapter C - Page 11, para. 25 "As to the question of whether a rule of customary international law prohibits a State, in the absence of a treaty obligation,

In sum, what can be discerned with respect to property protection under customary law in the investment context is what *Kämmerer* described as a "grey zone"[894] with the *Hull* formula as a commonly accepted point of origin for the standard of compensation, but probably not the last word in the discussion.

c) Interim Conclusion

Apart from the core protection under the customary law protecting aliens, international investment law is, in large parts, based on treaties, mostly bilateral ones.[895] Therefore, *substantive* protection *beyond* the controversial and vague "minimum standard" will depend on the agreement of the home state in the first place and reflects the derivative status of the individual under international law. In the presence of an investment treaty covering the subject, customary law becomes especially, but only, relevant in respect of issues such as the interpretation of investment treaties' clauses according to Art. 31 para. 3 lit. (c) VCLT, state responsibility and expropriation, denial of justice, and the nationality of the investor.[896] Second, what customary law in particular does not provide for, and what is therefore dependent upon conferral by treaty, is the *procedural* right of the investor to initiate investor-state arbitration.[897] Hence,

> "irrespective of the debate about the level of customary protection in investment law, it is protection by treaty that matters, as only the treaty

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from differentiating in its treatment of nationals and aliens, international law is clear. In the absence of a contrary rule of international law binding on the States parties, whether of conventional or customary origin, a State may differentiate in its treatment of nationals and aliens."

894 Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 143.

895 Dolzer and Schreuer (n 537) 44–45, 13 "BITs are the most important source of contemporary international investment law"; Schill, 'Sources of International Investment Law' (n 878) 1100.

896 Dolzer and Schreuer (n 537) 17; cf. also Schill, 'Sources of International Investment Law' (n 878) 1100. On perceived "benefits" of customary investment law, that, however, seem to built on the idea that customary law can be derived from BITs and at the same time inform their interpretation, d'Aspremont, 'International Customary Investment Law' (n 848) 26–28.

897 Cf. McLachlan (n 39), 264; Salacuse (n 455) 59; Schöbener, 'Outlook on the Developments in Public International Law and the Law Relating to Aliens' (n 561) 68, 74, paras. 12, 33, 34; cf. *ICJ Barcelona Traction* (n 266) paras. 88-90.

> will typically confer upon claimants a right to raise treaty violations before tribunals and as this right will be restricted to treaty breaches. As a consequence, one of the common arguments in succession debates – that customary international law would offer continuous protection – provides no easy way out."[898]

2) (Non-)Succession to Investment Treaties

The topic of succession into investment treaties,[899] mainly BITs,[900] was relatively recently discovered. Discussion is not abundant, often cursory in nature,[901] or relates to specific cases[902]. Much attention has been drawn by the *Sanum Investment* case(s), which, however, almost exclusively deal with the special situation of the re-transfer of Macau to China from a specific angle.[903] Moreover, the issue of state succession to investment treaties has

898 Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 325, footnote 67.

899 Dumberry *Guide to State Succession in International Investment Law* (n 14); Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316); Tams, 'Ways Out of the Marshland. Investment Lawyers and the Law of State Succession' (n 302).

900 E.g. Patrick Dumberry, 'An Uncharted Question of State Succession: Are New States Automatically Bound by the BITs Concluded by Predecessor States Before Independence?' (2015), 6(1) JIDS 74; Dumberry, 'State Succession to Bilateral Treaties' (n 295); Patrick Dumberry, 'State Succession to BITs: Analysis of Case Law in the Context of Dissolution and Secession' (2018), 34(3) Arbitr Int 445; Clàudia Baró Huelmo, 'Is Kazakhstan a State Successor to the USSR? A Perspective from Investment Treaty Arbitration' (2018), 36(2) ASA Bulletin 295; Pereira-Fleury, 'State Succession and BITs: Challenges for Investment Arbitration' (2016), 27 Am Rev Intl Arb 451.

901 Cf. Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 316 "the subsequent considerations are in the form of a conspectus".

902 Marja Lehto, 'Succession of States in the Former Soviet Union' (1993), 4 FYBIL 194 214–217; Reinisch, 'Das Schicksal des österreichisch-sowjetischen Investitionsschutzabkommens in den Wirren der Staatensukzession' (n 610).

903 *Sanum Investments (PCA)* (n 401); *Government of the Lao People's Democratic Republic v. Sanum Investments Ltd.* Civil Appeals No. 139 and 167 of 2015, 20 January 2015, [2015] SGHC 15 (High Court of the Republic of Singapore); *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic,* 29 September 2016, [2016] SGCA 57 (Singapore Court of Appeal). The decisions in large parts deal with the significance of a subsequent exchange of notes for the interpretation of the BIT, not the general rules to be applied to the case.

lately been in fashion with a view to annexed or occupied territories,[904] which, however, for the above-mentioned reasons,[905] is excluded from the analysis in this book. Beyond these special cases, somehow strikingly, most commentary has contented itself with treating investment treaties as ordinary treaties under the VCLT: Since Art. 34 VCSST is not considered as a codification of a customary rule, authors concluded that investment treaties will regularly not survive a change in sovereignty.[906] In the case of BITs, this result was fortified by the "personal" character of these agreements.[907] However, such a formal perspective on the topic without paying due regard to the particularities of the field, especially sometimes not even mentioning investors' rights as a point to take into account,[908] most probably did not do the topic justice.[909] As *Binder* has rightly observed: Because of the involvement of individual positions, "[q]uestions of State succession may [...] turn even more complex when applied to investment treaties."[910] In a comparable fashion to human rights treaties, a new paradigm seems to be emerging in the field of investment protection: Investment treaties do not only technically confer standing upon the individual to espouse claims in the name of the home state but those treaties endow the individual investors with own substantive rights and their termination is therefore

904 Repousis and Fry (n 345); Costelloe (n 348); Repousis, 'Why Russian Investment Treaties Could Apply to Crimea and What Would This Mean for the Ongoing Russo–Ukrainian Territorial Conflict' (n 356); Dumberry, 'Requiem for Crimea' (n 356).

905 *Supra*, Chapter II B) IV).

906 For multilateral treaties Dumberry *Guide to State Succession in International Investment Law* (n 14) 247–260; for BITs Dumberry, 'An Uncharted Question of State Succession' (n 900), 76, 82; Dumberry *Guide to State Succession in International Investment Law* (n 14) para. 6.01.

907 Dumberry, 'State Succession to Bilateral Treaties' (n 295), 25-26; Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 334; Dumberry *Guide to State Succession in International Investment Law* (n 14) paras. 5.22, 5.63-6.64; for bilateral treaties in general Shaw, 'State Succession Revisited' (n 259), 67.

908 E.g. Dumberry, 'State Succession to Bilateral Treaties' (n 295) or Patrick Dumberry, 'State Succession to BITs: Analysis of Case Law in the Context of Dissolution and Secession' (2018), 34(3) Arbitr Int 445. But see now Dumberry *Guide to State Succession in International Investment Law* (n 14) paras. 17.04-17.09.

909 Questioning this one-sided approach Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 335. Insisting on the individual dimension of investment law Binder, 'Sanum Investments Limited v the Government of the Lao People's Democratic Republic' (n 824), 293–294.

910 ibid 294.

subject to some limits. Few authors have linked the issue to acquired rights theories.[911]

a) State Practice

Especially for older succession cases until the mid-1990s, state practice is sparse. The law on protecting international investments, especially its treaty-based web, constitutes a relatively "young" field of international law that was only beginning to develop when the decolonization wave swept over the globe.[912] It was not until the 1980s that BITs started to proliferate exponentially. There were fewer than 400 BITs by the end of 1989, hence shortly before the independence of Namibia, the unification of Yemen, the demise of the SU, the separation of Czechoslovakia, the dismemberment of the SFRY, and the separation of Eritrea; but by 1999, that number had grown to 1,857,[913] probably also because the new countries were eager to participate in the international network of investment protection. Because many multilateral investment treaties only came into existence, or were in their infancy, after these developments,[914] BITs are the main object of inquiry in the following section. Nevertheless, with the exception of South Africa, which only started concluding BITs in 1994 and hence after the independence of Namibia, all predecessor states covered in this book had entered into at least some investment protection treaties by the time succession took place.

As it would be beyond the scope of this book to trace all bilateral investment relationships of all cases under discussion here, the following

911 E.g. Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 335; Gattini (n 750), 158; cf. Sir Daniel Bethlehem, 'Expert Report on behalf of the Defendant: in the Case of Sanum Investments Limited v. Lao People's Democratic Republic, UNCITRAL, PCA Case No. 2013-13' para. 42 <https://www.italaw.com/sites/default/files/case-documents/italaw4408_Part1.pdf>. For investor-state contracts Dumberry *Guide to State Succession in International Investment Law* (n 14) Chapter 10.

912 The first reported "modern" BIT was the one between Germany and Pakistan in 1959.

913 For exact numbers see UNCTAD, 'Bilateral Investment Treaties 1959-1999' UN Doc. UNCTAD/ITE/IIA/2 (2000) 1 <https://unctad.org/system/files/official-document/poiteiiad2.en.pdf>.

914 E.g. the Energy Charter Treaty (n 883) was signed in 1994, NAFTA enacted in the same year.

analysis will concentrate on exemplary and specific treaty relations for each case. Especially the destiny of BITs concluded by successor states with the Federal Republic of Germany (FRG) will be scrutinized.[915] Overall, the pattern for BITs appears to be similar to that of human rights treaties, as discussed above.

aa) Yemen

In line with the unified Yemen's proclaimed policy,[916] Germany considers all treaties concluded with the Yemen Arab Republic to apply to the unified Yemen.[917] In fact, in 1974 Germany concluded with the Yemen Arab Republic a BIT[918] that seems not to have been influenced by Yemen's unification but was applied until it was terminated in 2008, with a new agreement being concluded in 2005[919].

bb) Soviet Union

The Soviet Union (SU) concluded several BITs with states as early as 1989, i.e. only shortly before its demise. Russia took over some of the BITs, while also concluding new agreements with other states providing for the continuity of the treaties but also the possibility of revising their

915 All information concerning the German view with respect to continuity of BITs are either taken from BGBl. 2021, Fundstellennachweis B, Völkerrechtliche Vereinbarungen, Verträge zur Vorbereitung und Herstellung der Einheit Deutschlands or from the website of the German Federal Ministry for Economic Affairs and Climate Action https://www.bmwi.de/Navigation/DE/Service/Investitionsschutzvertraege/investitionsschutzvertraege.html. When Germany reunited in 1990, there existed no typical BITs in the GDR, but bilateral trade agreements with other COMECON countries. On their treatment after unification Oeter, 'German Unification and State Succession' (n 283), 373–377.

916 Cf. in detail *infra*, Chapter IV) B) I).

917 BGBl. 2021, Fundstellennachweis B, Völkerrechtliche Vereinbarungen, Verträge zur Vorbereitung und Herstellung der Einheit Deutschlands, p. 94.

918 Treaty Concerning the Encouragement and Reciprocal Protection of Investments (21 June 1974) BGBl. 1975 II 1247 (FRG/YAR).

919 Treaty Concerning the Encouragement and Reciprocal Protection of Investments (2 March 2005) BGBl. 2007 II 88 (FRG/Yemen).

content according to changing circumstances.[920] Reportedly, all states of the Commonwealth of Independent States (CIS) have re-negotiated their BITs.[921] Germany has accepted Russia's claim to continue the treaties and the membership status of the former SU in international organizations.[922] Correspondingly, the German Federal Ministry of Economic Affairs considers the BIT concluded with the SU[923] as continuously applicable towards Russia.[924] It furthermore concluded separate BITs with all successor states of the former SU.[925] However, even before those BITs, Germany had exchanged notes with the SU successor states, with the single exception of Turkmenistan, either agreeing on lists of treaties with the former SU (comprising the respective BIT) to be continued or continuously applied,[926]

920 Cf. Mark M Boguslavskij, *Die Rechtslage für ausländische Investitionen in den Nachfolgestaaten der Sowjetunion* (Beck 1993) 21–22.

921 Catherine Kessedjian, 'Continuation et Succession en Matière Contractuelle, Presentation Générale' in: *Burdeau/Stern Succession en Europe de l'Est* (n 610) 316 328.

922 See Bekanntmachung über die Fortsetzung der völkerrechtlichen Mitgliedschaften und Verträge der Union der Sozialistischen Sowjetrepubliken durch die Russische Föderation (14 August 1992) BGBl 1992 II 1016 (FRG).

923 Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (13 June 1989) BGBl 1990 II 343 (FRG/SU).

924 https://www.bmwi.de/Redaktion/DE/Gesetze/Investitionschutzvertraege/russland.html.

925 Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (28 April 1993) BGBl 1997 II 2107 (FRG/Uzbekistan); Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (15 February 1993) BGBl 1996 II 76 (FRG/Ukraine); Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (28 August 1997) BGBl 2000 II 665 (FRG/Turkmenistan); Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (27 March 2003) BGBl 2005 II 539 (FRG/Tajikistan); Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (28 February 1994) BGBl. 1997 II 2073 (FRG/Moldova); Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (28 August 1997) BGBl 2005 II 700 (FRG/Kyrgyzstan); Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (22 September 1992) BGBl 1994 II 3731 (FRG/Kazakhstan); Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (2 April 1993) BGBl 1996 II 86 (FRG/Belarus); Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (21 December 1995) BGBl 2000 II 47 (FRG/Armenia); Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (22 December 1995) BGBl. 1998 II 568 (FRG/Azerbaijan); Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (25 June 1993) BGBl 1998 II 577 (FRG/Georgia). Cf. also, apparently assuming discontinuity, Thomas Heidemann, 'Investitutionsschutzabkommen mit den Nachfolgestaaten der UdSSR' (1996), 5(8) WiRO 281.

926 See e.g. with respect to Tajikistan, Bekanntmachung über die Fortgeltung und das Erlöschen von deutsch-sowjetischen Übereinkünften im Verhältnis zwischen der

or on the general continued application of the SU treaties until new agreements were concluded.[927] This approach secured the (almost) continuous application of treaties protecting foreign investment even after the dismemberment of the SU.

In some cases, states explicitly mentioned ongoing deliberations as to the future content of the provisions.[928] The US also opted for a case-by-case approach with respect to its bilateral agreements with the SU and their con-

Bundesrepublik Deutschland und der Republik Tadschikistan (3 March 1995) BGBl 1995 II 255 (FRG).

927 See e.g. the official notifications of continued validity of German-Soviet treaties for the SU successor states Armenia, Bekanntmachung über die Fortgeltung der deutsch-sowjetischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Republik Armenien (18 January 1993) BGBl. 1993 II 169 (FRG); Belarus, Bekanntmachung über die Fortgeltung der deutsch-sowjetischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Republik Belarus (5 September 1994) BGBl 1994 II 2533 (FRG); Georgia, Bekanntmachung über die Fortgeltung der deutsch-sowjetischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Republik Georgien (21 October 1992) BGBl 1992 II 1128 (FRG); Kazakhstan, Bekanntmachung über die Fortgeltung der deutsch-sowjetischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Republik Kasachstan (19 October 1992) BGBl 1992 II 1120 (FRG); Kyrgyzstan, Bekanntmachung über die Fortgeltung der deutsch-sowjetischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Republik Kirgistan (14 August 1992) BGBl 1992 II 1015 (FRG); Moldova, Bekanntmachung über die Fortgeltung der deutsch-sowjetischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Republik Moldau (12 April 1996) BGBl 1996 II 768 (FRG); Ukraine, Bekanntmachung über die Fortgeltung der deutsch-sowjetischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Ukraine (30 June 1993) BGBl. 1993 II 1189 (FRG); Uzbekistan, Bekanntmachung über die Fortgeltung der deutsch-sowjetischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Republik Usbekistan (26 October 1993) BGBl. 1993 II 2038 (FRG), which was followed in 1995 (after the conclusion of a new FRG-Uzbekistan BIT and hence not comprising a reference to the SU BIT) by a list of continuing treaties, cf. Bekanntmachung über die Fortgeltung der deutsch-sowjetischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Republik Usbekistan (1 February 1995) BGBl. 1995 II 205 (FRG); in the case of Azerbaijan the new BIT was concluded before the ecxchange of notes and the BIT with Russia was therefore excluded from the agreement, cf. Protokoll zwischen der BRD und der Aserbaidschanischen Republik über die Geltung von Verträgen zwischen der BRD und der Union der sozialistischen Sowjetrepubliken (13 August 1996) BGBl 1996 II 2472 (FRG), § 2 No. 3.

928 E.g. Official Notifications of Continued Validity of SU Treaties with Ukraine (n 927).

tinued applicability to the new successor states.[929] Austria has concluded a bilateral agreement with Russia providing for the "continued" applicability of its BIT with the SU,[930] which would support the continuity thesis. For some SU successor states, Austria published announcements ("Kundmachungen") with a list of bilateral treaties in force between them,[931] which would also support continuity of these treaties. In general, the practice of Russia and the SU's successor states has been variable – in some cases agreeing on continuity, in some cases concluding new agreements, and sometimes abstaining from any action or agreement, but in the majority of cases opting for a continuity of any BIT relations.[932]

In line with this continuity, several investment tribunals seem to have held Russia to be bound by investment treaties of the former SU.[933] In comparison, little information is available on investment arbitrations concerning the other former Soviet republics. The case of *World Wide Minerals v. Republic of Kazakhstan* contains a recent and widely cited, but not publicly available, decision of an arbitral tribunal under rules of the United Nations Commission on International Trade Law (UNCITRAL).[934] The tribunal found Kazakhstan to be bound by the BIT concluded between the SU and Canada.[935] Yet, from the information publicly available, it can only be presumed that the tribunal took into consideration the respondent's

929 Sally J Cummins and Stewart, David P. (US Office of the Legal Adviser), *Digest of United States Practice in International Law, 1991-1999* (International Law Institute 2005) 747.

930 Notenwechsel über die vertraglichen Beziehungen (15 June 1993) BGBl. 257/1194 2727 (Austria/Russia); Reinisch, 'Das Schicksal des österreichisch-sowjetischen Investitionsschutzabkommens in den Wirren der Staatensukzession' (n 610), 23.

931 For Ukraine, Kundmachung des Bundeskanzlers betreffend die zwischen der Republik Österreich und der Ukraine geltenden bilateralen Verträge (28 June 1996) BGBl. 291/1996 (Austria); for Tajikistan, Kundmachung des Bundeskanzlers betreffend die zwischen der Republik Österreich und der Republik Tadschikistan geltenden bilateralen Verträge (12 January 1998) BGBl. III 4/1998 (Austria).

932 See in more detail Dumberry *Guide to State Succession in International Investment Law* (n 14) 56-62, paras. 3.21–3.28.

933 ibid 157-158, paras. 6.30–6.33.

934 See for the scarce available information https://www.italaw.com/cases/2354.

935 Jones Day, 'World Wide Minerals Achieves Right to Arbitrate its Expropriation and International Law Claims Against Republic of Kazakhstan.' (01/2016) <https://www.italaw.com/sites/default/files/case-documents/italaw8945.pdf>; JonesDay, 'World Wide Minerals Obtains Arbitration Award in Excess of $50 Million against the Republic of Kazakhstan' (10/2019) <https://www.jonesday.com/en/practices/experience/2019/10/world-wide-minerals-achieves-right-to-arbitrate-its-expropriation-and-international-law-claims-against-republic-of-kazakhstan>.

conduct towards the investor,[936] and tacit consent "was central" to the finding.[937] In a following proceeding,[938] the details of which are also not publicly available, another Canadian investor did not succeed in its claims against the Republic of Kazakhstan under the former Canada-SU BIT.[939] The available information suggests that the tribunal dismissed the claim for lack of evidence of a tacit agreement on continuation between the two states. Yet, this decision was set-aside by the UK High Court of Justice that again maintained that "Canada and Kazahkhstan impliedly agreed" on the applicability of the SU-Canada BIT between them.[940] Even if two of those decisions endorsed continuity of the BIT and thus individual positions acquired under them after succession, all three decisions made such continuity dependent on states' will, though.

cc) Yugoslavia

While considering the BIT[941] concluded with the former Yugoslavia (SFRY) as continuously applicable to Serbia, Kosovo, and Montenegro, Germany concluded new BITs with Bosnia-Herzegovina in 2001,[942] Croatia in 1997,[943] Slovenia in 1997,[944] and Macedonia in 1996[945]. This approach is interesting as, according to general opinion, Serbia-Montenegro, formerly

936 Baró Huelmo (n 900), 311.
937 Dumberry *Guide to State Succession in International Investment Law* (n 14) 73, 91–92, paras. 4.03, 4.38.
938 Gold Pool Limited Partnership v. Republic of Kazakhstan, PCA Case No. 2016-23.
939 Cf. Press Release by the Ministry of Justice of the Republic of Kazakhstan at https://www.italaw.com/sites/default/files/case-documents/italaw11751.pdf and *Gold Pool JV Lt. v. The Republic of Kazakhstan,* Case No.: CL-2020-000545, 15 December 2021, Set-Aside Decision, [2021] EWHC 3422 (Comm) para. 112 (UK High Court of Justice).
940 ibid paras. 113-114.
941 Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (10 July 1989) BGBl. 1990 II 351 (FRG/SFRY).
942 Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (18 October 2001) BGBl. 2004 II 315 (FRG/Bosnia-Herzegovina).
943 Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (21 March 1997) BGBl. 2000 II 654 (FRG/Croatia).
944 Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (28 October 1993) BGBl. 1997 II 2089 (FRG/Slovenia).
945 Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (10 September 1996) BGBl. 2000 II 647 (FRG/Macedonia).

the Federal Republic of Yugoslavia (FRY), is considered a successor state to the SFRY, Serbia is considered a continuator, Montenegro a successor to Serbia-Montenegro, and the status of Kosovo is unsettled.[946] Similar to the SU case, in the interim period until concluding new agreements, Germany had exchanged notes with the respective governments, agreeing on a list of former SFRY treaties, including the Germany-SFRY BIT, to be applied to the relations with the new countries as well,[947] or in general agreeing on the continued application of the former SFRY treaties[948]. Furthermore, Germany concluded an explicit agreement with the FRY in which it was stipulated that the SFRY BIT would "continuously apply."[949] Germany also concluded an agreement with Montenegro by way of exchange of notes listing several treaties, including the SFRY BIT, providing for their continuity.[950] Finally, in the case of Kosovo, Germany agreed by an exchange of notes on a list of treaties that distinguished between different categories – one of them declaring treaties as "continuing", a second declaring them "applicable" as long as there was no agreement about their adjustment or termination.[951] The former BIT with the SFRY was included in the first category. A new investment agreement has not been concluded to date.

946 Cf. in detail on the protracted demise of the former Yugoslavia *infra*, Chapter IV B) IV).

947 See e.g. for Bosnia-Herzegovina, Bekanntmachung über die Fortgeltung der deutsch-jugoslawischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Republik Bosnien und Herzegovina (16 November 1992) BGBl. 1992 II 1196 (FRG); for Slovenia, Bekanntmachung über die Fortgeltung der deutsch-jugoslawischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Republik Slowenien (13 July 1993) BGBl 1993 II 1261 (FRG).

948 E.g. for Croatia, Bekanntmachung über die Fortgeltung der deutsch-jugoslawischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Republik Kroatien (26 October 1991) BGBl. 1992 II 1146 (FRG), 962, no. 30; for Macedonia, Bekanntmachung über die Fortgeltung der deutsch-jugoslawischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Republik Mazedonien (26 January 1994) BGBl 1994 II 326 (FRG).

949 Bekanntmachung über die Fortgeltung der deutsch-jugoslawischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Bundesrepublik Jugoslawien (20 March 1997) BGBl 1997 II 961 (FRG).

950 Bekanntmachung über die Fortgeltung von Verträgen im Verhältnis zwischen der Bundesrepublik Deutschland und Montenegro (29 June 2011) BGBl 2011 II 745 (FRG) encompassing treaties with the SFRY as well as Serbia and Montenegro.

951 Bekanntmachung über die Fortgeltung beziehungsweise weitere Anwendung von Verträgen im Verhältnis zwischen der Bundesrepublik Deutschland und der Republik Kosovo (29 June 2011) BGBl 2011 II 748 (FRG) encompassing treaties with the SFRY as well as Serbia and Montenegro.

Only for some SFRY successor states did Austria publish announcements ("Kundmachungen") with a list of bilateral treaties in force between them,[952] which would argue in favor of continuity of these treaties. The Netherlands and France also reportedly chose a piecemeal approach towards their BITs with the former SFRY countries.[953]

Practice with respect to the former Serbia-Montenegro is reported as ambiguous. In the majority of cases, states seem to have acted on the agreed perception that BITs concluded with the SFRY had not ceased to be in force but were still binding for Serbia-Montenegro, while this was apparently not assumed in other cases.[954] This disparity in attitude was probably due to the disparity in attitude towards Serbia-Montenegro (FRY) as a successor state of the SFRY in general.[955] In the case of *Mytilineos Holding v. Serbia and Montenegro and Serbia*, the tribunal seems to have concluded that Serbia was not bound by the BITs of the former SFRY.[956] With respect to BITs of the FRY/Serbia and Montenegro, the tribunal adjudicating on *Mera Investment Fund Limited v. Republic of Serbia* found that, due to its continuator status, Serbia was bound by the Cyprus-Serbia-Montenegro BIT.[957] For Montenegro, the practice is named "diverse".[958] The sparse practice of international investment tribunals seems to have found Montenegro to be bound by the BITs of the SFRY but did not elaborate on the reasons.[959] In those cases, however, agreements existed on the BITs' continuity and

952 For Croatia, Kundmachung des Bundeskanzlers betreffend die zwischen der Republik Österreich und der Republik Kroatien geltenden bilateralen Verträge (6 September 1996) BGBl. 474/1996 (Austria); for Macedonia, Kundmachung des Bundeskanzlers betreffend die zwischen der Republik Österreich und der ehemaligen jugoslawischen Republik Mazedonien geltenden bilateralen Verträge (3 June 1997) BGBl. III 92/1997, No. 10 (Austria).

953 Alexandre Genest, 'Sudan Bilateral Investment Treaties and South Sudan: Musings on State Succession to Bilateral Treaties in the Wake of Yugoslavia's Breakup' (2014), 11(3) TDM 1 14–22.

954 Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 329/330.

955 In detail *infra*, Chapter IV B) IV) 1).

956 Case reported in Dumberry *Guide to State Succession in International Investment Law* (n 14) 159-161, paras. 6.36–6.40.

957 *Mera Investment Fund Limited v. Republic of Serbia,* ICSID Case No. ARB/17/2, 30 November 2018, Decision on Jurisdiction para. 16.

958 Cf. Dumberry *Guide to State Succession in International Investment Law* (n 14) 62-65, para. 3.29–3.34

959 ibid 161-162, para. 6.41.

the continuation was not contested by the parties.[960] Again, the solution of continuity aligns with the declared will of Montenegro.[961]

BIT practice with respect to Kosovo has been described as ambiguous, being based on negotiation.[962] In *ACP Axos Capital GmbH v. the Republic of Kosovo*, the tribunal briefly remarked in a footnote that the relevant BIT was concluded between Germany and Yugoslavia[963] and afterwards applied it to Kosovo as well. Again, while continuity of the investment relations was the principle followed, this continuity was achieved on the basis of mutual, deliberate agreement.

dd) Czechoslovakia

The newly formed Czech and Slovak republics continued the BITs of former Czechoslovakia (CFSR).[964] In fact, many states have signed agreements with the Czech and Slovak Republic respectively, declaring the "continuity", "continued validity" or "continued applicability" of their BITs.[965] Germany considers the BIT with the CFSR[966] to be continuously applicable, which nevertheless was expressly agreed on by an exchange of notes between the two new nations.[967] Arbitral practice in this case has mostly eschewed an answer as to whether the applied BITs were applicable due to succession or

960 ibid para. 6.41.
961 See *infra*, Chapter IV B) IV) 4) b).
962 ibid 51-53, paras. 3.14–3.15.
963 *ACP Axos Capital GmbH v. the Republic of Kosovo,* ICSID Case No. ARB/15/22, Award of 3 May 2018 footnote 2.
964 Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 331 "near-absolute continuity"; Pavel Šturma and Vladimir Balaš, 'Czech Republic' in: *Shan Legal Protection of Foreign Investment* (n 598) 313 316.
965 Cf. e.g. Kundmachung des Bundeskanzlers betreffend die zwischen der Republik Österreich und der Tschechischen Republik geltenden bilateralen Verträge", (31 July 1997) BGBl. III 123/1997 (Austria), para. 38.
966 Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (2 October 1990) BGBl. 1992 II 295 (FRG/CFSR).
967 For the Czech Republic, Bekanntmachung über die Fortgeltung der deutsch-tcheschoslowakischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Tschechischen Republik (24.03.11993) BGBl. 1993 II 762 (FRG); for the Slovak Republic, Bekanntmachung über die Fortgeltung der deutsch-tcheschoslowakischen Verträge im Verhältnis zwischen der Bundesrepublik Deutschland und der Slowakischen Republik (24 March 1993) BGBl. 1993 II 762 (FRG).

"novation".[968] In general, tribunals have approached the issue pragmatically and have not decided on succession issues when the parties of the dispute seem to have agreed on the applicability of a specific BIT.[969] It has to be borne in mind that both the Czech and the Slovak republics considered themselves bound by CFSR treaty obligations.[970]

ee) Ethiopia

All but one Ethiopian BITs were entered into after 1993, i.e. after the independence of Eritrea. Ethiopia's first BIT, with the FRG, concluded in 1964[971] (which, however, did not provide for investor-state arbitration) operated until its termination in 2006 and a new one was concluded.[972] No respective agreement seems to exist with Eritrea nor is the aforementioned BIT supposed to be applicable in that relation.

ff) Hong Kong, Macau, Walvis Bay

For the territory of Walvis Bay, no special independent investment agreements could be found. As South Africa signed its first BIT after Walvis Bay's transfer to Namibia, no question of investor rights arises here. Hong Kong and Macau, however, had been accorded relatively far-reaching rights with respect to their foreign relations even before their re-transfer to China. While both territories concluded their own BITs, Macau did so only after its (re-)transfer to China.

In the case of *Sanum Investment v. Laos*, the tribunal relied on Art. 15 VCSST and the "moving treaty frontiers" rule to hold that the China-Laos

968 See overview of case law in Dumberry *Guide to State Succession in International Investment Law* (n 14) 146-151, paras. 6.08–6.15.

969 E.g. *Saluka Investments* (n 830) para. 2. For further examples cf. Dumberry *Guide to State Succession in International Investment Law* (n 14) 151-155, paras. 6.16–6.26.

970 See *infra*, Chapter IV B) V) 1).

971 Treaty Concerning the Promotion of Investments (1964) https://investment-policy.unctad.org/international-investment-agreements/treaty-files/1165/download (FRG/Ethiopia).

972 Treaty Concerning the Encouragement and Reciprocal Protection of Investments (19 January 2004) BGBl. 2005 II 744 (FRG/Ethiopia).

BIT also applied to investments held in the territory of Macau.[973] Inferences from these special cases have to be taken with caution. While the "*Sanum* saga" has attracted considerable interest and comment, the analysis of a closely connected question has been curiously evaded: Are individual rights potentially acquired under UK or Portuguese BITs applicable to Hong Kong or Macau even after the transfer? The UN Secretary General received a list of treaties between the UK and China that were supposed to remain in force or to be applied from then to the territory of Hong Kong.[974] However, that list was concerned with multilateral treaties only and hence leaves the BITs' status unclear. Some authors report that the Sino-British Joint Liaison Group found about 180 UK bilateral treaties extending to Hong Kong that were to lapse due to the succession, among them ones promoting investment.[975] Third states were required to conclude new treaties with the Hong Kong Special Administrative Region itself.[976] For example, Germany concluded separate agreements with China[977] and Hong Kong[978] before the re-transfer.

973 *Sanum Investments (PCA)* (n 401) paras. 211-269. See also with but with respect to Chinese nationality of residents of Hong-Kong and without reference to Art. 15 VCSST *Tza Yap Shum v. The Republic of Peru,* ICSID Case No. ARB/07/6, Award of 7 July 2011 paras. 67-77.

974 Position on Multilateral Treaties Applying to the Hong Kong Special Administrative Region (20 June 1997), 36 ILM 1675 (PRC/UK).

975 Cheng (n 326) 216/217; Aust *Modern Treaty Law and Practice* (n 294) 339–340.

976 ibid. See also Annex I part VI to the Sino-British Joint Declaration (n 709) according the HKSAR far-reaching autonomy rights with respect to economic issues and (foreign) trade.

977 Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen (7 October 1983) BGBl. 1985 II 31 (FRG/China) (followed by Agreement on the Encouragement and Reciprocal Protection of Investments (1 December 2003) BGBl. 2005 II 733 (FRG/China)).

978 Agreement for the Encouragement and Reciprocal Protection of Investments (31 January 1996) BGBl. 1997 II 1849 (FRG/Hong Kong).

gg) South Sudan

Surprisingly (especially in comparison to Eritrea), Germany considers the Germany-Sudan BIT[979] also applicable to South Sudan.[980] Arguably, no agreement has been concluded on continuity. South Sudan has pledged on a bilateral basis in very general terms to respect international commitments of the former Sudan.[981] Yet, such commitment was made under the reservation of later "review" by both parties.[982] It is therefore not clear whether the Sudan BITs are applicable.[983] South Sudan has rejected concession agreements concluded by Sudan with respect to resources on its territory.[984] The first reported BIT of South Sudan was concluded with Morocco in 2017[985] even though the Morocco-Sudan BIT from 1999 is still in force.

hh) The ICSID Convention

Succession to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[986] does not represent a typical example of succession to investment treaties since it represents less a succession to a treaty than one to an international

979 Agreement concerning the Encouragement of Investments (7 February 1963) BGBl 1966 II 890 (FRG/Sudan).

980 Cf. https://www.bmwi.de/Redaktion/DE/Gesetze/Investitionschutzvertraege/suedsudan.html.

981 See e.g. exchange of letters with the US reprinted in: US Office of the Legal Adviser, 'Digest of United States Practice in International Law 2011: Chapter IX' 273–274 <https://2009-2017.state.gov/documents/organization/194056.pdf>

982 E.g. ibid 273, "As relations between our two countries progress, we are, of course, prepared to review any such treaties to determine whether they should be revised, terminated, or replaced to take into account developments in United States-South Sudanese relations."

983 Cf. e.g. South Sudan/USAID/IFC (ed), 'South Sudan Investors Guide' (17.04.2013) <http://mofep-grss.org/wp-content/uploads/2013/09/South-Sudan-Investment-Forum-Guide.pdf> in which Sudan's BITs are not mentioned at all. See also Genest (n 953) who, however, makes a dubious analytical comparison with the SFRY cases.

984 See in detail *infra*, Chapter IV) B) IX).

985 See https://investmentpolicy.unctad.org/international-investment-agreements/countries/196/south-sudan.

986 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965) UNTS 575 159.

organization.[987] The ICSID Convention does not stipulate material standards for treating investments but is of certain interest here as ICSID membership confers *standing* upon individual investors of the contracting states to sue another contracting state in case of an alleged violation of their rights. Additionally, for *Schreuer et al.*, as "[c]onsent to jurisdiction under the ICSID Convention is intimately linked to the host State's status as a Contracting State […] a continuing participation in the Convention also implies continuity with regard to consent agreements."[988] ICSID has followed the "conservative" approach, which means that no succession to ICSID membership will take place.[989] All successor states of the SFRY, including Montenegro, Serbia and even Kosovo,[990] joined independently, as did the Czech Republic, Slovakia and South Sudan.[991] Yemen joined only after its unification. Neither Namibia, nor Eritrea nor Ethiopia[992] are yet member states to the ICSID Convention. The SU had never been a party to the Convention. The FRG had been a member since 1969 and supposedly applied the Convention to the territory of the German Democratic Republic (GDR) after unification. In their common understanding, the UK and China agreed that the ICSID Convention (to which China was a party at

987 Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 321; Dumberry *Guide to State Succession in International Investment Law* (n 14) 261–262. The issue of state succession to membership in international organizations is *prima facie* not regulated by the VCLT. The issue was intentionally left out of the discussion of succession of states and governments, cf. ILC, 'Report on the Work of its Nineteenth Session' (1967), 1967(II) YbILC 344 368, para. 41.

988 Christoph H Schreuer and others, *The ICSID Convention: A Commentary* (2nd ed. CUP 2009) Art. 25, para. 309.

989 Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 321–324; Dumberry *Guide to State Succession in International Investment Law* (n 14) 267.

990 If not indicated separately, information on membership was taken from the official ICSID website https://icsid.worldbank.org/about/member-states/database-of-member-states, that diverts in some respects from the information on the official UN website https://treaties.un.org/pages/showDetails.aspx?objid=080000028012a925 (e.g. for Macedonia the official UN record speaks of "acceptance").

991 See also Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 323–324; Schreuer and others (n 988) Art. 25, paras. 306-310; Dumberry *Guide to State Succession in International Investment Law* (n 14) para. 9.10.

992 Ethiopia has only signed (21 September 1965), but never ratified the Convention. Argubaly incorrect therefore Zeray Yihdego, 'Ethiopia' in: *Shan Legal Protection of Foreign Investment* (n 598) 329 342.

the time of the re-transfer) would also apply to Hong Kong,[993] and Hong Kong is considered as having standing in ICSID proceedings due to it being a territory of China.[994]

b) Interim Conclusions

This rough overview[995] shows that practice with respect to succession into BITs and the ICSID Convention is diverse and lacks a consistent pattern. However, it is obvious that, in most cases, states soon after their emergence as an independent state tried to keep their investment agreements alive or to become party to investment agreements concluded by their predecessors. This upkeeping of economic relations should not be taken as a sign of automatic succession: Such behavior is significant, but its interpretation remains unclear. It can be construed as a means to comply with existing legal standards but at the same time as a political decision to act in one's own best (economic) interest. It remains open to discussion whether the concluded "interim-agreements" are declaratory or constitutive in nature.[996] Under the assumption of automatic succession, it seems superfluous to conclude these agreements. Their mere existence would thus rather militate against such rule.[997] Additionally, the result of this interpretation will often depend on the exact wording of the declarations, which varies

993 Communications, including Annexes (n 974) Annex I No. 64. No comparable information could be found on Macau, but Odysseas G Repousis, 'On Territoriality and International Investment Law: Applying China's Investment Treaties to Hong Kong and Macao' (2015), 37 MichJInt'l L 113 155–156 maintains that Art. 70 ICISD Convention would automatically include Macau as part of Chinese territory.

994 *Standard Chartered Bank (Hong Kong) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/15/41, Award of 11 October 2019 paras. 182-184.

995 More, albeit very selective, state practice on the topic can be found in Dumberry *Guide to State Succession in International Investment Law* (n 14) 3.35-3.44.

996 For a declaratory effect of relevant Austrian declarations Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 413; see also Papenfuß (n 306), 486. Cf. in this respect the position of the German Social Courts with respect to rights under bilateral social security agreements between Germany and the SFRY, Nadja Reimold, 'Headnote on Ms S and ors, Decision on a constitutional complaint, 2 BvR 194/05' ILDC 3046 (DE 2006).

997 Ambigiously Dumberry *Guide to State Succession in International Investment Law* (n 14) paras. 3.12, 3.35, 3.43, 6.28. See also Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 335; Dumberry, 'State Succession to BITs' (n 908), 450.

considerably.[998] Therefore, again, no clear rule of automatic continuity can be detected, with states seeming to prefer a "pick-and choose" approach and to negotiate the fate of bilateral agreements. Overall, analogue to the findings with respect to human rights treaties, there is not enough stringent state practice to conclude that new states would be bound by previous investment treaties regardless of their will.

3) Investor Rights in Case of Consensual Termination of a BIT

Recently, literature dealing with terminating investment treaties has been at least as comprehensive as that on terminating human rights treaties.[999] The interest in the topic seems to have[1000#] been prompted by several recent instances of termination of investment treaties or specific investment provisions.[1001] This situation is to be seen against the background of a perceived "backlash" against the international investment system and rising doubts about the ability of investment treaties to promote foreign investment, economic development of national markets, or a fair allocation of global wealth.[1002] Analogous to the human rights scenario and taking into account the differences between the two situations,[1003] an analysis of the discussion relating to terminating investment agreements can potentially shed more light on the succession context. Essentially, both questions center around the question of who the bearer of such rights is, in particular whether

998 Cp. the example in Dumberry *Guide to State Succession in International Investment Law* (n 14) para. 3.06.

999 See e.g. Voon, Mitchell and Munro (n 733); Voon and Mitchell, 'Denunciation, Termination and Survival' (n 733); Tania Voon and Andrew D Mitchell, 'Ending International Investment Agreements: Russia's Withdrawal from Participation in the Energy Charter Treaty' (2017), 111 AJIL Unbound 461; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10); Katharina Gatzsche, *Aufhebungen und Abänderungen von Investitionsschutzabkommen: Eine Untersuchung zur Reichweite von Survival Clauses in BITs* (Nomos; facultas Verlag; Dike Verlag 2019); August Reinisch and Sara Mansour Fallah, 'Post-Termination Responsibility of States?: The Impact of Amendment/Modification, Suspension and Termination of Investment Treaties on (Vested) Rights of Investors' (2022), 37(1-2) ICSID Review 101.

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1001 Examples in Salacuse (n 455) 390–391. For an overview of the various reasons for this development Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 229–238.

1002 Cf. Bagchi (n 875).

1003 See *supra*, C) II) 2) e).

these rights emancipate themselves from the treaty and hence from the consent of states. It thus comes as no surprise that the notion of acquired rights has been discovered in the area of investment law, too.[1004] Again, a situation of special interest to the topic of this book is the case that states a) *agree* to terminate an investment treaty by *consensus* and b) the investment treaty does *not* contain an explicit termination provision. Since, in those cases, sovereignty concerns are relatively peripheral, the discussion centers around interests of third parties, especially private investors, who may, however, have a legitimate expectation in the perpetuity of the treaties.

a) The (Too) Traditional Doctrinal Approach

In principle, the VCLT, especially its Art. 54 and 56, also apply to a termination of an investment treaty.[1005] Much of the literature embraces a traditional application of the VCLT rules, which are said to exclusively govern the relations between states.[1006] The authors focus on consent as the

1004 E.g. by Binder, 'A Treaty Law Perspective on Intra-EU BITs' (n 752), 978–979; Gattini (n 750), 158 "The conceptual framework therefore is not that of third party rights, but that of acquired rights"; Voon, Mitchell and Munro (n 733), 468–472 who, however, reject acquired rights as a way to uphold investors' rights under international investment agreements; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 252–253 who also discards the doctrine; Gatzsche (n 999) 171–175, paras. 262-265; with respect to sunset-clauses Hervé Ascensio, 'Article 70: Conséquences de l'Extinction d'un Traité' in Olivier Corten (ed), *Les Conventions de Vienne sur le Droit des Traités: Commentaire Article par Article* (Bruylant 2006) 2503-2539 para. 22.

1005 Salacuse (n 455) 388; James Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties' (2012), 13(6) The Journal of World Investment & Trade 928 930; cf. Douglas (n 455), 152 "Investment treaties are international instruments between states governed by the public international law of treaties."

1006 Voon, Mitchell and Munro (n 733); Voon and Mitchell, 'Denunciation, Termination and Survival' (n 733); Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 250–251 discussing Art. 37(2) and 70 VCLT; but differently Alexander Reuter, 'Taking Investors' Rights Seriously: The Achmea and CETA Rulings of the European Court of Justice do not Bar Intra-EU Investment Arbitration' (2021), 36(1) ICSID Review 33 42 who considers investors third parties who can, curiously, rely on "arts 26, 27(2) and 46(2)" as well as the principle of *pacta sunt servanda*; also Reuter, 'Taking Investors' Rights Seriously' (n 832), 402.

governing principle and on the sovereignty of states to establish their treaty relations as they see fit.[1007]

> "[T]reaty parties will create enforceable rights for third parties *when it is in the interests of the treaty parties to do so.* […] A third party can only legitimately expect to receive the rights or benefits that the treaty parties, acting jointly, would have had an incentive to bestow."[1008]

Even more for investment treaties than for human rights treaties, it has to be acknowledged that, originally, investor rights are conferred by states.[1009] In consequence, the general conviction in the academic literature seems to be that states are, in principle, at liberty to end their investment agreements consensually with immediate effect; rights of investors are no bar to such termination and will come to an end accordingly.[1010] This conviction is even upheld for the termination of so-called "sunset" or "survival clauses",[1011]

1007 Cf. Kim, 'Investment Law and the Individual' (n 831); Voon and Mitchell, 'Denunciation, Termination and Survival' (n 733), 430; Voon, Mitchell and Munro (n 733), 458–459, 472; Gattini (n 750), 158; Roberts, 'Triangular Treaties' (n 752), 365–370; James Crawford, 'A Consensualist Interpretation of Art. 31 (3) the Vienna Convention of the Law of Treaties' in: *Nolte Treaties and Subsequent Practice* (n 724) 29 31 "it is too often forgotten that the parties to a treaty, that is, the states which are bound by it at the relevant time, own the treaty. It is their treaty. It is not anyone else's treaty."

1008 Roberts, 'Triangular Treaties' (n 752), 366 [emphasis in original].

1009 Cf. ibid 368 "if investors are to have any rights under international law, they will be the rights that states have granted to them through instruments like investment treaties."

1010 Gattini (n 750), 156/157; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 249; Gatzsche (n 999) 187-188, paras. 288-291; Roberts, 'Triangular Treaties' (n 752), 403 (mentioning the possibility of compensation requirements); Voon, Mitchell and Munro (n 733), 463, 472; following them Katariina Särkänne, 'Agreement for the Termination of the Intra-EU: Breaking the Stalemate, But Not Quite There Yet?' (2022), 91(2) Nord J Intl L 253 260; with reservations Binder, 'A Treaty Law Perspective on Intra-EU BITs' (n 752), 978; *contra* Reuter, 'Taking Investors' Rights Seriously' (n 832), 389.

1011 Klein (n 530) 258–259; Voon, Mitchell and Munro (n 733), 467, 468, 472 "In summary, nothing in the law of treaties necessitates the operation of survival clauses following the termination of IIAs by consent"; arguably Kim, 'Investment Law and the Individual' (n 831). Similar arguments can be made with respect to the initial minimum periods of application in many investment treaties, cf. Voon and Mitchell, 'Denunciation, Termination and Survival' (n 733), 430 who argue that even within this initial period consensual termination should be possible; also Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 249.

i.e. clauses included in the majority of investment treaties under which investors may bring claims against the foreign state even after the investment treaty has been terminated.[1012] Their purpose is to promote a certain level of long-term security for a foreign investor[1013] and therefore to stimulate the latter to invest in the country.[1014] Survival clauses have occasionally been linked to the doctrine of acquired rights[1015] but often been seen as some kind of *lex specialis*, thereby excluding the doctrine's application.[1016]

Advocates of the legality of immediate consensual termination argue that to hold otherwise would mean protecting the individual against its own state – a construction foreign to the law on investment protection.[1017] Individuals are said not to be able to rely on a principle of legitimate expectations,[1018] as that principle would not be part of general public international law.[1019] Alternatively, the individual would have to expect a consensual termination of the treaty as a realistic possibility.[1020] Other principles, such as

1012 Voon, Mitchell and Munro (n 733), 466; cf. Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 242.

1013 ibid 243; cf. Wittich, 'Art. 70' (n 2) paras.13, 31 they "shall ensure the continuing protection of investments made in reliance on the existence of the treaty".

1014 Cf. Voon, Mitchell and Munro (n 733), 466 "The inclusion of such a clause arises from the core purpose of IIAs: to attract foreign investment by generating confidence *in a country's domestic regimes* through protections on the international plane" [footnote omitted, emphasis added].

1015 E.g. by Wittich, 'Art. 70' (n 2) paras. 13, 30-32: see also Roberts, 'Triangular Treaties' (n 752), 404 "Survival clauses may be understood as provisions on the vesting of investors' rights."

1016 Ascensio, 'Art. 70' (n 435) para. 22; Voon, Mitchell and Munro (n 733), 470; *contra* Gatzsche (n 999) 172.

1017 ibid 139-141, 147/148, paras. 210- 211, 225; similarly Roberts, 'Triangular Treaties' (n 752), 383.

1018 Kim, 'Investment Law and the Individual' (n 831).

1019 Gatzsche (n 999) 174, para. 266; differently Klein (n 530) 258. The holding in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* 1 October 2018, ICJ Rep 2018 507 para. 162 (ICJ) that "references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation" only related to the state of Bolivia.

1020 Roberts, 'Triangular Treaties' (n 752), 411 "In the absence of express clauses or specific representations […] investors should expect that the balance of benefits and burdens they receive from investment treaties may change over time. Investors cannot argue that, in investing, they had a legitimate expectation that the investment treaty would continue to cover their investment, at least for the period of

estoppel, would be difficult to apply in the state-individual relationship.[1021] The possibility of constructing investor rights under an investment agreement as third party rights governed by Art. 34, 36-38 VCLT is regularly mentioned[1022] but mostly discarded for reasons similar to those related to human rights treaties.[1023] Art. 70 para. 1 lit. b) VCLT is again rejected as not being applicable to individual rights.[1024] Sunset clauses are said not to apply to consensual termination of treaties, but only unilateral ones.[1025]

It is striking, but consistent with that approach, that the argument of acquired rights is also dealt with relatively superficially either by pointing to the principle's vagueness[1026] or by begging the question and maintaining that the right under scrutiny was simply not acquired under the investment treaty[1027]. Instead of asking whether generally applicable underlying principles might exist, the issue of legitimate expectations of the individual

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the survival clause"; cf. also Klein (n 530) 258 doubting the existence of legitimate expectations on the side of the investor.

1021 Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010), 104(2) AJIL 179 214; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 253.

1022 But see Martins Paparinskis, 'Analogies and Other Regimes of International Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 73 81/82 et seqq.; Voon, Mitchell and Munro (n 733), 696-670; Gattini (n 750), 157–158.

1023 Voon, Mitchell and Munro (n 733), 470; Gattini (n 750), 157–158; Reinisch and Mansour Fallah (n 999), 115.

1024 Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 251; Reinisch and Mansour Fallah (n 999), 116. Admittedly, its nature as a default rule severely limits its relevance in cases of consensual termination, see Voon, Mitchell and Munro (n 733), 467; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 251.

1025 Nowrot, 'Kommentar: Völkerrechtlicher Umgang mit ambivalenten Regressionsphänomenen im internationalen Investitionsrecht' (n 831) 117; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 256–257; Gatzsche (n 999) 147-148, paras. 224, 225; cf. Roberts, 'Triangular Treaties' (n 752), 411; leaning towards this opinion Reinisch and Mansour Fallah (n 999), 112; *contra Magyar Farming Company Ltd. Kintyre KFT, and Inícia ZRT v. Hungary,* ICSID Case No. ARB/17/27, Award of 13 November 2019 para. 224. Sunset clauses often do not explicitly differentiate between consensual and unilateral terminations of a treaty, cf. Voon, Mitchell and Munro (n 733), 466; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 255.

1026 Reinisch and Mansour Fallah (n 999), 116; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 253; cf. Voon, Mitchell and Munro (n 733), 470–471.

1027 Gatzsche (n 999) 172–174.

investor is rejected swiftly, even in the case of sunset clauses, which are supposed to motivate the investor to invest because of this security. The individual dimension of investment treaties thus remains underexplored. Construed in this way, investment treaties are mere law between states treating individuals as objects whose rights are dependent upon the whim of states. Such an approach seems even less convincing considering that

> "[t]he avowed purpose of most investment protection treaties is the promotion of economic cooperation in the cause of development. The *legal security* created by the treaties is designed to contribute to a favourable investment climate which is expected to facilitate private investments."[1028]

aa) The Comparison to Human Rights Law

In light of the detailed and sophisticated argumentation and diverse state practice on the persistence of legal positions concerning termination of human rights treaties, it is astonishing how easily parallel argumentation with respect to investment agreements is often discarded. By way of an *a maiore ad minus* inference, the "fact" that "even" human rights treaties would not survive a change in sovereignty is used as an argument to buttress non-survival of investor rights.[1029] Yet, the (negative) analogy with respect to the termination of human rights treaties is not only methodically questionable but does not recognize some of the particularities of the topic. A reference to the mentioned opinion of the UN Secretary General from 1997 with respect to North Korea is not enough to assume that states could unfetteredly withdraw from global human rights instruments not containing a termination clause if all parties to the treaty agreed. Other examples are often not considered at all, with arguments resting on the ambiguities of the now more than 25-year-old example that, as mentioned, offers neither evidence for sufficiently wide state practice nor solid *opinio juris*.

Admittedly, as long as no universal investment treaty exists or as long as the multilateralization of BITs has not developed, no argument of "law

1028 Christoph Schreuer and Ursula Kriebaum, 'From Individual to Community Interests in International Investment Law' in: *Fastenrath/Geiger et al. From Bilateralism to Community Interest* (n 647) 1079 1081 [footnote omitted, emphasis added].

1029 See e.g. Klein (n 530) 257–258; Binder, 'A Treaty Law Perspective on Intra-EU BITs' (n 752), 980–981; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 246 with footnote 82

making treaties" or "treaties building an objective régime" parallel to human rights systems ought to be made. Human rights treaties are more suitable to such arguments than investment treaties, which protect the individual foreign investor and not the individual human being. As long as most of the (bilateral) investment treaties do not aspire to universality, the case for their non-derogability is considerably weaker from the beginning.[1030] Nevertheless, the claim that "[i]nternational investment law is founded on reciprocity and consent, whereas international human rights law is founded on universality"[1031] is oversimplistic in both directions. Human rights treaties have also been shown to be subject to the reciprocity principle, and neither can some rights, especially the human right of property, be considered as containing a firm universally applicable ambit. The usual argument of a "lesser normative quality" of investor rights as compared to human rights, which are purported to be "inherent in the notion of a human being",[1032] in fact compares apples to oranges by referring to a natural law or customary source of human rights. However, this argument cannot be upheld for human rights under treaties in general. The separability of both fields is illusory, which is amply evidenced by the huge overlap of the branches in the field of property protection. In sum, while it is true that human rights *can* represent a more profound type of individual right, this truth does not mean that investors' rights, in their field of application, cannot enjoy some protection against immediate denunciation not foreseen in a treaty. The alleged consequence that "[t]he characterization of human rights should […] not play a significant role in determining the nature and revocability

1030 For some, treaties of a commercial character or trade agreements, due to their temporary character, may even fall under Art. 56 para. 1 lit. b) VCLT, i.e. are supposed to be derogable irrespective of the explicit or implied will of the state parties, cf. Villiger (n 731) Art. 56, para. 4; Aust, 'Treaties, Termination (2006)' (n 738) para. 20; hesitant about including trade matters in this category Christakis, 'Art. 56' (n 739) paras. 57-59.

1031 Voon, Mitchell and Munro (n 733), 458 [footnote omitted]; similarly Roberts, 'Triangular Treaties' (n 752), 406.

1032 E.g. ibid 368 "if investors are to have any rights under international law, they will be the rights that states have granted to them through instruments like investment treaties. This situation arguably differs from the human rights sphere where there are arguments that individuals enjoy certain rights by virtue of being human". This assertion neglects, however, that the existence of human rights under treaties is also dependent on the treaty parties' will. Cf. also Binder, 'A Treaty Law Perspective on Intra-EU BITs' (n 752), 980.

of investor rights"[1033] is therefore often based on wrong assumptions and pre-empts the analogy at a crucial point.

bb) The Inconsistent Argumentation

Additionally, but surprisingly in light of the insistence on consent as the primary principle, large parts of academia also accept a limit to the freedom to terminate individual positions under investment treaties with respect to "executed rights," also named "exercised rights".[1034] Rights are deemed to be "executed" when the investor has initiated a claim under the investment agreement with respect to them.[1035] This treatment sounds reminiscent of the distinction between "executed" and "executory" rights made under Art. 70 para. 1 lit. b) VCLT. Under consideration of a marked and primary emphasis on states as "masters of the treaty", it seems surprising to exclude such rights from termination, all the more so since the ability of the individual to initiate such claims is bound to state consent as well. Such an approach insinuates that state consent cannot be the only factor in the equation. It bespeaks of a certain uncomfortableness with the aforementioned result of unfettered power to terminate individual positions. Furthermore, the reasoning behind this differentiation is unclear. Some authors bring up the principles of estoppel, good faith, or abuse of process,[1036] all principles that, under a traditional reading of international law, would only be applicable between states.[1037] However, others use alternative justifi-

1033 Voon, Mitchell and Munro (n 733), 458.

1034 ibid 453, 457, 464-465, 472; Gattini (n 750), 157–158 linking these rights to acquired rights; Gatzsche (n 999) 172, 177, paras. 263, 271; cf. Binder, 'A Treaty Law Perspective on Intra-EU BITs' (n 752), 981 "arbitration crystallizes once accepted by the investor through the initiation of a claim, i.e. at the latest with the institution of the arbitration proceedings"; *contra* Roberts, 'Triangular Treaties' (n 752), 411–412; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10).

1035 Gatzsche (n 999) 172, para. 263; Reinisch and Mansour Fallah (n 999), 108; Voon, Mitchell and Munro (n 733), 453; following them Särkänne (n 1009), 260–261. Differently, considering the moment the investor has made an investment as crucial; Reuter, 'Taking Investors' Rights Seriously' (n 832), 389.

1036 Voon, Mitchell and Munro (n 733), 464, 451; following them Särkänne (n 1009), 261; see also Reuter, 'Taking Investors' Rights Seriously' (n 832), 407–408.

1037 Therefore critical Gattini (n 750), 158. But this critique in principle also applies to the principle of *perpetuatio jurisdictionis* which is proposed at ibid 157–158.

cations for this exception, such as procedural fairness[1038] or the frustration of expectations of the investor,[1039] which focus more on the individual's position. While the moment of bringing a claim is generally agreed on, scholarly commentary is vague as to the relevance of earlier points in time. This silence is arguably the consequence of a missing theoretical underpinning of such an exception.

An influential opinion[1040] accords investors a non-derogable position once the investor has accepted a state's "offer to arbitrate" contained in an investment treaty, an investment contract, or even national legislation. This acceptance can be expressed by raising a claim before an international tribunal but can also be "perfected" before. This according of rights comes very close to genuine international rights of the individual investor as a third party in the sense of Art. 34-38 VCLT. Of special interest in this respect is also Art. 72 of the ICSID Convention, which rules that a notice of denunciation according to Art. 71 shall not

> "affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary."

This (exceptional) provision is far-reaching first, by explicitly encompassing "nationals" of the contracting states, i.e. individuals, second, by not subjecting this rule to deviating agreement by states, and finally, by forbidding withdrawal of the right to arbitrate irrespective of whether it was exercised

1038 Gatzsche (n 999) 173, para. 264; Binder, 'A Treaty Law Perspective on Intra-EU BITs' (n 752), 981–982 ("retroactive extinguishment of exercised rights" or "would invite abuse"), who, however, in footnote 60 mentions that consent can be "perfected" independently of the initiation of an arbitration.

1039 Voon, Mitchell and Munro (n 733), 464 "That State has represented through its offer to arbitrate in an IIA that it is willing to be made accountable to investors for contraventions of the IIA […] An investor that has initiated a claim under the IIA has relied on that representation by bringing the claim. A retroactive termination effectively prejudices that reliance to the detriment of the investor."

1040 Christoph Schreuer, 'Consent to Arbitration' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2012) 855–856; Binder, 'A Treaty Law Perspective on Intra-EU BITs' (n 752), 982; for the ICSID Convention Schreuer and others (n 988) Art. 72 para. 7.

or not before withdrawal.[1041] It therefore goes beyond the generally agreed scope of "executed rights".

b) State Practice

Not unexpectedly, state practice seems to favor the possibility of consensual termination of BITs with immediate effect. There are numerous examples of parties agreeing to terminate their investment agreements and revoke or even contradict the incorporated survival clauses.[1042]

A well-known and recent case is the "Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union" (Termination Agreement)[1043] signed in May 2020. The agreement was concluded after the Court of Justice of the EU (CJEU) in 2018 ruled in the *Achmea* case that arbitration clauses contained in investment agreements between EU member states violate EU law.[1044] In a declaration from

1041 According to ibid Art. 72, para. 2 "Art. 72 is an expression of the rule, contained in Art. 25(1), that consent, once given, cannot be withdrawn unilaterally […] The rights and obligations arising from consent to ICSID's jurisdiction are preserved and insulated from later legal developments". On the dispute whether consent can only be "perfected" until the withdrawing state announces its denunciation or also within the following six-month-period until the denunciation takes effect, cp. Lucas Bastin and Aimee-Jane Lee, 'Venoklim Holding B. V. v. Bolivarian Republic of Venezuela' (2015), 109(4) AJIL 858; Schreuer and others (n 988) Art. 72, paras. 6-10; Emmanuel Gaillard and Yas Banifatemi, 'The Denunciation of the ICSID Convention' (2007), 237(122) NYLJ.

1042 See examples in Voon, Mitchell and Munro (n 733), 467; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 248.

1043 Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (29 May 2020) OJ L169 1 (2020). See on the implications of this agreement Johannes Tropper, 'The Treaty to End All Investment Treaties' *Völkerrechtsblog* (12 May 2020) <https://voelkerrechtsblog.org/the-treaty-to-end-all-investment-treaties/> and John I Blanck, 'European Union Member States Sign Treaty to Terminate Intra-EU Bilateral Investment Treaties' (2020), 24(18) ASIL Insights <https://www.asil.org/insights/volume/24/issue/18/european-union-member-states-sign-treaty-terminate-intra-eu-bilateral>.

1044 *Slovak Republic v Achmea BV,* C-284/16, 6 March 2018, Reference For a Preliminary Ruling para. 60 (CJEU [GC]); critical Claus D Classen, 'Autonomie des Unionsrechts als Festungsring? Comment on the CJEU's Achmea Judgment' [2018] Europarecht 361. In September 2021 the ECJ followed up on that jurisprudence by deciding that under the *Achmea* case law also the arbitration clause under the Energy Charter Treaty (n 883) was not applicable between EU member states, *République de Moldavie v Komstroy LLC,* C-741/19, 2 September 2021, Reference

January 2019, all EU member states concluded that "[i]n light of the *Achmea* judgment" they "will terminate all bilateral investment treaties concluded between them"[1045] In the Termination Agreement (only) 23[1046] EU member states put theory into practice and agreed to terminate all BITs and pertaining sunset clauses, which are defined as "any provision in a Bilateral Investment Treaty which extends the protection of investments made prior to the date of termination of that Treaty for a further period of time", Art. 1 para. 7, listed in Annex A, as well as sunset clauses of already terminated agreements, listed in Annex B, Art. 2 and 3 of the Agreement. Importantly, according to Art. 4 para. 1 of the agreement, arbitration clauses were to be considered as inapplicable not only from the date of coming into force of the agreement but "as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union". While this provision should not have an influence on already *concluded* proceedings, Art. 6 para. 1,[1047] no new arbitration proceedings were to be

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For a Preliminary Ruling (CJEU [GC]); and in October 2021 decided that this also held true for (tacit) bilateral arbitration agreements between states and investors with identical content to invalid arbitration clauses *Polish Republic v. PL Holdings Sàrl,* C-109/20, 26 October 2021, Reference For a Preliminary Ruling (CJEU [GC]).

1045 Common Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Achmea Judgment and on Investment Protection (15 January 2019) https://commission.europa.eu/system/files/2019-01/190117-bilateral-investment-treaties_en.pdf, 4 no. 5 [italics in original]. On the declaration Johannes Tropper, 'Alea iacta est?: Post-Achmea Investment Arbitration in Light of Recent Declarations by EU-Member States' *Völkerrechtsblog* (24 January 2019) <https://voelkerrechtsblog.org/de/alea-iacta-est/>. The member states also, somehow contradictory, in their Common Declaration considered "all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States [...] contrary to Union law and thus inapplicable".

1046 No signatories were Austria, Finland, Sweden and Ireland. The UK had already left the EU. Furthermore, the European Commission by the end of 2021 opened infringement proceedings against Austria, Sweden, Belgium, Luxembourg Portugal, Romania and Italy for not having terminated all their intra-EU BITs and/or not having ratified the Termination Agreement, *see* European Commission, 'December Infringements Package: Key Decisions' (2021) <https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201>. On the special status of the UK's BITs with EU states after its withdrawal from the EU Mark McCloskey, 'Safe Haven for Investors in (and Through) the UK Post-Brexit?' (2021), 25(3) ASIL Insights <https://www.asil.org/insights/volume/25/issue/3/safe-haven-investors-and-through-uk-post-brexit>.

1047 That are narrowly defined in Art. 1 para. 4 as "any Arbitration Proceedings which ended with a settlement agreement or with a final award issued prior to 6 March 2018 where: (a) the award was duly executed prior to 6 March 2018, even where a

initiated on the basis of the listed arbitration clauses after 6 March 2018, i.e. the date of the *Achmea* judgment, Art. 1 para. 6 in combination with Art. 5. States were to inform an investment tribunal of this consequence, and they should neither recognize nor enforce awards on the basis of such arbitral proceedings, Art. 7. Thus, and contrary to the just presented opinion of the majority of commentators, even already commenced arbitration proceedings were to be affected.[1048] Arguably, the EU states not signing the Termination Agreement refrained from doing so exactly because of this retroactive applicability, which they did not include into their (individual) agreements terminating their BITs.[1049]

Since intra-EU arbitrations between 2008 and 2018 accounted for approximately 20 % of all international investor-state dispute settlement cases,[1050] the Termination Agreement is definitely remarkable. It could, indeed, be construed as a marked conviction by 23 states that the consensual termination of investment agreements immediately taking away substantive and procedural positions of individual investors is in line with international law and also extends to protection accorded by sunset clauses. However, any interpretation of these events should not neglect that the states signing the Termination Agreement did so because they felt compelled to terminate their BITs due to the *Achmea* judgment.[1051] Additionally, not all signatories have ratified the treaty.[1052] Formally, the legal order of the EU has to be separated from the international legal order, and EU member states might, at least theoretically, be bound by two contradicting rules.[1053] In addition, the state parties to the agreement were eager to underline that investors

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related claim for legal costs has not been executed or enforced, and no challenge, review, set-aside, annulment, enforcement, revision or other similar proceedings in relation to such final award was pending on 6 March 2018, or (b) the award was set aside or annulled before the date of entry into force of this Agreement".

1048 Decidedly critical on that solution from the viewpoint of "acquired rights" Särkänne (n 1009), 261–263.

1049 ibid 280–281.

1050 UNCTAD, 'Fact Sheet on Intra-European Union Investor-State Arbitration Cases' [2018] IIA Issues Notes, 1, 3 <https://unctad.org/en/PublicationsLibrary/diaepcb2018d7_en.pdf>.

1051 Cf. Common Declaration (n 1044) 1, 2.

1052 See European Commission, 'December Infringements Package: Key Decisions' (n 1045).

1053 Särkänne (n 1009), 255–256, 265. The tribunal in *Eskosol S.P.A. in Liquidazione v. Italian Republic,* ICSID Case No. ARB/15/50, 7 May 2019, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes paras. 167 - 186

from member states, if acting within the scope of application of Union Law, enjoy the protection granted by the fundamental freedoms, the EU Rights Charter, "and by the general principles of Union law, which include in particular the principles of non-discrimination, proportionality, legal certainty and the protection of legitimate expectations"[1054]. The substantive protection for the investors thus might not be much less after the termination,[1055] but at least the procedural right to appeal to an independent investment tribunal is abrogated.

c) Jurisprudence

Arbitral tribunals have continuously held that a mere subsequent agreement by the parties to a BIT cannot divest an arbitral tribunal of its jurisdiction once seized by an investor.[1056] The ICSID tribunal in *Eskosol S.P.A. v. Italy* in 2019 explicitly relied on the principle of acquired rights to flesh out its argument:

> "[I]t would be inconsistent with general notions of acquired rights under international law to permit States effectively to non-suit an investor part-way through a *pending case*, simply by issuing a joint document purporting to interpret longstanding treaty text so as to undermine the tribunal's jurisdiction to proceed."[1057]

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seized with intra-EU arbitral proceedings after *Achmea*, found itself not bound by the CJEU's ruling and did not decline jurisdiction in this case.

1054 Common Declaration (n 1044) 2 with reference to *Robert Pfleger et al.* C-390/12, 30 April 2014, Reference For a Preliminary Ruling paras. 30-37 (CJEU).

1055 But cf. *EUREKO B.V. v. The Slovak Republic,* PCA Case No. 2008-13, 26 October 2010, Award on Jurisdiction, Arbitrability and Suspension para. 245 "protections afforded to investors by the BIT are, at least potentially, broader than those available under EU law". As well doubting the identical scope of EU law Schreuer, 'The Future of International Investment Law' (n 836) 1908, para. 17.

1056 For ICSID arbitrations *Magyar Farming* (n 1024) paras. 213-214, 224 and *Marfin Investment Group Holdings S.A. Alexandros Bakatselos and others v. Republic of Cyprus,* ICSID Case No. ARB/13/27, Award of 26 July 2018 para. 593 "The Tribunal considers that the principle of legal certainty entitles investors to legitimately rely upon a State's written consent to arbitrate disputes as long as that consent has not been withdrawn through the proper procedures included in the underlying treaty."

1057 *Eskosol S.P.A.* (n 1052) para. 226 [emphasis added]; endorsed by *Addiko Bank AG v. Republic of Croatia,* ICSID Case No. ARB/17/37, 12 June 2020, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis para. 290.

The tribunal further justified this finding with the prohibition of retroactive withdrawal of consent to arbitration,[1058] which would run counter to individual notions of legal certainty and legitimate expectations of the investor.[1059] In *Magyar Farming Company*, the tribunal explicitly opposed the opinion that sunset clauses were, by default, only applicable to unilateral terminations and found that

> "[t]he BIT is an international treaty that confers rights on private parties. While the Contracting States remain the masters of their treaty, their control is limited by the general principles of legal certainty and *res inter alios acta, aliis nec nocet nec prodest*."[1060]

Even if not determinatively deciding about the fate of the 2020 Termination Agreement, these findings place a marked emphasis on the position of the individual investor under the treaty, a position that is said to become protected by the principle of legal certainty.

What has to be underlined is that, according to the tribunal, the protection of this certainty no longer flows from the BIT itself, which is terminated and therefore cannot produce any legal consequences, but from the "general principle" of legal certainty. The tribunal in *Magyar Farming Company* even applied the *res inter alios acta* principle (without referring to the VCLT), thereby denying an unfettered power of states to change the legal status of individuals under international law by inter-state agreements. Even if these proceedings were conducted under ICSID rules, and therefore especially according to Art. 25 and 72 ICSID Convention, these basic findings can possibly be transposed to another context.[1061]

The arbitral tribunal in *Eastern Sugar* referred to Art. 70 VCLT to justify the upholding of its jurisdiction in an investor-state arbitration after an investment agreement had been unilaterally terminated,[1062] and hence (albeit without further discussion) extended the provision's scope beyond the traditional inter-state application. The tribunal in *Spoldzielnia Pracy*

1058 *Eskosol S.P.A.* (n 1052) paras. 199, 226.
1059 ibid para. 198.
1060 *Magyar Farming* (n 1024) para. 222 [footnote omitted, italics in original].
1061 Cf. Binder, 'A Treaty Law Perspective on Intra-EU BITs' (n 752), 982.
1062 *Eastern Sugar B.V. v. The Czech Republic,* SCC Case No. 088/2004, Partial Award of 27 March 2007 paras. 176-177.

Muszynianka v. Slovak Republic, a decision rendered after the Termination Agreement was concluded, did not feel bound by *Achmea*.[1063]

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> A subsequent termination of the BIT, even through the Termination Agreement, was considered as influencing neither the jurisdiction nor the material law of the dispute, which both had to be ascertained according to the law in force at the time the dispute arose.[1064]

These decisions cannot provide any evidence on how far this protection extends to rights having "crystallized" *before* a claim was raised in front of a tribunal. Additionally, it appears as if there has not yet been a tribunal dealing with a suit brought under the provisions of a consensually abrogated sunset clause.[1065] Furthermore, the argument of non-relevance of EU law for investment tribunals may not be applicable to arbitrations with a seat in one of the EU member states.[1066] That several national courts have denied

1063 *Spoldzielnia Pracy Muszynianka v. Slovak Republic,* Case No. 2017-08, Award of 7 October 2020 paras. 215-217 (PCA). A subsequent termination of the BIT, even through the Termination Agreement, was considered as influencing neither the jurisdiction nor the material law of the dispute, which both had to be ascertained according to the law in force at the time the dispute arose ibid. paras. 260-265. Because it relied on those very general rules of international law, the tribunal did not address the claimant's argument of vested rights. The tribunal also saw no conflict between EU law and the BIT ibid paras. 240-259; cf. also *Addiko Bank AG* (n 1056) paras. 267, 270, 295.

1064 *Spoldzielnia Pracy Muszynianka* (n 1062) paras. 260-265. Because it relied on those very general rules of international law, the tribunal did not address the claimant's argument of vested rights.

1065 Tropper, 'The Treaty to End All Investment Treaties' (n 1042), who favors jurisdiction over such claims "over disputes involving investments made prior to the consensual termination of a sunset clause because a sudden withdrawal of the rights guaranteed to already established investments contravenes legal security and legal certainty – principles which are arguably the raison d'être of investment treaties"; see also *Eastern Sugar B.V.* (n 1061) para. 175 "The Arbitral Tribunal can only reject the Czech Republic's argument that the implied termination of the BIT through accession also terminated the continuing effect expressly guaranteed by [the sunset clause] of the BIT."

1066 See recently *Green Power Partners K/S and SCE Solar Don Benito APS v The Kingdom of Spain,* SCC Arbitration V (2016/135), Award of 16 June 2022 being the first investor-State tribunal upholding the intra-EU objection and comment by Martin Gronemann, 'Is the Tide Turning for Intra-EU Investment Disputes?' *verfassungsblog* (29 June 2022) <https://verfassungsblog.de/trumping-international-investment-law/>.

the admissibility of arbitrations based on intra-EU BITs[1067] is, of course, still relevant for the actual ability of investors to enforce their awards.[1068] The last word in this discussion has not been uttered.

However, these tribunal argumentations clearly express the conviction that, under investment agreements, individual investors can acquire their own rights and positions, which can no longer be taken away without restrictions. This conviction seems to creep into international scholarship.

> "Although investors cannot expect and must not be protected eternally, a certain kind of protection for a defined period of time has to prevail - an investment will often have been undertaken because of such a guaranteed protection for a certain period of time and such protection is the very object and purpose of a survival clause. The investor's willingness to invest is not only grounded in his reliance towards the host state, but in his implicit belief towards his home State that the latter will vouch for the protection granted by the IIA […]. The increasing evolvement of individual rights and mechanisms of enforcement for individuals in international law further suggests that a circumcision of investors' rights would not be accurate. Rather, it bespeaks an overall progressive development which may possibly find its sequel here."[1069]

4) Interim Conclusions

Even more than with respect to the position under human rights law, the law on the protection of foreign investment, in principle, offers only limited protection to individuals in cases of state succession, on the substantive and especially on the procedural level. As has been shown, there is currently no rule of automatic succession to treaties of the predecessor state irrespective of the successor state's will, and investment treaties do not constitute an exception to this rule. However, comparable to human rights under treaties, in almost all cases of the mentioned secession scenarios, continuity of investment relations was the goal pursued and finally achieved, albeit on a

1067 *Incompatibility of an Arbitration Clause Contained in a Bilateral Investment Treaty with Union Law,* 26 SchH 2/20, 11 February 2021 (Higher Regional Court Frankfurt am Main) confirmed by *Invalidity of an Arbitration Agreement Under an Investment Treaty Between EU Member States,* I ZB 16/21, Decision of 17 November 2021 (German Federal Court of Justice [BGH]).

1068 Särkänne (n 1009), 269–278; Aceris Law LLC (n 1065).

1069 Kim, 'Investment Law and the Individual' (n 831) 1600, para. 66.

consensual basis. When it comes to the termination of investment treaties, academia tends to support a state-centric approach with states as "masters of the treaty" being free to abrogate treaty clauses and pertaining individual rights. Not surprisingly, state practice has followed this line. Yet, attempts to retroactively transform or curtail individual positions under investment treaties have not gone unchallenged. Tribunals have repeatedly underlined the importance of individual positions and the limits of their abrogation, relying on notions such as legitimate expectations, legal security, and good faith.

However, it seems dubious whether these arguments could also be held against a potential successor state. The more the general perception moves away from the state-centric approach to a more individualistic argumentation, the more easily such transposition could take place. While some steps in this direction are discernible, a complete overhaul of the concept does not seem to have taken place, yet. Thus, investment law has not emancipated itself from its origin in the law on the protection of aliens. Nevertheless, developments in recent jurisprudence and academia may lead in that direction.

D) Conclusions – A Place for Acquired Rights

The traditional doctrine of acquired rights purports to protect individual domestic rights in cases of state succession. This chapter has traced recent developments in two fields of international law most suited to protecting individual rights outside war situations: human rights law and the law on the protection of foreign investment. This review was done especially with an eye to their relationship with and influence on the doctrine of acquired rights. In fact, both fields have been recurrent reference points for authors discussing today's application of the acquired rights doctrine. In both areas, in the last decades, individuals have been accorded own rights, in some cases also the right to enforce them on the international plane, an ability that, as has been shown, still constitutes the exception rather than the rule in an international system based on the will of states. This development has to be seen as a major improvement of an individual's position under international law. Furthermore, it is now generally accepted that such international guarantees can influence an individual's domestic position. Having been treated as a fact by the PCIJ, domestic law today is reviewed by international courts for its congruence with international

law. For example, domestic property law is no longer within the state's *domaine réservé* but subject to international regulation. When sketching its legal environment, a new state will today find itself confronted with these regulations.

The new level of individual rights protections provided by human rights law and investment law has led some authors to conclude that the theory of acquired rights is obsolete; the fields of human rights and investment protection are seen as subsequent developments of the acquired rights doctrine. The doctrine is depicted as an expression of the traditional theory on the protection of aliens and the pertaining system of diplomatic protection, which have been eclipsed by these new developments. However, conversely, the doctrine of acquired rights has been used as an argument by authors discussing the succession into human rights or investment treaties. Especially with respect to human rights treaties, proponents of a rule of "automatic succession" have, occasionally, advanced a purported "acquired rights analogy" as supporting such a rule. From that perspective, although not spelled out explicitly, the doctrine of acquired rights was considered as a principle independent of and able to inform other (sub-)fields of international law. It was also conceived as open to evolution, in particular as applicable to individual rights acquired on the *international*, rather than the domestic, plane. Apart from the still lamentable lack of inquiry into the legal basis of the doctrine, the latter view embraces a more dynamic and interconnected picture of international law.

The analysis in this chapter thus had to work in two directions. First, by historically tracing the evolution of the individual's role in international law, the traditional doctrine of acquired rights could be positioned within this evolution. Second, in a further step, the relationship between the traditional doctrine and new evolutions was sketched. As the original doctrine of acquired rights was mainly concerned with property rights or generally "rights of an assessable monetary value," the analysis particularly inquired in how far property rights are guaranteed by human rights law or investment law when sovereignty changes.

The traditional doctrine of acquired rights, as conceived in the 1950s to 1960s, mostly constituted a particular expression of the theory of an international minimum standard for aliens, the general standard of protection for individuals at that time, applied to the special situation of state succession. Due to the particularities of state succession, the requirement of foreign nationality was mitigated, even if not completely renounced. Although, in principle, only protecting foreigners, the doctrine guaranteed

individuals a certain *status quo* a new state had to accept – even if it was an individual's new state of nationality. This guarantee was a remarkable deviation from the then existing theory of the *domaine réservé* of every state as towards the treatment of its nationals. The doctrine, therefore, can be seen as an – at least theoretical – predecessor of the idea of human rights.

The analysis has shown that the first assumption of a complete substitution of the theory of acquired rights by human rights and investment protection law cannot be upheld in all aspects. Even if these evolutions cover large fields of the protection formerly thought to be guaranteed by the doctrine of acquired rights, substantial gaps are visible, in particular in cases of state succession, and there is still room for more rules. In their customary expression, both human rights law and the law on protection of foreign investment present a relatively diffuse state of the protection of property. In general, no global standard of property protection independent of domestic law has emerged. In fact, the protection of individual property has proven to be one of the most controversial and almost non-agreeable topics in international relations. At the most, regional consensus may have emerged. Customary international law does not protect nationals of a state from expropriation without compensation in all cases.[1070] Investment law in particular only protects foreigners making a trans-border investment, not nationals of the state. The status of stateless persons remains unsettled. Therefore, crucially, as the granting of nationality is still almost exclusively a state's sovereign prerogative,[1071] the protection of property of a state's nationals or stateless persons in cases of state succession is in a state of limbo. While the ambit of human rights law is conceptionally universal, although practically tied to regional enforcement mechanisms, investment law is still built on a network of bilateral and sometimes plurilateral, regional, or "sectoral" treaties. Even if the multitude of, mostly bilateral, investment treaties

1070 Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 132-133; Kriebaum, 'Nationality and the Protection of Property under the European Convention on Human Rights' (n 590) 656/657; *Von Maltzan and others v. Germany,* Appl. Nos. 71916/01, 71917/01 and 10260/02, 2 March 2005, ECHR 2005-V 395 para. 80 (ECtHR [GC]); *Jahn and others v. Germany,* Appl. Nos. 46720/99, 72203/01 and 72552/01, 30 June 2005, Judgment on the Merits, ECHR 2005-VI 55 paras. 94-95 (ECtHR [GC]).

1071 Dörr, 'Nationality (2019)' (n 499) paras. 4, 7, 9; cf. Castrén (n 8), 486; Rainer Hofmann, 'Denaturalization and Forced Exile (2020)' in: *MPEPIL* (n 2) para. 17; cp. Göcke, 'Stateless Persons (2013)' (n 449) para. 19.

and pertaining jurisprudence has led to some substantive principles,[1072] the determination of customary protection standards beyond the minimum standard is, at best, vague, in particular for expropriation issues. Effective property protection is therefore, to a large extent, tied to being acclaimed in specific treaties.

With respect to treaties, despite decade-long fierce and prolonged discussion, there is still no rule of customary international law providing for automatic succession into human rights or investment treaties, i.e. succession into these treaties irrespective of a state's will or at least as a default rule. Majority position, supported by a non-uniform and often equivocal state practice, still maintains that states are the masters of their treaty, and consent remains the governing principle. To inquire more profoundly into the individual's position under human rights or investment treaties, the analysis also considered the consequences of withdrawal or denunciation of both types of treaties. Despite the notable differences between the termination of a treaty by a willful act of a state and the change of sovereignty over a territory, the central question from the perspective of the individual in both cases is similar: Can rights once acquired under a treaty be taken away or do they stick with the individual? For both systems under scrutiny, in principle, the withdrawal from or termination of a treaty, not only according to its provisions but as well by consensus of all the states parties to the treaty, has been found to be lawful and to terminate the respective treaty rights with immediate effect. Individuals are routinely denied the status of a party to the treaty able to invoke Art. 34-38 VCLT and, at most, are seen in the role of a third-party beneficiary. This situation is in fact reflective of the still derivative position of the individual under international law.

Within these confines, the rule contained in Art. 70 para. 1 lit. b) VCLT plays a crucial role. It stipulates that the termination of a treaty while releasing "the parties from any obligation further to perform the treaty" does "not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination." It therefore provides for some rights acquired under the treaty to be maintained irrespective of the original treaty basis being terminated and in general for non-retroactivity of the effects of the termination. Even if, according to its plain wording, only applicable to states parties, the argument that Art. 70 VCLT encapsulates a general international rule of reason also applicable to

1072 Schill *The Multilateralization of International Investment Law* (n 840): McLachlan, Shore and Weiniger (n 823).

individual rights has gained weight in the international discourse, especially when the elevated role of the individual in the system of international law is considered. This independent basis in international law could argue for the rights' persistence also in cases of state succession and therefore provide a promising basis for the entrenchment of a doctrine of acquired rights in international law.

What has to be recognized, however, is that that rule provides for non-retroactivity, not for eternal rights. It therefore most probably only protects "executed rights", i.e. status rights acknowledged by state act, typically, e.g., property or pension rights, or factual situations established through exercising rights acquired under the treaty. Moreover, Art. 70 VCLT, and probably also its customary expression, stand under the caveat of deviating state agreement. It can therefore only, but at least, work as a default rule in case of non-regulation in the treaty itself. In this respect, it is true that, according to traditional opinion, acquired rights have not been immune to change; property rights could always be abrogated by a new sovereign. At no point in time has the right of property been protected as a right to keep the "substance" of the property. It is generally only protected as to its value, and expropriation is a lawful option for every state. But, as mentioned earlier, the successor had to accept the existence of the right, and thus that the right had to be abrogated explicitly and that, in general, a compensation for the taking had to be paid. As *O'Connell* explained, the theory of acquired rights was *not* about having the *same* right, it was about having a legitimate interest in rectifying a *situation* of *inequity*. Furthermore, the traditional doctrine did not refer to any other rights than those having a "monetary value" and hence being open to compensation. The crux with extending the scope of the doctrine to other rights thus lies less in the faculty of abrogation than in the intrinsic nature of the protected right. Because they lead to a continuous state obligation, most human rights under treaty, are not suited to being protected after termination of the treaty.

To restate, in practice, the fields of human rights protection and investment protection do cover large parts of the protection originally thought to be conveyed by the theory of acquired rights. This fact has to be acknowledged, especially with an eye to the factual continuity of most of human rights or investment protection treaties after modern instances of state succession. However, neither human rights law nor the law on the protection of foreign investment would compensate completely for a – potentially updated – theory of acquired rights upholding individual property rights vested by domestic law in cases of state succession. This statement does not

purport at this stage either that the doctrine of acquired rights has ever constituted binding and solid international law or that it does today. Yet, to declare it outright obsolete without even inquiring into its modern material content would not do justice to its original scope or to its development potential and therefore would unduly pre-empt the analysis to follow.

An analysis of the modern content of the doctrine of acquired rights becomes especially virulent as, moreover, instead of replacing the doctrine, the fields of human rights and investment law can be seen as invigorating, rejuvenating, and expanding it.[1073] The doctrine of acquired rights, conceptionally, is not a mere defunct predecessor of individual rights protection by human rights or investment law, nor can it be seen as a specific sub-section of both. In fact, the three fields may overlap. Ultimately, the final goal of the doctrine of acquired rights is to maintain individual rights in cases of state succession. In what way such persistence is brought about is another, secondary question. Thus, I do not share the view that the (future) emergence of a rule of automatic succession would lead to the inapplicability of the theory of acquired rights.[1074] Quite the contrary, the emergence of a rule in that direction would tend to support the doctrine. Examples outside the succession context, such as denunciation clauses limiting states' possibilities to end treaty commitments containing individual rights, can also be seen as an expression of the acquired rights doctrine. In the same vein, "survival clauses" are not a substitute for acquired rights, but rather a specific application case of the theory within the field of investment law, reinforcing its *raison d'être*. The significance and independent value of the doctrine become clear in cases in which these clauses are deviated from. If the theory of acquired rights was, in fact, superseded, the abrogation of survival clauses would be subject to no limits. Such moments, when treaty rights do not survive because of a succession or because they are abrogated, are exactly the moments when the underlying principle might come into play. Especially in light of a certain backlash against the human rights and investment treaty system as well as against international institutions adjudicating them, the theory of acquired rights may well become the means of choice to cope with such conflicts.

1073 See also Ronen *Transition from Illegal Regimes* (n 14) 252 "With the development of a right to property under international law, and the growing governmental involvement in economic activity, the doctrine appears to have become definitive and widely applicable, including with respect to grants of land by the state."

1074 But in this way Wittich, 'Art. 70' (n 2) para. 30; cf. also Voon, Mitchell and Munro (n 733), 470.

Indeed, what has also become clear from the analysis above is that, while the focus with respect to the ownership of rights still definitely rests on the sovereign state, the international legal order by no means completely denies the value of individual positions. Despite the mentioned controversies and ambiguities in states' behavior, there is an all the more significant tendency in international practice, relentlessly acknowledged by scholars and international tribunals, to uphold specific individual positions. Even if most examples in this direction are relatively inconclusive, they show that states are guided by concerns about individual rights as well. Even if those examples do not resemble a "virtually uniform" consistent pattern, state practice in cases of state succession shows a remarkable trend to continuity with respect to how to treat human rights and investment treaties. In particular, most of the new states have *opted* for continuity. That almost none of them did so explicitly under the assumption they were bound to do this should neither be surprising nor decisive.

We can witness a further tendency by international courts and tribunals to uphold provisions protecting individual rights under investment or human rights treaties (and therefore often their own jurisdiction) before a change of sovereignty. In line with states' behavior, the courts and tribunals have been reluctant to endorse a rule of automatic succession, which seems understandable given the delicate relationship between their *competence de competence* and the fundamental dependence of their jurisdiction on the consent of the states involved. When it came to questions of state succession, most arbitral tribunals have upheld their jurisdiction based on findings of tacit consent or implicit novation of a specific treaty.[1075] Yet, the factual outcome of most of these cases is the upholding of individual positions even after succession.

Additionally, a customary rule seems to have emerged – developed in inter-state cases – that, at least once an international authority is seized with a dispute, *later* amendments or changes to an underlying treaty may not impact that procedure. Whether such a "vested right" can exist at an earlier

1075 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections* (n 71) paras. 105-117. Cf. on this issue in general, but with special focus on investment agreements Dumberry *Guide to State Succession in International Investment Law* (n 14) paras. 4.01-4.45. See also on the possibilities to evade having to judge on automatic succession Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 332–334. Cf. for the third party rule outside succession scenarios Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 367, para. 121.

point in time remains uncertain. According to the traditional doctrine, acquired rights merely had to be *enforceably* granted under the domestic law of a state, their enforcement by judicial means was not necessary. It is as well at this point where the doctrine may have a wider scope than the protection of human or investor rights and therefore can influence them. However, at the moment, this issue remains unsettled, too.