Chapter IV: State Practice on Acquired Rights

"*There is, after all, nothing so remote from reality and practicality as the realistic positivist in search of a precedent.*"[1076]

A) Preliminary Remarks

The preceding chapters have shown that a comprehensive yet reasonable analysis of recent state practice is much needed in the scientific engagement with the doctrine of acquired rights. Besides constituting one of the essential parts of customary international law, state practice is also of great relevance in detecting general principles of law, the second major source of the law of state succession. In a field lacking comprehensive coverage in international treaties, such research is even more vital than in other areas. Even if literature abounds on the issue of state succession, a proper, diligent, and thorough analysis of underlying state practice has seldom been conducted, for many reasons. In addition to a general uncomfortableness with state succession as a field of law, this subject requires material to be collected from a wide array of places throughout the world. Hence, practical hurdles exist, such as language barriers and the poor accessibility of some relevant documents. Furthermore, practice with respect to state succession is difficult to grasp - it is multifaceted and touches upon a panoply of different topics such as succession to debts, treaties, borders etc. Since there is not one decisive act of succession, potentially so much evidence is available that it is sometimes simply overwhelming and too much to be processed by one individual and within one piece of academia. Furthermore, the legal issues are intrinsically linked and hard to dissociate from the political value judgments accompanying succession. Therefore, every analysis will have to engage deeply with the historical background of the case under investigation.

The following concentrates on succession cases from 1990 onwards, i.e. a time span covering more than thirty years of international development. Including (in a more or less temporal order) the succession cases of Yemen,

1076 Jennings (n 326), 446.

Germany, the Soviet Union, Yugoslavia, Czechoslovakia, Eritrea, Walvis Bay, Hong Kong, Macau and South Sudan, this time frame encompasses about ten cases of state succession - with several sub-cases. The time limitation has the advantage of enabling a more through, detailed, and diligent analysis of those cases. Within the constraints of a work such as this one, to enlarge the analysis would necessarily mean having to deal with the topic in a more cursory and potentially also more superficial manner. Since the forgoing analysis has shown that there was abundant scholarship on acquired rights before the beginning of the 1970s, it is of particular importance to have a look at instances of state succession since then. Beyond that, one of the basic working hypotheses is that the doctrine of acquired rights has been influenced by the evolutions of international law after 1945, the enactment of the UNC and the following developments in the areas of human rights and the law on the protection of foreign investment - both fields conceptionally designed but still in their infancy at the mid-20th century. As mentioned, especially since 1980, the latter two fields have experienced a dynamic boost. It is submitted here that, by seriously challenging the alleged international consensus on property protection, the decolonization process of the 1950s to 1980s also set the idea of acquired rights on a new track. It has also been mentioned that the decolonization process was a relatively peculiar form of succession, distinct from cases happening afterwards.[1077] It thus seems prudent to start the analysis of state practice after that time.[1078] Doing differently risks replicating old power structures and comparing apples to oranges.[1079]

This limitation does not mean that all precedents before 1990 are completely irrelevant today or that a definite gap disconnected the cases. On the contrary, and as has been underlined several times, the "classic" definition of the doctrine of acquired rights from the 1950s and 1960s is routinely invoked in relevant discussions and remains an important point of departure and comparison. Yet, as has also been clarified, that reference is often too inflexible, does not consider sufficiently the game-changing evolution of the surrounding legal landscape and thereby "freezes" the doctrine in time.

1077 *Supra*, Chapter II C) IV).

1078 Thus, e.g. the unification of Syria and Egypt in 1958-1961 will not be covered. Also the "unification" of North and South Vietnam in July 1976 is outside the scope of this work.

1079 Sterio (n 392) 72–77 even considers Eritrea and East Timor as "historically remote" instances of secession.

While, for a holistic picture of the doctrine of acquired rights, familiarity with PCIJ cases such as *German Settlers* is useful, today they should not be relied on without any historical or political re-assessment. Additionally, what is also excluded in principle from this analysis are all cases of illegal occupation or annexations, such as the illegal annexation of Crimea,[1080] as no genuine change of sovereignty has taken place there.[1081] For example, the independence of East Timor in 2002 can be systemized as a case of decolonization but also one of illegal occupation by Indonesia.[1082] The same holds true for the independence of Namibia - the termination of its illegal occupation by South Africa was, simultaneously, the final point of a decolonization process.[1083]

These basic decisions should not obscure the fact that such distinctions are and can never be clear-cut. All cases under analysis have emanated from and were shaped by their specific history and political environment, often shifting and sometimes only finally assessed years later. Even amongst those cases generally held to constitute cases of state succession, some examples are considered controversial. The controversy is a natural consequence of the extremely wide succession definition in the Vienna Conventions and the ambiguous status of statehood. Hence, in this chapter, the cases of the Baltic states and the Kosovo are discussed, even though they can partly be understood as cases involving illegal occupations; and a caveat is also called for with Eritrea, which additionally includes a decolonization factor. The succession cases in Hong Kong and Macau, commonly referred to as cases of cessions of territory, can also be seen as the last steps in a long process of decolonization. However, those cases were, overall, considered to be closer to genuine succession scenarios and are thus included in this analysis.

1080 On the annexation of Crimea Walter, 'Postscript' (n 386) especially 310; Marxsen (n 386), 380–391.

1081 See *supra*, Chapter II B) IV). Mere de-facto regimes are also not included, cf. Sterio (n 392) 78–92.

1082 See in more detail Carsten Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis' (2001), 5(1) Max Planck Yrbk UN L 105 110–115.

1083 See, in comparison especially with East Timor, ibid 121. However, some of the consequences of Namibia's independence from South Africa for its domestic legal order will be explained when talking about the transfer of the territory of Walvis Bay.

Furthermore, what makes succession cases taking place after 1990 even more special[1084] is that the earliest ones largely coincided with one of the major international political developments of the last century - the fall of the iron curtain between East- and West-Bloc states and the ensuing triumph of the idea of a free market economy. That development entailed profound changes in the economic systems and property orders of former socialist states. For the cases discussed here, it is of particular relevance for Yemen, Germany, the SU, the SFRY, and Czechoslovakia. In those cases, change induced by the political "defrosting" of the conflict is not always easy to separate from the direct consequences of succession. Moreover, some of the states under analysis were also subject to military conflict, war, sieges, and ethnic cleansing, sometimes leading to occupation of or international involvement in the territory. Those states' attitude towards their former legal order sometimes is more connected to the military conflict than to the succession aspect of the scenario. For example, the "Dayton-Peace Accords",[1085] concluded to end the conflict on the territory of Bosnia-Herzegovina, contained various stipulations relating to the restitution of property to refugees. Another example - years after Eritrea separated from Ethiopia, violent conflict erupted between both countries in the course of which some laws enacted shortly after independence were enforced for the first time. There, as well, distinguishing in how far a certain behavior had its roots in the laws of war or was more a consequence of succession is not easy.

Hence, since none of the cases exists outside their historical and political contexts and to set a common point of departure, their background will be explained in each case in a short introduction justifying its inclusion in the analysis and at the same time mentioning potential caveats of comparability. Within the confines of this work, it is not possible to analyze the private law of each of the successor states in detail. To a certain extent, this analysis can only give an overview of some of the most important developments in each of the successor states. Additionally, there are huge differences between the cases in the amount of available and readily accessible material. While some ministries have translated their most important documents, such as the constitution or relevant by-laws, into English or

1084 See Degan (n 2), 142 who considers successions taking place after 1990 as having a distinct character.

1085 General Framework Agreement for Peace in Bosnia and Herzegovina (14 December 1995) UN Doc. A/50/790-S/1995/999, in more detail *infra*, Chapter IV) B) IV) e).

French, in some jurisdictions, finding reliable information on the domestic law and its application was difficult. Nevertheless, what can be discerned in this work are "broad strokes", the general attitude towards a predecessor's legal system, especially with respect to individual rights.

To scrutinize the attitude towards individual rights after a change in sovereignty, the following analysis asks two main question blocks. First, was the former private legal order continued in general? How was this done - in a sweeping fashion or only as an exception? Implicitly? Explicitly? In what kind of law was such continuity stipulated? What was the default option? Did the continuity of international obligations impact the domestic law of the respective state? Second, were there stipulations that particularly protected individual rights after a change? Here, from the panoply of potential areas, two subjects will be discussed:

– (domestic) private property protection, encompassing the definition of (immovable and/or movable) property, modes of protection, and rights in relation to such property (usufruct, lease etc.); in some cases also questions of restitution of formerly expropriated assets, and
– pension claims of private individuals.

While the question of property legislation is basically confined to the sphere traditionally considered as private law, pension claims of individuals are a *sui-generis* type of rights as, in most social welfare states, such pension claims are attributed to an individual but, as part of a system of social protection, born by the society. Both areas have regularly been associated with the notion of acquired rights and are of pivotal importance to individuals since they constitute the economic basis on which most other freedoms can be exercised. A focus will be put on what is encompassed by the specific definition of protected "property" under national law and prerequisites for protection. Of particular importance is the significance of nationality for the protection of rights. The significance arises because the link to nationality qualified the doctrine of acquired rights as a sub-theory of the law on the protection of foreigners.

Finally, the case of the UK's withdrawal from the EU in 2020 will be dealt with from the perspective of acquired rights. Even if that situation did not constitute a case of state succession in the traditional sense, it still shows remarkable similarities. Since the withdrawal took place recently and sparked highly emotional discussions about the fate of a range of individual rights conveyed by the EU legal order, it is of interest to see in how far

the continuous invocation of acquired rights in the process of negotiating a withdrawal agreement has come to fruition.

Crucially, in the search for such examples and in order to collect a holistic and comprehensive sample of state policies, no importance will be attached to the literal use of the term "acquired rights" or "vested rights". Instead, account will be taken of all instances in which individual rights acquired under a domestic legal order were upheld after a change in sovereignty. In that respect, even if this book submits to the view that there is no automatic succession to treaties,[1086] international treaty obligations will also be reviewed, as will in how far those obligations have been incorporated into national law and therefore protect rights under it.

B) Case Studies

I) The Unification of Yemen (1990)

1) General Background

As foreseen in the Agreement on the Establishment of the Republic of Yemen (Unity Treaty),[1087] the unification of Yemen in May 1990 was brought about by a *merger* between the state of the Yemen Arab Republic (YAR or North Yemen) and the state of the People's Democratic Republic of Yemen (PDRY or South Yemen) in order to form the new state of the Republic of Yemen (RoY).[1088]

1086 *Supra*, Chapter III) C) II) 2) g).

1087 Art. 1 of the Agreement on the Establishment of the Republic of Yemen (22 April 1990) 30(4) (1991) ILM 822 (YAR/PDRY) "there shall be established between the State of the Yemen Arab Republic and the State of the People's Democratic Republic of Yemen (both parts of the Yemeni Homeland) a full and complete union, based on a merger, in which the international personality of each of them shall be integrated in a single international person called 'the Republic of Yemen.' The Republic of Yemen shall have one legislative, executive and judicial power."

1088 Crawford *The Creation of States* (n 308) 705; Arnauld *Völkerrecht* (n 255) § 2 para. 104; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 519/520; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 403, 406, 412-413; Goy, 'La Réunification du Yémen' (n 615), 261; Mohammed A Al-Saqqaf, 'La constitution du Yémen réunifié' in Rémy Leveau, Franck Mermier and Udo Steinbach (eds), *Le Yémen Contemporain* (Éd. Karthala 1999) 161 163.

The YAR had been part of the Ottoman Empire until its end in 1918.[1089] The PDRY had been a British protectorate and became independent in 1967.[1090] The merger of the two states in 1990 entailed the challenge of reconciling two economic systems, a free-market economy in the YAR and a socialist, centrally organized system in the PDRY.[1091] Yet, "the North's capitalist orientation and the South's socialism represented tendencies or goals, for both were really 'mixed' economies."[1092] In both states, a private business sector had emerged.[1093] Despite significant ideological differences and only a short history as one state, both sides adhered to the idea of Yemeni unity.[1094] While the PDRY's authorities were prepared to adapt to a more "western" free market system, "[m]ore 'socialist heritage' has been retained in Yemen than in Germany."[1095] Even if the PDRY was economical-

1089 On the history of North Yemen before unification Faten Plassmann, 'Yemen (2015)' in: *MPEPIL* (n 2); Robert D Burrowes, 'Prelude to Unification: The Yemen Arab Republic, 1962-1990' (1991), 23(4) Int J Middle East Stud 23 (1991), 483-506 483.

1090 Helen Lackner, 'Land Tenure, Social Structure and the State in the Southern Governorates in the Mid-1990s' in Kamil Mahdi, Anna Würth and Helen Lackner (eds), *Yemen into the Twenty-First Century: Continuity and Change* (Garnet Publishing 2007) 197 199–200; Goy, 'La Réunification du Yémen' (n 615), 252. On South Yemen's history before unification Fred Halliday, 'Yemen's Unfinished Revolution: Socialism in the South' (1979), 81 MERIP Reports 3.

1091 Nada Choueiri and others, *Yemen in the 1990s: From Unification to Economic Reform* (IMF 2002) 3, 26; Nassib G Ziadé, 'Introductory Note to the Agreement on the Establishment of the Republic of Yemen' (1991), 30 ILM 820 821; Olivier M Ribbelink, 'On the Uniting of States in Respect of Treaties' (1995), 26 NYbIL 139 153. Al-Saqqaf, 'La constitution du Yémen réunifié' (n 1087) 163 underlines that there existed no "liberal and democratic experience" for both Yemeniti states while the FRG had constituted such an example for the GDR.

1092 Sheila Carapico, 'The Economic Dimension of Yemeni Unity' (1993), 184 Middle East Report 12.

1093 ibid 9–10 "The South, with its colonial legacy, entered the 1960s with many more capitalist enterprises than North Yemen."

1094 Cf. Burrowes (n 1088), 489; Charles Dunbar, 'The Unification of Yemen: Process, Politics, and Prospects' (1992), 46(3) Middle East Journal 456 473–474; Goy, 'La Réunification du Yémen' (n 615), 249-250; Halliday (n 1089), 4; Lackner, 'Land Tenure, Social Structure and the State in the Southern Governorates in the Mid-1990s' (n 1089) 216–217; Choueiri and others (n 1090) 3. The constitutions of YAR and PDRY both adhered to unity, Al-Saqqaf, 'La constitution du Yémen réunifié' (n 1087) 162 footnote 4. On the reasons for the failure of the various previous initiatives for unity Gerd Nonneman, 'The Yemen Republic: From Unification and Liberalization to Civil War and Beyond' in Haifaa A Jawad (ed), *The Middle East in the New World Order* (2nd ed. Macmillan 1997) 61 62.

1095 Carapico (n 1091), 14. See e.g. Art. 6 paras. 2 and 4 of the constitution "The national economy stands on the following principles: […] The construction of a

ly weaker[1096] than the YAR and considered to be economically not viable in the long run,[1097] until their merger, both states remained relatively poor countries for which unification promised economic advantages.[1098] The discovery of oil reserves in the border area[1099] had necessitated common regulation and cooperation even before formal unity.[1100] Important concession contracts for the exploration of oil had been concluded by the YAR and the PDRY together even before 1990, and unification does not seem to have impacted their validity or content.[1101] Unification efforts were ushered in by the establishment of a demilitarized zone along their border and the border's opening in 1988 for the free flow of persons and goods.[1102] Beyond that, even before unity, common legislation concerning public service, household questions, or questions of diplomatic representation had been introduced.[1103] The new common constitution[1104] was approved

developed public sector capable of owning major means of production […] All such relations and energies shall be directed towards ensuring the creation of an efficient national economy […] ensuring the creation of socialist relations derived from the Arab Islamic heritage and the circumstances of Yemeni society" and Art. 7 of the constitution "Natural resources including all their derivatives and sources of energy being under or above ground, in territorial waters, the continental shelf and the exclusive economic zone are the property of the State which ensures their exploitation for the public interest."

1096 Kamil Mahdi, Anna Würth and Helen Lackner, 'Introduction' in: *Mahdi et al. Yemen into the Twenty-First Century* (n 1089) xvii xvii; Ribbelink (n 1090), 153. Cf. for a brief comparison Choueiri and others (n 1090) 3.

1097 Cf. Nonneman, 'The Yemen Republic' (n 1093) 64; Dunbar (n 1093), 464–466.

1098 Carapico (n 1091), 10; cf. Yves Gazzo, 'The Specifics of the Yemeni Economy' in: *Leveau/Mermier et al. Le Yémen Contemporain* (n 1087) 319 320–326.

1099 On the history of oil exploration until unity Horst Kopp, 'Oil and Gas in Yemen: Development and Importance of a Key Sector Within the Economic System' in: *Leveau/Mermier et al. Le Yémen Contemporain* (n 1087) 365 365–367.

1100 Cf. Nonneman, 'The Yemen Republic' (n 1093) 65, 67; Burrowes (n 1088), 490–491; Carapico (n 1091), 13–14; Goy, 'La Réunification du Yémen' (n 615), 260; Choueiri and others (n 1090) 3. On the importance of the exploration of oil for the unification process also Abou B Al-Saqqaf, 'The Yemen Unity: Crisis in Integration' in: *Leveau/Mermier et al. Le Yémen Contemporain* (n 1087) 141 154–155.

1101 Choueiri and others (n 6) 5. At least two concession contracts were re-negotiated by the central government in 1995-1996, cf. Choueiri and others (n 1090) 5; also Kopp, 'Oil and Gas in Yemen' (n 1098) 367–368.

1102 Cf. Nonneman, 'The Yemen Republic' (n 1093) 68; Dunbar (n 1093), 459; Goy, 'La Réunification du Yémen' (n 615), 260; Choueiri and others (n 1090) 3.

1103 Goy, 'La Réunification du Yémen' (n 615), 263.

1104 Constitution (1990/1991) 7 (1992) ALQ 70 (Yemen).

by the two parliaments on 21 May 1990 and one year later espoused by public referendum.[1105] In Art. 6 para. 3, it provided for the protection of private property "which is not to be interfered with except for the sake of the public interest and for a fair compensation in accordance with the law". Interestingly though, that article was included in Part I, subsection "Economic foundations of the State" of the constitution, and not in Part II "Basic Rights and Duties of Citizens", which casts doubts on its conception as an individual right rather than as a political principle.

2) Continuity of the Legal Framework

The relatively consensual and equal[1106] transition process is mirrored in the regulation of the take-over of international and domestic legal instruments. The RoY took on all treaties of both predecessor states,[1107] at least as foreseen by the rule encapsulated in Art. 31 VCSST, i.e. with respect to the territory of the respective state.[1108] With regards to domestic law, Art. 10 of the Unification Treaty provided for the abrogation of the former two constitutions. For statutory law, Art. 130 of the 1990 Constitution stipulated that

> "[t]he provisions of the laws and decrees in force in each of the two parts of Yemen shall remain valid in the Part in which they were in

1105 Nageeb Shamiri, 'Yemen Country Survey' (1994), 1 Yrbk Islam Mid East L 369 376; Al-Saqqaf, 'La constitution du Yémen réunifié' (n 1087) 162; Art. 3 of the Unity Treaty (n 1086) set up a 30-month interim period in which the state legislatures of both states would be merged. The new state provided for almost equal power of the former ruling powers from both states, see Mahdi, Würth and Lackner, 'Introduction' (n 1095) xvii. The common constitution was amended in 1994.

1106 Goy, 'La Réunification du Yémen' (n 615), 263 "Elles considèrent qu'il y a réunion de deux États en un État nouveau et non annexion d'un Etat par l'autre, et donc une certaine succession aux deux États et non une extension du droit de l'État annexant à l'État annexé."; also Carapico (n 1091), 10.

1107 See YAR/PDRY, 'Letter to the UN Secretary General' (1990) <https://treaties.un.org/pages/HistoricalInfo.aspx?clang=_en#Yemen>. According to accounts by *Al-Zwaini The Rule of Law in Yemen* (n 801) 47 this taking over happened partly "unwilfully".

1108 Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 523; Andreas Zimmermann, 'State Succession in Respect of Treaties' in: *Klabbers/Koskenniemi et al. State Practice Regarding State Succession* (n 297) 80 114; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 412–413. Arguing for effect for the whole territory Ribbelink (n 1090), 165.

force on issue until they are amended in accordance with the rules and procedures provided for in this Constitution."[1109]

Hence, at first glance, legal continuity was the principle underlying Yemeni unification.

3) Restitution of Nationalized Land Holdings

That principle was especially applied to the question of restituting land nationalized under socialist rule. As in most states undergoing transition from a socialist to a capitalist economy, after unification one of the main issues in the PDRY became the (re-)distribution of land and tenure. Large parts of rural land were expropriated by law in the 1970s to 1980s in the territory.[1110] Shortly before unification, the PDRY had transformed the communally owned property and usufruct rights into ownership and issued certificates to those in actual possession of the property.[1111] A law provided that the former owners of the land expropriated in socialist times had to be compensated by the new owners for their loss, and they were accorded new land and compensation by the government.[1112] In accordance with the principle decision encapsulated in Art. 130 of the Constitution, those laws survived the merger and afterwards were not repealed by the unified state of Yemen.[1113] Thus, in principle, the nationalization of land was not reversed.

Yet, conversely, *in practice* many land holdings were subjected to a restitution scheme by ministerial decree and the beneficiaries of the land reform

1109 It has to be mentioned that seemingly the 1981 draft constitution which in large parts became the constitution of the unified Yemen in 1990 had contained a similar Art. 134 (which is still referred to by some authors, e.g. Ziadé (n 1090), 820/821) making the survival of laws subject to their conformity with the constitution. But this article arguably has not become the law in Yemen.

1110 Thomas Pritzkat, 'Land Distribution after Unification and its Consequences for Urban Development in Hadhramawt' in: *Mahdi et al. Yemen into the Twenty-First Century* (n 1089) 347 348; Lackner, 'Land Tenure, Social Structure and the State in the Southern Governorates in the Mid-1990s' (n 1089) 200–202; Carapico (n 1091), 10, 11 speaks of the re-distribution of about 2/3 of South Yemen's cultivated land and that "Public ventures controlled 60 to 70% of the value of industry in the South".

1111 Pritzkat, 'Land Distribution after Unification and its Consequences for Urban Development in Hadhramawt' (n 1109) 348.

1112 ibid.

1113 ibid 348–349.

had to give back the land granted.[1114] While compensation was owed in these cases as well, it was not always paid.[1115] The enforcement of that restitution scheme was not based on formal parliamentary law, was carried out on a case-by-case basis, and proved to be uneven depending on the tribal or administrative power on the ground or the political affiliation of the owner.[1116]

> "Confronted with often complex ownership structures, and finding the issues involved too highly politicised, the Yemeni government has apparently been unable to settle the ensuing 'land question' on a general and definitive level. Rather, it has preferred to deal with each claim for restitution or indemnification individually on an ad hoc basis, leaving the entire matter in an exceedingly ambiguous state."[1117]

Be that as it may, the rights of both the former owners and any new owners to property of land were in principle respected and, at least, compensation was due.

4) Interim Conclusions

On the face of the Yemeni merger, continuity of the national legal order was chosen. Yet, such continuity meant upholding two different legal systems along territorial lines in a unified state with one people. Obviously, that state of affairs was not tenable for too long. A closer look at the actual events surrounding unification indeed reveals the disparity between formal commitment and actual enforcement of rights and the speediness of change after change. As an example, the upholding of two, very different, legal frameworks with respect to family law and status law in the RoY shortly

1114 Lackner, 'Land Tenure, Social Structure and the State in the Southern Governorates in the Mid-1990s' (n 1089) 202-211; Pritzkat, 'Land Distribution after Unification and its Consequences for Urban Development in Hadhramawt' (n 1109) 348-349, for the Hadhramawt province 351–353.

1115 Lackner, 'Land Tenure, Social Structure and the State in the Southern Governorates in the Mid-1990s' (n 1089) 203.

1116 Cf. ibid 202–203; Choueiri and others (n 1090) 40; Pritzkat, 'Land Distribution after Unification and its Consequences for Urban Development in Hadhramawt' (n 1109) 349–352; on bribery ibid 353, 356-357.

1117 ibid 349.

after unity led to awkward consequences.[1118] When a unified law was proposed in 1992, it meant for a lot of women living in the Southern part of Yemen, which, in line with its political philosophy, had endorsed a liberal reading of Islamic law with respect to women's rights, that their living conditions as compared to the situation before in fact deteriorated,[1119] mainly due to the strong influence of Sharia principles on all areas of the law.[1120] Furthermore, tribal structures and societal strata still played an eminent role in Yemen, also with respect to law-making and adjudication besides and within the state's judicial system.[1121] From our narrow perspective, it should not be overseen that

> "[c]onsidering that almost 80 percent of Yemenis are not within reach of the official courts, or for other reasons adhere to tribal customary rules or informally administered Islamic norms, state law is not the supreme law in Yemen, neither effectively, nor in the perception of most Yemenis."[1122]

The potential joy and advantages of unification were soon swallowed up by the outbreak of the Gulf War and Yemen's unfortunate role in it, followed by the next civil war beginning in 1994.[1123] Still existing tribal structures and power gambles have again and again led to hostilities and new wars and a humanitarian catastrophe in Yemen.[1124] Those hostilities have evolved so far that some Southerners are now calling for independence from the North.[1125]

1118 Anna Würth, 'Stalled Reform: Family Law in Post-Unification Yemen' (2003), 10(1) IL& S 12 16–17. On the situation before unity ibid 12–16.

1119 Cf. *Al-Zwaini The Rule of Law in Yemen* (n 801) 42–43, 87-92. For a specific overview of the new regulations Würth (n 1117), 19–22.

1120 The new constitution from 1990 had in Art. 3 declared Shari'a law to be the "principal source for legislation". For an overview of the Sharia influence on the law Shamiri (n 1104); *Al-Zwaini The Rule of Law in Yemen* (n 801) 38–47, 53-54.

1121 ibid 50–55, 59-60; cf. Würth (n 1117), 22–25. For the YAR Burrowes (n 1088), 484; Gazzo, 'The Specifics of the Yemeni Economy' (n 1097) 326–327.

1122 *Al-Zwaini The Rule of Law in Yemen* (n 801) 15.

1123 For a pessimistic account of Yemen's unity Al-Saqqaf, 'The Yemen Unity' (n 1099) 154–159.

1124 See for a recent account Kali Robinson, 'Yemen's Tragedy: War, Stalemate, and Suffering: Yemen's Internal Divisions and a Saudi-led Military Intervention Have Spawned an Intractable Political, Military, and Humanitarian Crisis.' (1 May 2023) <https://www.cfr.org/backgrounder/yemen-crisis>.

1125 Iain Walker, 'Yemen: The Resurgent Secessionism in the South' in: *Pavković/ Radan Secession Research Companion* (n 392).

II) The Unification of Germany (1990)

1) General Background

On 3 October 1990, the Federal Republic of Germany (FRG or colloquial "West Germany") and the German Democratic Republic (GDR or colloquial "East Germany") united, as was agreed in their bilateral Unification Treaty (UT)[1126] from August that year.

The two states had emerged after the Second World War from the several occupation zones of the defeated German Reich. The victorious allied powers of the SU, UK, USA, and France had completely occupied the territory of Germany, a country that, in turn, had lost all its state power. While the UK, USA, and France built the Western occupation zone, which became the FRG, the Eastern part, the later GDR, remained under Soviet rule. When the FRG on 23 May 1949 and the GDR on 7 October 1949 proclaimed their foundations, the political division of Germany became manifest and, from 1961 onwards, was solidified by a wall between the two zones. The GDR, part of the "East Bloc" and hence closely associated with and under the lead of the SU as well as a member of the Treaty of Warsaw[1127], implemented a socialist ideology and planning economy. The FRG was included into the western European and transatlantic network, especially the North Atlantic Treaty Organization (NATO),[1128] and structured its state according to principles of a free-market economy and liberal democracy. That separation was to last for more than 40 years and, over time, was so consolidated that most states recognized the GDR as an

1126 Treaty on the Establishment of German Unity (31 August 1990), 30 ILM 463 (FRG/GDR). The treaty provided in Art. 1 for the accession of the five recently (re-)built "Länder" of the GDR and East-Berlin to the FRG. For an overview Gerhard Wegen, 'Introductory Note on the Treaty on the Establishment of German Unity' (1991), 30 ILM 457; for a detailed discussion Bruno Schmidt-Bleibtreu, 'Der Einigungsvertrag in seiner rechtlichen Gestaltung und Umsetzung' in Klaus Stern and Bruno Schmidt-Bleibtreu (eds), *Verträge und Rechtsakte zur Deutschen Einheit: Band 2 Einigungsvertrag und Wahlvertrag* (C.H. Beck 1990) 57.

1127 Treaty of Friendship, Co-operation and Mutual Assistance (14 May 1955) UNTS 219 3.

1128 Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany (23 October 1954) UNTS 243 308 and Accession by The Federal Republic of Germany to the North Atlantic Treaty (6 May 1955) UNTS 243 313.

independent state.[1129] In 1973, both states became members of the UN.[1130] The FRG, however, never fully recognized the GDR as a foreign state but considered it to be part of the "whole of Germany" ("Deutschland als Ganzes", "Gesamtdeutschland") and was constitutionally indebted to the goal of German unification.[1131] That "whole of Germany" again was the continuator, not the successor, state of the German Reich, which had never ceased to exist.[1132] The accession of the GDR to the FRG took place in 1990 after a phase of intense international upheavals and the demise of the political power of the East Bloc. The fall of the Berlin Wall in November 1989 marked the beginning of the end of the GDR and of the SU. Moreover, it heralded the end of the Cold War and was seen as a breaking point in European history. The unification of the two German states came with the lifting of the administration by the four occupying powers and all sovereign rights were transferred back to the unified Germany according to Art. 7 of the "Two-plus-Four-Treaty" from 12 September 1990.[1133]

The (re-)unification of the two German states is generally considered a case of an incorporation or absorption of one state, the GDR, into the

1129 Rudolf (n 872), 2/3; Hafner and Kornfeind (n 27), 9/10; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 411; Oeter, 'German Unification and State Succession' (n 283), 351.

1130 See https://www.un.org/en/about-us/growth-in-un-membership.

1131 Preamble of the GG until 1990, see *Grundlagenvertrag,* 2 BvF 1/73, 31 July 1973, BVerfGE 36 1 17, 22-24 (German Federal Constitutional Court [BVerfG]). Mansel (n 615), 442 picturing German unification as „abortion of the GDR's seccession attempt"; in this direction also Jochen A Frowein, 'Germany Reunited' (1991), 51 ZaöRV 333 347 who speaks of the GDR as "another state" but at the same time of the foundation of the GDR as a "non-effective secession"; cf. Oeter, 'German Unification and State Succession' (n 283), 350–351.

1132 *BVerfG Grundlagenvertrag* (n 1130) 16; Legislative Explanatory Memorandum on the Treaty of German Unity (31 August 1990) BT-Drs. 11/7760 (1990) (FRG), 358; also Rudolf (n 872), 4; Jochen A Frowein, 'The Reunification of Germany' (1992), 86(1) AJIL 152 157; Christian Jasper, 'Art. 123' in Michael Sachs (ed), *Grundgesetz* (9th ed. C.H. Beck 2021) para. 1. On the different views on this topic Czaplinski (n 306), 89–90; Ingo von Münch, 'Deutschland: gestern - heute - morgen: Verfassungsrechtliche und völkerrechtliche Probleme der deutschen Teilung und Vereinigung', 1991(14) NJW 865 865-868.

1133 Treaty on the Final Settlement with Respect to Germany (12 September 1990) UNTS 1696 124 = ZaöRV 1991, 494 = 29 ILM (1990) 1186.

FRG[1134] and not as a merger,[1135] as no new state came into being. The FRG continued with respect to its territory and, at the same time, was a successor with respect to the territory of the GDR, which perished as a state.[1136] That perception was mirrored in (the old version of) Art. 23 of the constitution of the FRG, the *Grundgesetz* (GG),[1137] which became obsolete and was completely re-drafted in 1990.

The declared goal of the unification process was the accession of the GDR to the FRG and hence the establishment of a unified sole state with a common legal system.[1138] As in the case of Yemen, the unification required the reconciliation of two legal systems built upon different ideological and economical foundations. Contrary to the case of Yemen, however, the reconciliation was not sought through the preservation and later assimilation of both legal systems but by extension of the FRG's legal system to the ac-

1134 Dörr *Inkorporation* (n 397) 399–404; Crawford *The Creation of States* (n 308) 673–675; ILA, 'Aspects of the Law of State Succession' (n 616) 8, 27; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 519, 522; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 397, 403; Hafner and Kornfeind (n 27), 1; Thomas Giegerich, 'Art. 123 (August 2012)' in Roman Herzog and others (eds), *Dürig/Herzog/Scholz: Grundgesetz Kommentar* (C.H. Beck 2022 (lose leaf)) para. 56; Oeter, 'German Unification and State Succession' (n 283), 351–352; Arnauld *Völkerrecht* (n 255) § 2 para. 104; Herdegen (n 255) § 29 para. 6; Jennings and Watts (n 27) "absorption".

1135 Shaw, 'State Succession Revisited' (n 259), 54–56; Hailbronner (n 612), 34.

1136 Jeremy Hill and Michael Wood, 'Germany, Reunification of (1990) (2022)' in: *MPEPIL* (n 2) paras. 1, 15; Hafner and Kornfeind (n 27), 10; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 411; Oeter, 'German Unification and State Succession' (n 283), 352; cf. also Frowein, 'The Reunification of Germany' (n 1131), 157. On the intricacies of this model Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 144–145. Notification to the UNSG (3 October 1990) https://treaties.un.org/pages/historicalinfo.aspx#Germany (FRG) "Through the accession of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, the two German States have united to form one sovereign State, which as a single Member of the United Nations remains bound by the provisions of the Charter in accordance with the solemn declaration of 12 June 1973. As from the date of unification, the Federal Republic of Germany will act in the United Nations under the designation 'Germany'".

1137 Grundgesetz (23 May 1949) BGBl I 1949 1 (FRG); for an English translation cf. https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0832.

1138 Cf. Explanatory Memorandum UT (n 1131) 356. For an elaborated view on the term "unified law" and earlier instances of unifying different legal systems in German history Rolf Grawert, 'Rechtseinheit in Deutschland' (1991), 30(2) Der Staat 209 especially 209-222.

ceded territory. Preceding formal unity, in May 1990, the GDR and the FRG had concluded the Treaty Establishing a Monetary, Economic and Social Union (TMU).[1139] That treaty was a first step towards unity and already incorporated important repercussions for the every-day life of Germans, especially those in the eastern part: It introduced the rule of the "social market economy" and provided for adapting the GDR pension and other social welfare schemes to those of the FRG. Even at that point, economic, trade, and corporate law had been unified in large parts.[1140] The UT and its annexes, which after unification became statutory law,[1141] contained more detailed rules.[1142]

2) International Treaties

Pursuant to Art. 11 UT, the FRG's international treaties, including treaties establishing membership in an international organization, were in general deemed to remain in force after unification and were applicable to the whole territory of the unified Germany. Exceptions were listed in Annex I to the UT and encompass treaties of a special "political nature" such as treaties with the three occupying powers or treaties concerning the deployment of foreign troops and arms on German soil, especially the status of forces' agreements with NATO partners. Conversely, according to Art. 12 UT, treaties concluded by the GDR were to be "discussed" ("erörtert") with the treaty partners to ascertain their continued validity, adaption, or extinction, para. 1. The unified Germany hence reserved its freedom to decide on the succession into the GDR's international treaty obligations, cf. para. 2. Treaties were intentionally left in a state of limbo until a final

1139 Treaty Establishing a Monetary, Economic and Social Union (18 May 1990) BGBl 1990 II 537 (FRG/GDR) = 29 ILM (1990) 1120; for a general overview Gerhard Wegen and Christopher L Crosswhite, 'Introductory Note on the Treaty Establishing a Monetary, Economic and Social Union' (1990), 29(5) AJIL 1108.

1140 Georg Brunner, 'Was bleibt übrig vom DDR-Recht nach der Wiedervereinigung?' [1991] JuS 353, 355; Reinhard Nissel, 'Fortgeltendes DDR–Recht nach dem Einigungsvertrag', 1990(9) DtZ 330 333.

1141 Art. 45 para. 2 UT (n 1125); Grawert (n 1137), 222; Klaus Stern, 'Die Wiederherstellung der staatlichen Einheit' in: *Stern/Schmidt-Bleibtreu Verträge und Rechtsakte zur Deutschen Einheit* (n 1125) 1 39; for the TMU (n 1138) cf. Art. 40 para. 1 UT (n 1125) and Münch (n 1131), 868.

1142 The UT (n 1125) contains only 45 articles, but its annexes and protocols span over more than 300 pages of the Official Gazette.

decision was to be made; they were not extinguished automatically.[1143] Eventually, most of the treaties of the former GDR[1144] were discontinued,[1145] including treaties with a humanitarian goal,[1146] and localized treaties[1147]. With only few exceptions,[1148] that procedure seems to have been accepted

1143 Cf. Explanatory Memorandum UT (n 1131) 362; Oeter, 'German Unification and State Succession' (n 283), 360–362 links this decision to the principle of *rebus sic stantibus*; differently Münch (n 1131), 868.

1144 Ulrich Drobnig, 'Das Schicksal der Staatsverträge der DDR nach dem Einigungsvertrag' [1991] DtZ 76, 76/77 speaks of around 6000 treaties; Papenfuß (n 306), 484 speaks of a data file of around 2600 treaties the GDR authorities had compiled for consultation.

1145 Cf. BGBl. Fundstellennachweis B (2021) 1063-1068 „Termination of international Treaties with Third States" and "Treaties with the former GDR" listing several treaties which came to an end when the GDR vanished. Cf. also Zimmermann, 'State Succession in Respect of Treaties' (n 1107) 88; Hill and Wood, 'Germany, Reunification of (1990) (2022)' (n 1135) para. 68; the ILA, 'Aspects of the Law of State Succession' (n 616) 10 speaks of 2044 treaties which lapsed by the date of unification; Papenfuß (n 306), 485 "more than 80 percent"; ibid 479 also mentions "only two multilateral agreements" of the GDR the FRG acceded to. The FRG e.g. succeeded by exchange of notes to the GDR's compensation agreements with several states, cf. *Lump Sum Compensation Agreement GDR-Austria,* 2 BvR 194/05, 8 November 2006, BVerfGK 9 412 (German Federal Constitutional Court [BVerfG]) with headnote by Reimold, 'Headnote on Ms S and ors, Decision on a constitutional complaint, 2 BvR 194/05' (n 996). Speaking of the "highly politicized character" of "nearly every" GDR treaty Oeter, 'German Unification and State Succession' (n 283), 360.

1146 Oeter, 'German Unification and State Succession' (n 56), 365 considers the loss of some individual rights as negligeable compared to the formation of a uniform legal system.

1147 ILA, 'Aspects of the Law of State Succession' (n 616) 10; cf. also Czaplinski (n 306), 100–101 with respect to the Polish border; apparently differently Papenfuß (n 306), 486; Hill and Wood, 'Germany, Reunification of (1990) (2022)' (n 1135) 68. On the Polish border and the "Treaty of Görlitz" also Frowein, 'Germany Reunited' (n 1130), 338–343; Oeter, 'German Unification and State Succession' (n 283), 365; Hailbronner (n 612), 26–27.

1148 The Netherlands reportedly did not accept the expiry of bilateral treaties with the GDR and referred to Art. 31 VCSST, see Ribbelink (n 1090), 161; ILA, 'Aspects of the Law of State Succession' (n 616) 10. On the solution cf. Protocol inzake de gevolgen van de Duitse eenwording voor de bilaterale verdragsrelaties, met bijlagen (25 January 1994) Tranctatenblad (NL) (1994) No. 81 (Netherlands/FRG); Protocol tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland inzake de gevolgen van de Duitse eenwording voor de bilaterale verdragsrelaties, met bijlagen, Bonn, 25.01.1994 Tranctatenblad (NL) (1994) No. 81. On the view of the European Commission see Frowein, 'The Reunification of Germany' (n 1131), 159; Oeter, 'German Unification and State Succession' (n 283), 372.

by the international community, especially the treaty partners of the former GDR.[1149]

As a consequence, many authors consider the rule encapsulated in Art. 15 VCSST, the moving treaty frontiers rule, to be applicable to the case.[1150] The acceptance is significant since the VCSST only provides for the rule in cases of transfer of "part of the territory", while Art. 31 VCSST is applicable to the "uniting of states"[1151]. It is, however, difficult to determine conclusively whether the FRG in general discarded the rule encapsulated by Art. 31 (1) VCSST or, alternatively, opted for an individual approach as foreseen by Art. 31 (1) lit. a VCSST ("unless […] the successor State and the other State party or States Parties otherwise agree").[1152]

Art. 12 para. 1 UT refers to the protection of legitimate expectations ("Vertrauensschutz"), the interests of treaty partners, existing treaty commitments of the FRG, principles of a free, democratic order, and the rule of law ("rechtsstaatlich"). With a view to acquired rights, in particular the term "legitimate expectations"[1153] could function as a vehicle to include private interests into the treaty. But it is not evident that the listed requirements

1149 Cf. Papenfuß (n 306), 476; Aust *Modern Treaty Law and Practice* (n 294) 326.

1150 Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 338; Frowein, 'The Reunification of Germany' (n 1131), footnote 32.

1151 Therefore interpreting „uniting" only as "merger" Mansel (n 615), 441; Ulrich Magnus, 'Deutsche Rechtseinheit im Zivilrecht - die Übergangsregelungen' [1992] JuS 456, 459; differently Czaplinski (n 306), 99; Papenfuß (n 306), 470 who holds that Art. 31 VCSST "assumes"also in cases of incorporation that "two separate legal territories remain in existence"; Frowein, 'The Reunification of Germany' (n 1131), 158 who only views the consequence of Art. 31 VCSST as "inappropriate" in cases of incorporation; in the same way Hailbronner (n 612), 36–37.

1152 The fact that the Explanatory Memorandum UT (n 1131) 362 only mentions the "moving treaty frontiers" rule with respect to the FRG's treaties (Art. 11 UT), but explicitly stated that the GDR's treaties would not "generally extinguish" in the course of accession (Art. 12 UT), would rather militate for the second, more flexible approach. Reportedly, the GDR had favored the application of Art. 31 VCSST, see Papenfuß (n 306), 477. Several authors (Stern, 'Die Wiederherstellung der staatlichen Einheit' (n 1140) 52; Oeter, 'German Unification and State Succession' (n 283), 359–362) refer to the *clausula rebus sic stantibus*, codified in Art. 62 VCLT (n 291); cp. also ILA, 'Aspects of the Law of State Succession' (n 616) 8, 10.

1153 Art. 29 UT (n 1125) even provided for the protection of legitimate expectations with respect to trade treaty relations with states of the (Eastern) Council for Mutual Economic Assistance (COMECON). In comparison to Art. 12 UT, Art. 29 para. 1 UT speaks of "developing" and "intensifying" the trade relationships. To achieve this goal, even interim rules providing for exceptions were taken into consideration, Art. 29 para. 2 UT. Yet, the economic and political decay of the Soviet Bloc also entailed the demise of the COMECON which was officially terminated

functioned as real constraints on the FRG's leeway for consultations.[1154] Interestingly, in relation to that point and as an exception to Art. 12 UT, the FRG deliberately chose to make use of the tool under Art. 3 UT and to declare, by way of federal decree, that several GDR treaties with other states on social security would continue to *apply*.[1155] However, that continued application was soon limited to the end of 1992 or of 1995.[1156] The continuation was, therefore, more an interim application than a genuine continuation of a treaty relationship.[1157] German social courts explicitly

in 1991. Therefore, the promise given in the UT was not tested. On this situation see also Papenfuß (n 306), 479–480.

1154 ILA, 'Aspects of the Law of State Succession' (n 616) 10 doubts the existence of criteria; also Oeter, 'German Unification and State Succession' (n 283), 377 "it is doubtful whether the principle of "Vertrauensschutz" really is a legal duty arising under the laws of succession or the principles of *rebus sic stantibus*" [italics in original]; differently Drobnig (n 1143), 79–80. Cf. also Papenfuß (n 306), 480 who mentions that "As part of the protection of confidence principle for the benefit of individuals, even after October 3, 1990, the Federal Republic of Germany continued to finance all scholarships and vocational training that the GDR had previously promised to finance under international treaties. In addition, all certificates, diplomas, degrees and academic grades obtained under GDR agreements on equivalence were recognized by united Germany on the understanding that they did not automatically entitle holders to access to jobs in the Federal Republic."

1155 Verordnung über die vorübergehende weitere Anwendung verschiedener völkerrechtlicher Verträge der Deutschen Demokratischen Republik im Bereich der sozialen Sicherheit (3 April 1991) BGBl. 1991 II 614 (FRG) (concerning e.g. Bulgaria, the CSFR, Hungary, Poland, Romania and the SU). Cf. ILA, 'Aspects of the Law of State Succession' (n 616) 10; Zimmermann, 'State Succession in Respect of Treaties' (n 1107) 88.

1156 Art. 1 No. 5 lit. b) Verordnung zur Änderung der Verordnung über die vorübergehende weitere Anwendung verschiedener völkerrechtlicher Verträge der Deutschen Demokratischen Republik im Bereich der sozialen Sicherheit (18 December 1992) BGBl. 1992 II 1231 (FRG); incorrect therefore the statement in ILA, 'Aspects of the Law of State Succession' (n 616) 10 that "ces accords a Été [sic] prolongée successivement *ad infinitum*" [italics in original].

1157 The government expected "uneven" financial burdens for the FRG compared to the treaty partners due to "unilateral immigration flows from Middle-, East- and Southeast-Europe", did not want to accord immigrants to the GDR a better position than immigrants to the FRG, and considered the "integration" principle to be outdated, cf. BR Drs. 776/92, 05.11.1992 at 7, 11; also Bernd Abendroth, 'Beendigung der Sozialversicherungsabkommen der DDR: Weitreichende Übergangsregelungen vorgesehen' (1993), 40(6) DAngVers 209 210. On the different approach with respect to treaties on social security the FRG had concluded with the former Yugoslavia see Reimold, 'Headnote on Ms S and ors, Decision on a constitutional complaint, 2 BvR 194/05' (n 996).

rejected the idea of a FRG succession into these treaties but declared the bilateral treaties to have been extinguished at the date of unification.[1158]

3) Domestic Law

With respect to domestic law, the UT opted for a similar, albeit more nuanced, approach.[1159]

a) The Continuity of the Legal Order in General

According to Art. 3 UT, the GG, subject to exceptions provided for in the UT itself,[1160] would be applicable to the territory of the former GDR. Only few provisions in the GG were changed in the course of unification,

1158 *Continued Application of the Treaty on Social Security with the SU,* B 4 RA 4/98, 29 September 1998, BSGE 83 19 paras. 16-17, 20-23, 29 (German Federal Social Court (BSG)); *Continued Application of Social Security Treaty with Bulgaria,* B 4 RA 62/99 R, 29 June 2000 paras. 29–30, 38 (German Federal Social Court (BSG)); *Continued Application of the Treaty on Social Security with SU (II),* B 5 RJ 6/00 R, 25 July 2001 para. 13 (German Federal Social Court (BSG)); but cf. Explanatory Memorandum UT (n 1131) 362 which leaves the status of the treaties in a case of limbo. Additionally, the social courts often even curtailed the interim application period to 31 December 1991 *Continued Application of the Treaty on Social Security with the SU* (n 1157) para. 37; *Recognition of Work in East-Bloc States,* B 13 R 427/12 B, 7 August 2014, SozR 4-8580 Art 7 Nr 1 (German Federal Social Court [BSG]). This meant that much of the work conducted in East-Bloc states was not recognized by the FRG's pension authorities and pension claims therefore rejected, also for German nationals, cf. e.g. *Continued Application of the Treaty on Social Security with the SU* (n 1157); *Recognition of Work Executed in East-Bloc States* (n 1157); *Continued Application of Social Security Treaty with Bulgaria* (n 1157) para. 42. Cf. for the consequences e.g. *Continued Application of the Treaty on Social Security with the SU* (n 1157) especially para. 30 (denying the applicant any claim to old-age pension under German law despite years of work in the SU because she had not attained the pension age by the end of 1992 but only in 1993). On the constitutionality of these provisions *Continued Application of Social Security Treaty with Bulgaria* (n 1157) paras. 44-46. For further details Abendroth (n 1156), 210–214.

1159 For an overview of the different alternatives envisaged before unification Herwig Roggemann, 'Von der interdeutschen Rechtsvergleichung zur innerdeutschen Rechtsangleichung' (1990), 45(8) JZ 363.

1160 Such as Art. 6 UT (concerning Art. 131 GG) or Art. 7 UT.

cf. Art. 4 UT.[1161] The GG contains no explicit provision dealing with the survival of the GDR's domestic legal order.[1162] Art. 8 and 9 UT contain the basic rules with respect to domestic law under the constitution:[1163] Unless there were explicit exceptions, especially contained in Annex I, FRG law was implemented in the territory of the former GDR as well, Art. 8 UT.[1164] Yet, GDR law, in principle, remained in force unless it contradicted the law of the FRG and/or as long as the special field was not regulated by FRG law or EC law, Art. 9 para 1 UT.[1165] For specific subjects enlisted in Annex II of the UT, the GDR law even remained in force if it was (merely) conform with the GG and EC law, Art. 9 para. 2 UT. Thus, the transitional arrangements for harmonizing the law were subject to a sophisticated rule-exception relationship, which was regulated in Annex I and II to the

1161 For an overview of the constitutional changes Stern, 'Die Wiederherstellung der staatlichen Einheit' (n 1140) 41–46.

1162 Art. 123 para. 1 GG ("Law in force before the Bundestag first convenes shall remain in force insofar as it does not conflict with this Basic Law") was only applicable to the legal order of the German Reich, i.e. a case of state continuity. It was therefore not applicable to the accession of the GDR, a case of state succession, Hans D Jarass, 'Art. 123' in Hans D Jarass and Bodo Pieroth (eds), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* (17th ed. Beck 2022) paras. 4; Jasper, 'Art. 123' (n 1131) paras. 8, 18; Roland Broemel, 'Art. 123' in Jörn-Axel Kämmerer and Markus Kotzur (eds), *von Münch/Kunig Grundgesetz Kommentar* (7th ed. C.H. Beck 2021) para. 17; Fabian Wittreck, 'Art. 123' in Horst Dreier (ed), *Grundgesetz-Kommentar* (3rd ed. Mohr Siebeck 2018) para. 27; Giegerich, 'Art. 123 (August 2012)' (n 1133) para. 60. Furthermore, it is disputed within German academia if this norm is of a constitutive (Jarass, 'Art. 123' (n 1161) Rn. 1; Jasper, 'Art. 123' (n 1131) para. 2; Wittreck, 'Art. 123' (n 1161) para. 19) or merely a declaratory (Heinrich A Wolff, 'Art. 123' in Peter Huber and Andreas Voßkuhle (eds), *von Mangoldt/Klein/Starck: Grundgesetz Kommentar* (7th ed. C.H. Beck 2018) paras. 4, 5, 10; cf. Christian Seiler, 'Art. 123' in Volker Epping and Christian Hillgruber (eds), *Beckscher Online Kommentar GG* (52nd ed. C.H. Beck 2022) para. 1.1; Broemel, 'Art. 123' (n 1161) para. 2) character. Not completely clear, speaking of a constitutive effect but maintaining that statutory law "has to remain in place in order to "prevent legal wholes" due to "legal security" Giegerich, 'Art. 123 (August 2012)' (n 1133) paras. 1-2.

1163 In more detail Michael Kloepfer and Heribert Kröger, 'Rechtsangleichung nach Art. 8 und 9 des Einigungsvertrags' [1991] DVBl 1031, 1032–1040.

1164 The reason for this approach was that, for the sake of legal security, unity ought to be achieved as swiftly as possible, cf. Explanatory Memorandum UT (n 1131) 356. Cf. also Brunner (n 1139), 353 who suggests that shortly later unity would not have been possible any more. Kloepfer and Kröger (n 1162), 1031 hold the view that FRG law did not apply automatically to the GDR's territory, but this extension of scope had to be provided for explicitly.

1165 For an overview of GDR law remaining in force Brunner (n 1139); Nissel (n 1139).

UT. GDR law enacted *after* the signing of the UT only remained in force if, additionally,[1166] the FRG agreed, Art. 9 para. 3 UT. In comparison, all *decisions* of GDR courts and administration rendered before unification remained in force, Art. 18, 19 UT.[1167] Hence, the UT, on the one hand, opted for the continuity of the GDR order but, on the other hand, declared FRG law to be applicable to the former GDR territory and to supersede conflicting GDR law.

GDR law thus, in principle, only applied in gaps or in specifically named exceptions. Protection of acquired rights of GDR nationals therefore had to be sought through those exceptions. As an example, Art. 4 No. 5 UT introduced into the GG Art. 143, which, in paras. 1 and 2, provided for interim periods in which the laws within the territory of the former GDR were to be adapted to the new constitutional order and could therefore deviate from the GG as long as they did not encroach upon certain core requirements. Those particularly "sensitive" areas of law were made subject to special interim regimes until 1992 or 1995 and were supposed to be grounded on a completely new basis after unification.

b) Private Rights

Unification was an enormous task as it had to be effectuated in a comparably short period of time and touched upon a vast array of topics of relevance to individual rights. To cover all of them would go beyond the scope of this book.[1168] However, the book will investigate two subject areas of particular relevance: social welfare law, especially pension law (Art. 30 UT), and the law on property.

1166 Kloepfer and Kröger (n 1162), 1038.

1167 Both articles provide for the possibility of revocation of such decisions in case they violate the rule of law, though. The Explanatory Memorandum UT (n 1131) says both articles only "clarify" the situation which militates in favour of their declaratory character.

1168 Cf. the list of references in Kloepfer and Kröger (n 1162), footnote 9. For an overview of the changes in private law Magnus (n 1150), 457–461. For the new challenges posed to private international law and several other fields of German private law see e.g. Erik Jayme and Oliver Furtak (eds), *Der Weg zur deutschen Rechtseinheit: Internationale und interne Auswirkungen im Privatrecht* (C.F. Müller 1991).

aa) Old-Age Pensions of Former GDR Citizens

The pension systems in both states had functioned pursuant to different schemes and, in particular, to different social environments established on disparate political assumptions.[1169] The TMU in Art. 20 para. 1 required the GDR to "introduce all necessary measures to adapt its pension law to the pension insurance law of the Federal Republic of Germany" but a good faith protection of legitimate expectations was foreseen for "persons approaching pensionable age" for a "transitional period of five years". Art. 20 para. 2 TMU contained the basic decisions for adaption, stipulating that

> "[t]he existing supplementary and special pensions schemes shall be discontinued as of 1 July 1990. *Accrued claims and entitlements shall be transferred to the pension insurance fund*, and benefits on the basis of special arrangements shall be reviewed with a view to abolishing unjustified benefits and reducing excessive benefits." [emphasis added]

Thus, while in principle already accrued rights of GDR citizens should be protected as "acquired rights",[1170] "special" pension schemes were abolished for the future and reviewed for the past. Art. 30 UT stipulated rules for an interim period until the GDR pension scheme was to be transferred into the FRG system. For example, for those retiring between 1 January 1992 and 30 June 1995, Art 30 para. 3 UT contained a guarantee that their pensions were to amount to at least the basic amount they would have received under GDR law in 1990 ("Zahlbetragsgarantie"). Other GDR employees close to retirement were granted an "early retirement payment" of at least 65% of their last wage until the beginning of their pension, Art. 30 para. 2 UT. To a large part, the expenses were born by the FRG's social security system, cf. Art. 20 para. 2 sentence 4 TMU. Those principles were cast into federal statutory law in 1991 and put into practice in 1992, when the two systems were united.[1171]

1169 For an overview of the differences Judith Kerschbaumer, *Das Recht der gesetzlichen Rentenversicherung und die Deutsche Einheit* (VS Verlag 2011) 78–90.

1170 The ECtHR in *Kuna v. Germany,* Appl. No. 52449/99, 10 April 2001, ECLI:CE:ECHR:2001:0410DEC005244999 (ECtHR) even translated the phrase "[a]ccrued claims and entitlements" as "acquired rights".

1171 See on the factual and legal background also ibid. and *Klose and Others v. Germany,* Appl. No. 12923/03, 25 September 2007, Decision on Addmisibilty (ECtHR).

While those seemingly straightforward provisions tend to support acquired rights of GDR citizens with respect to their pension rights, their factual implementation proved technically difficult and politically delicate. As could be expected, especially the distinction between "ordinary" and "supplementary" GDR pensions became a bone of contention. What was called "transition" was not treated as a "transferal" of rights acquired under the GDR pension regime but often seen as a "novation" of pension claims under FRG law.[1172] According to the German Constitutional Court (*Bundesverfassungsgericht* (BVerfG)), while positions acquired under GDR law could be protected as property, they could only fall under the respective constitutional guarantee if accepted and acknowledged by the UT.[1173] According to the BVerfG, the FRG authorities, when negotiating and concluding the UT, were bound by the guarantee of property under the GG[1174] but had a wide margin in how to define and modify property as long as any curtailments were not disproportionate or unbearable.[1175] They were not bound to treat persons having acquired pension entitlements under GDR law as if they had acquired these entitlements within the FRG.[1176] An important argument for cutting the specific extra payments some GDR citizens had received was, e.g., the viability of the social system in the FRG.[1177] However, the BVerfG denounced a further capping of the "Zahlbetragsgarantie" as unconstitutional as those affected were held to have a legitimate expectation in the amount stipulated in the UT. Although such payments of sometimes high pensions later seemed politically inopportune,

1172 *Recognition of Times of Work in the Former SU,* B 4 RA 34/98 R, 29 September 1998, SozR 3-8000 Art 3 Nr 1, SozR 3-8580 Art 7 Nr 1 para. 11 (German Federal Social Court [BSG]) "it was necessary […] to *substitute* and form *new* claims, rights and entitlements through a *constitutive* federal act within the frame and according to the stipulations of the federal legal order" [own translation from German, emphasis added].

1173 *Rentenüberleitung I,* 1 BvL 32/95, 1 BvR 2105/95, 28 April 1999, BVerfGE 100 1 paras. 123-130, 132-133 (German Federal Constitutional Court [BVerfG]); affirmed by *Rentenüberleitung II,* 1 BvR 713/13, 13 December 2016, NJW 2017 876 para. 10 (German Federal Constitutional Court [BVerfG]); for an overview of the leading BVerfG decisions on the unification of the two pension systems see [in German] https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/1999/bvg99-052.html.

1174 *BVerfG Rentenüberleitung I* (n 1172) para. 134.

1175 ibid paras. 135-137, 143.

1176 ibid para. 142; for a succinct overview of the jurisprudence of the BVerfG on this issue Kerschbaumer (n 1168) 122–125.

1177 *BVerfG Rentenüberleitung I* (n 1172) para. 144.

that consequence was already known when the UT was drafted.[1178] The BVerfG reasoning was accepted by the ECtHR, which declared pertaining complaints inadmissible as no *prima facie* case of a violation of P-I 1 could be made.[1179]

> "La Cour rappelle qu'un requérant ne peut alléguer une violation de l'article 1 du Protocole no 1 que dans la mesure où les décisions qu'il incrimine se rapportent à ses « biens » au sens de cette disposition. La notion de « biens » peut recouvrir tant des « biens existants » que des valeurs patrimoniales, y compris des créances, en vertu desquelles le requérant peut prétendre avoir au moins une « espérance légitime » d'obtenir la jouissance effective d'un droit de propriété. […] En l'espèce, ni le Traité d'Etat ni le Traité d'unification n'ont conféré aux requérants des droits qui iraient au-delà de ceux conférés par les lois litigieuses telles qu'amendées suite aux arrêts de principe de la Cour constitutionnelle fédérale."[1180]

Thus the ECtHR reiterated that, to qualify under P-I 1, a claimant had to prove a legal right acknowledged by the UT. Even if the FRG was the legal successor of the GDR, the ECtHR did not assume continuity of individual positions derived from pension legislation unless the legislation was accepted by the FRG. The ECtHR again showed a remarkable self-restraint in controlling the German legal acts.

> "Or dans les affaires liées à la réunification allemande dont elle a eu à connaître, la Cour a évoqué le contexte unique de celle-ci et l'immense tâche à laquelle le législateur était confronté pour régler toutes les questions qui se sont nécessairement posées lors du passage d'un régime communiste à un régime démocratique d'économie de marché. A cet égard, le législateur disposait d'une ample marge d'appréciation […]."[1181]

For the most claimants, that approach led to acceptable solutions, and pensioners were better off than they would have been in the GDR.[1182] Yet,

1178 ibid paras. 166-182, 185.

1179 *ECtHR Klose and Others* (n 1170), affirmed by *Peterke and Lembcke v. Germany,* Appl. No. 4290/03, 4 December 2007, Decision on Admissibility (ECtHR).

1180 *ECtHR Klose and Others* (n 1170) [references omitted].

1181 ibid. [references omitted]. Similarly, but with respect to Art. 14 ECHR (in combination with P-I 1) *ECtHR Kuna v. Germany* (n 1169).

1182 Research Services of the German Parliament, 'Von der Rentenüberleitung betroffene besondere Personen- und Berufsgruppen: Expert Opinion' (22 March 2019)

for some former GDR employees, the transfer engendered harsh economic and personal consequences, e.g., workers eligible for extra pensions under the GDR system or women divorced in the GDR.[1183] The disadvantage was due to the transfer of pension biographies into a completely different economic and social system without enough account being taken of their particularities or without enough willingness or ability to adapt the FRG system to new realities in the midst of a huge, exceptional transition process.[1184] Therefore, the hardships tended often not to result from acquired rights not being recognized (in the GDR the mentioned individuals would not have received much more money) but from the change of the social system those people had previously trusted and the corresponding change in the effective value of the pension. Such a prospective value, however, was not protected.

Resultingly, a general, not an individual, approach to acquired pension rights was administered. Such an approach, in particular, took only limited notice of legitimate expectations of former GDR citizens. The approach has, of course, to be evaluated with an eye to the enormous task of transitioning about four million GDR pension biographies to the FRG system[1185] while trying to maintain payments already running. The envisaged political solution to the problem was to initiate a financial fund for cases of hardship,[1186] but such a fund has still not been established.[1187] It should not be forgotten that, at the time of unification, the GDR was practically bankrupt[1188] and

WD 6 - 3000 - 047/19 6. Cf. on the first reforms still under GDR authority in July 1990 Kerschbaumer (n 1168) 99 and for the later developments ibid 117, 120.

1183 For an overview *Expert Opinion Pension Claims* (n 1181). On divorced women, CEDAW Committee, 'Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Germany' (9 March 2017) UN Doc. CEDAW/C/DEU/CO/7-8 para. 49 lit. (d) and the reply by the FRG, 'CEDAW Interim Report' (March 2019) 6–8 <https://www.bmfsfj.de/resource/blob/136168/41562bdf33d23798f1b1fcbb21f669fc/20190517-cedaw-zwischenbericht-englisch-data.pdf>.

1184 On the parliamentary discussion Kerschbaumer (n 1168) 111–116, in general ibid 125. Moreover, wrong perceptions about the future developments, e.g. the convergence of salaries and wages in both parts of Germany, see Art. 30 para. 5 UT, have influenced the process, too.

1185 *BVerfG Rentenüberleitung I* (n 1172) para. 10.

1186 Cf. German Government, 'Coalition Agreement of the Governing Parties in Germany' (2018) 93 paras. 4323-4325.

1187 German Government, 'Antwort auf die Kleine Anfrage: Zeitnahe Lösung für die Härtefälle in der Rentenüberleitung' (12 October 2020) BT-Drs. 19/23275.

1188 Hill and Wood, 'Germany, Reunification of (1990) (2022)' (n 1135) para. 12.

hence the actual value of the pension claims would have been severely diminished.

bb) Property Questions, Especially Land Rights

The notion of property was different in the two German states.[1189] In the openly socialist GDR state, private property, especially property in the hands of natural persons, was a rare exception.[1190] Property was classified according to its function.[1191] In the wake of unity on 15 June 1990, the GDR and the FRG concluded the "Joint Declaration" ("Gemeinsame Erklärung")[1192]. That document, pursuant to its own words, tried to solve problems emanating from the separation of the two Germanys, the related moving of parts of the population from East to West, and the two distinct national legal orders. Notably, legal certainty ("Rechtssicherheit"), legal clarity ("Rechtseindeutigkeit"), and the right of property were considered guiding principles. Moreover, it was agreed that a "(socially) acceptable balance of different interest" ("verträglicher Ausgleich verschiedener Interessen") had to be found in order to secure legal peace ("Rechtsfriede") in a future united Germany.

After unification, the principle of Art. 8 UT applied which meant that the Civil Code of the FRG, the Bundesgesetzbuch (BGB), and hence the corresponding notion of property was extended to the GDR territory.[1193] However, in principle, property acquired under GDR law was recognized,

1189 Starting with the same civil code (the BGB from 1900), after their separation both states interpreted and modified the code independently. Eventually, the GDR even enacted its own new Civil Code, the ZGB, in 1976. On the historical evolution Magnus (n 1150), 456–457.

1190 On the notion of property in the GDR George Turner, 'Der Eigentumsbegriff in der DDR' [1990] NJW 555; cf. Magnus (n 1150), 460; decidedly negative Otto Kimminich, 'Bemerkungen zur Überleitung der Eigentumsordnung der ehemaligen DDR' in Klaus Stern (ed), *Deutsche Wiedervereinigung. Die Rechtseinheit: Band I Eigentum - Neue Verfassung - Finanzverfassung* (Heymanns 1991) 3-14 (completely "incompatible" notions of property).

1191 Susanne Jung and Milos Vec, 'Einigungsvertrag und Eigentum in den fünf neuen Bundesländern' [1991] JuS 714, 714–715.

1192 Gemeinsame Erklärung (Annex III to the UT) (15 June 1990) BGBl II 1990 1237 (FRG/GDR). Before incorporation into the UT, the Declaration was not legally binding, Stern, 'Die Wiederherstellung der staatlichen Einheit' (n 1140) 43.

1193 §§ 230, 233 Einführungsgesetz zum Bürgerlichen Gesetzbuche (18 August 1896) BGBl. I 2494; 1997 I S. 1061 (FRG).

albeit subject to the new BGB provisions.[1194] The BGB did not apply retroactively. Additionally, multiple provisions existed for protecting real rights acquired under GDR law, which even extended the effect of GDR provisions to the FRG legal system.[1195]

i. Restitution

Privatization began in the last days of the GDR.[1196] In addition, similar to the Yemen case, the upheavals surrounding unification also raised the question of a potential reversal of GDR policies, especially the, generally non-compensated, expropriation or taking under state administration of large rural private estates, land owned by foreigners or people fleeing the GDR.[1197] As a principle, the Joint Declaration stipulated that real estate ("Grundstücke und Gebäude") expropriated by the GDR was to be returned to the owners or their heirs and any measures restricting the freedom to dispose over property were to be terminated. That rule, however, was subject to fairly wide exceptions, e.g., when the estates had been converted to objects for the public good, were used as apartments or premises, or had been acquired in good faith etc. In those cases, the fair balance of interests mentioned in the Joint Declaration had to be achieved by an exchange of property or compensation. Moreover, business enterprises and pertaining shares had to be re-transferred to the owner as well. Corrupt, unethical or illicit ("unlauter") acquisition of assets had to be reversed. Notwithstanding the reversal of ownership, GDR tenants and owners of usufruct rights ("Nutzungsrechte") had to be accorded legal protection and

1194 On the compatibility of most property forms of GDR law with the FRG notion of property Franz J Säcker, 'Art. 233 EGBGB, § 2 "Eigentum"', *Münchener Kommentar zum BGB* para. 2, cf. also Art. 231 EGBGB § 5 Abs. 1.

1195 See e.g. Art. 231 EGBGB, § 5; Art. 232 EGBGB, §§ 2, 3; Art. 233 EGBGB, §§ 3-6; Quack, 'Art. 233 EGBGB § 3' in: *Münchener Kommentar zum BGB* (n 1193) para. 1. Cf. on the continuing effect of the GDR Civil Code after unification, Brunner (n 1139), 354–355. Cf. on the réglement in the UT for real property Günther Rohde, 'Die Entwicklung der Grundeigentums– und Bodennutzungsverhältnisse nach dem Einigungsvertrag' [1990] DtZ 312.

1196 For an overview of procedure and methods of privatization in the GDR territory Haxhi Gashi, *A Comparative Analysis of the Transformation of State/Social Property: Privatization and Restitution in the Post-Communist Countries - Kosovo as a sui generis Case of Privatization* (Nomos 2013) 70–74.

1197 Jung and Vec (n 1190), 715–716. For an overview Gashi (n 1195) 102–105.

their rights were preserved according to GDR law. Furthermore, any former owner could choose compensation instead of restitution. A further exception was added by Art. 41 para. 2 UT: Land or buildings deemed by statutory law as necessary for investment purposes were also exempted from the restitution scheme, but compensation had to be provided for in the law.[1198] Those basic rules were dealt with in more detail in the *Vermögensgesetz* (VermG).[1199] Today, almost all of the claims under der VermG have been dealt with.[1200] While *formally* the legal force of the expropriations was not questioned, in practice, expropriations of doubtful lawfulness were *reversed* while trying to protect rights acquired in good faith.[1201]

ii. The Land Reform ("Bodenreform") before the BVerfG and the ECtHR

As already mentioned, under the GDR system, private property, especially property to land, was an exception rather than the rule and was mostly distributed for specific reasons perceived as socially important. That principle also held true for the "Bodenreform-Land", real estate that had been expropriated from war criminals and Nazi-supporters or taken from individuals owning more than 100 hectares of land without compensation after the Second World War and then given to farmers, especially for agricultural purposes. While those lands, in principle, could be inherited, their disposal was subject to several legal restrictions and official approval. However, there was some backlog in executing the laws, and several pieces of land were owned by heirs not satisfying those formal criteria.

Briefly before unification, in March 1990, the GDR authorities, as a step to adapting their own legal system to the system in the FRG,[1202] had adopt-

1198 See also Gesetz über besondere Investitionen in der Deutschen Demokratischen Republik (31 August 1990) BGBl. 1990 II 1157 (GDR).

1199 Gesetz zur Regelung Offener Vermögensfragen Annex II Chapter III Subject B Sec. I No. 5 UT, BGBl. 1990 II 1159 (GDR).

1200 See https://www.badv.bund.de/DE/OffeneVermoegensfragen/Statistik/start.html.

1201 Very critical about the partial upholding of the expropriations Stern, 'Die Wiederherstellung der staatlichen Einheit' (n 1140) 43–46 with further references; outrightly rejecting an international guarantee for the persistence of the GDR property order Kimminich, 'Bemerkungen zur Überleitung der Eigentumsordnung der ehemaligen DDR' (n 1189) 8, 9.

1202 Such limited right as those to "Bodenreform-land" probably would not have qualified as property under the BGB Säcker, 'Art. 233 EGBGB, § 2 "Eigentum"' (n 1193) para. 3; Jörn Eckert, '§ 233 EGBGB Vorbemerkung zu § 1l' in: *Münchener*

ed the "Modrow Law" lifting all public restrictions on the "Bodenreform-Land", which from then on could be freely disposed of and inherited.[1203] In 1992, the unified Germany enacted a further law obliging owners of such estates to transfer their property *without any compensation* to the state if they had not used the land according to the provisions of the old GDR law.[1204] Several heirs of "Bodenreform-Land", who were then being asked to give up their property, appealed the decision before the German courts, but their challenges were quashed even by the highest echelons. Furthermore, the BVerfG had rejected their constitutional complaint, which had alleged a violation besides others of their right of property and the prohibition of the retroactive application of laws under the GG.

The BVerfG reasoned that, after the lifting of the restrictions by the law of March 1990, "Bodenreform-Land" had to be considered as property protected under Art. 14 GG. The obligation to transfer those lands to the state therefore amounted to a taking of property.[1205] Nevertheless, according to the chamber, those takings could not be considered as "expropriations", for which compensation would have to be paid. The law merely re-defined and clarified the contours and content of property under German law. Thereby, it was within the state's power to eliminate formerly existing rights ("Rechtspositionen") without having to pay compensation.[1206] The legislator had to take into account all interests, public and private, when constructing a new order of property.[1207] Because of the groundbreaking nature of the changes in the German economic and legal order, which needed time, the German legislator had a wide margin of appreciation and was allowed to achieve its goal in several consecutive steps.[1208] Crucially, the BVerfG rejected the claim that the complainants had legitimate expectations. Such trust in the

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Kommentar zum BGB (n 1193) paras. 2-4; but its qualification is controversial, see ibid para. 2.

1203 Cf. in detail on the Modrow Law ibid paras. 7-10.

1204 Cf. in more detail on the factual and legal background of the case *ECtHR [GC] Jahn and others* (n 1069) paras. 14-24, 55-69; German Federal Constitutional Court [BVerfG], 'Press Release Nr. 144/2000: Zum Eigentumserwerb an Bodenreformland' (9 November 2000) <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2000/bvg00-144.html>.

1205 *Bodenreformland,* 1 BvR 1637/99, 6 October 2000 para. 17 (German Federal Constitutional Court [BVerfG]), partly translated in *ECtHR [GC] Jahn and others* (n 1069) para. 42.

1206 *BVerfG Bodenreformland* (n 1204) paras. 17, 19.

1207 ibid para. 18.

1208 ibid para. 19.

perpetuity of laws worthy of protection in general could not have existed at a time when unification was forseeable. Only in exceptional circumstances could people have legitimately believed in the persistence of GDR law by then.[1209] An unintended gap existed in the Modrow Law since it could not be expected that the GDR legislator had wanted to confer property to those heirs who did not conduct agricultural activities as initially foreseen.[1210] Therefore, even if the legal position had not already been modified but upheld by the UT, property rights concerning "Bodenreform-Land" could be abrogated once the German legislator had realized the problem.[1211]

The decision was later successfully challenged before a chamber of the ECtHR[1212] but that decision was again reversed by the Grand Chamber (GC), which confirmed the taking's lawfulness under the ECHR, especially P-I 1.[1213] The GC agreed with the initial Chamber's findings that a deprivation of property had taken place (which was not challenged by the German government either),[1214] which was "provided for by law",[1215] and that it was in the public interest.[1216] The GC emphasized, again, that "the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, that it will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation" and that "[t]he same applies necessarily, if not *a fortiori*, to such radical changes as those occurring at the time of German reunification"[1217]. However, while the GC opined that "the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances",[1218] it - in contradiction to the initial chamber judgment - found such exceptional circumstances to exist here.[1219]

1209 ibid paras. 28, 29.
1210 ibid para. 29.
1211 ibid para. 30.
1212 *Jahn and Others v. Germany,* Appl. Nos. 46720/99, 72203/01 and 72552/01, 22 January 2004 (ECtHR).
1213 *ECtHR [GC] Jahn and others* (n 1069).
1214 ibid paras. 79-80.
1215 ibid paras. 81-87.
1216 ibid paras. 88-92.
1217 ibid para. 91 [italics in original].
1218 ibid para. 94.
1219 ibid paras. 99-117. However, there were also several dissenting opinions on the question of a violation of P I-1.

It largely followed the reasoning of the BVerfG by relying on mainly three factors: "the circumstances of the enactment of the Modrow Law" shortly before unification, which had only led to a "precarious" title;[1220] the short time frame within which the new German legislator had to tackle the issue;[1221] and the "reasonable" purpose to rectify lapses in the Modrow Law that would otherwise have led to unjustified, socially unjust privileges for some heirs.[1222]

Therefore, even if the FRG in principle accepted the allocation of property rights or other real rights by the GDR legal system, it reserved the right to reverse such decisions for material reasons. The main criterium for this decision was whether those rights had been acquired in good faith or not. § 4 para. 3 lit. a VermG stipulated that the acquisition of a right had to be considered as having taken place in bad faith if it was not in compliance with laws, administrative principles, or practice of the GDR and the person acquiring the right knew or ought to have known of the circumstance. However, to generally deny the existence of good faith even in cases in which a "hidden loophole" existed in the law goes one step further. The reasoning of the BVerfG, backed up by the ECtHR, in fact seems to accord all laws enacted within a short time before the formal act of succession a "precarious" status from which no trust worthy of protection can emerge.

4) Interim Conclusions

Succession, and with it the theory of acquired rights, was typically based on the idea that the "political" constitution changed while the "a-political" private law remained intact.[1223] Yet, as *Tomuschat* expected in 1990,[1224] in the case of German (re-)union, the real fights were fought on the level of statutory law, not on the constitutional level. Only a few changes were made to the GG. That limited need for change was due not only to the GG anticipating re-unification but also to the mode of succession: Because the GDR acceded to the state of the FRG, with the one state perishing while the other state continued, the more general, theoretical "roof" of the FRG

1220 ibid para. 116(a).
1221 ibid para. 116(b).
1222 ibid para. 116 (c).
1223 Cf. Benjamin Kneihs, 'Rente und Revolution: Zum Schicksal prärevolutionärer Ansprüche und Anwartschaften im postrevolutionären System aus menschenrechtlicher Sicht' (2007), 62(4) ZÖR 501 504.
1224 Christian Tomuschat, 'Wege zur deutschen Einheit' (1990), 49 VVDStRL 70 100.

stayed the same or was easier to substitute than the practical, social fabric of domestic law defining everyday life of the population.

The example of German unification vividly shows the need to fill the "envelope" of property with content and life through statutory law. It is an exceptional example of how, in the absence of an international agreed standard of property protection, an absence of a customary rule providing for succession, and in the face of a state refuting succession into most international treaties of the predecessor, it is "ordinary" domestic law that in fact defines property and therefore fleshes out the constitution. In most cases involving the "Wende", the GG offered only little protection to status acquired under GDR law if that status was not accepted in the UT or afterwards in FRG statutory law. Moreover, courts accorded much leeway to the state and accepted many justifications for redistribution and redefinition of property after the end of the GDR. The BVerfG and the ECtHR both clarified that trust in the persistence of a certain system of law or in the non-modification of laws in the future was not protected. Crucially, individuals and their legitimate expectations were taken into account - but only on a general scale and only if not contrary to the "greater goal" of unification, which placed a heavy financial burden on the FRG. In the end, however, individual positions in practice were recognized and were therefore important in the weighing process, and restrictions had to be justified.

While the general goal was to adapt the GDR's legal order to that of the FRG, Art. 8 and 9 UT, in all justice, a reticence existed on the part of the new legislator and the UT to consider the GDR legal order as having lapsed automatically with the vanishing of the state. It is not clear whether Art. 9 UT is constitutive or declaratory for the (partial) persistence of the GDR's domestic legal order.[1225] As shown, the FRG did not question the transferal of property by GDR authorities *per se*. Especially in the field of private law, there were generous transitional arrangements and most real rights persisted. There was a preparedness to accept rights acquired under the former legal order and decisions of GDR authorities as a certain *status quo*. Art. 143 paras. 1 and 2 GG even provide that, in some particularly "sensitive" areas, GDR law was allowed to partly deviate from the GG. With respect to acquired pension rights of former GDR citizens, the task was to

1225 By implication from the discussion surrounding Art. 123 GG, *supra*, footnote 1161, it could be suggested that the majority of German academic commentary holds the view that there is rather no *automatic* continuity of the domestic legal order.

completely transfer their pension biographies into the FRG system. First of all, it seemed clear that the FRG accepted already acquired rights to pensions under GDR law, but the pivotal question of how to adapt such rights to the new pension system remained. In comparison to the regulation of real and movable property, the approach to acquired pensions rights was even more general with less focus on the individual case. Furthermore, as pensions are inherently vulnerable to future changes in lifestyle and external economic factors, a comparable protection of quality of life was not guaranteed.

III) The Demise of the Soviet Union (1990s)

1) General Background

After the fall of the Berlin Wall and the unification of the German state(s), it became increasingly clear that the Union of Soviet Socialist Republics (Soviet Union (SU)) would not continue to exist in the form it had taken during the time of the Cold War, during which it had represented one of the world's superpowers. The exact categorization of its demise remains subject to dispute. The controversy centers around the question whether there was a complete dismemberment of the SU leading to several successor states, *including* Russia,[1226] or whether the Russian Federation can claim to be the continuator state of the former SU, with all the other successor states seceding or separating from the "rump-SU"[1227].

1226 E.g. Yehoda Z Blum, 'Kaleidoscope: Russia Takes Over the Soviet Union's Seat at the United Nations' (1992), 3(2) EJIL 354 360; Theodor Schweisfurth, 'Ausgewählte Fragen der Staatensukzession im Kontext der Auflösung der UdSSR' (1994), 32 AVR 99 103–104, 106 (Russia as "universal successor" [own translation from German]); Tancredi, 'Dismemberment of States (2007)' (n 324) para. 7; Tomuschat, 'Die Vertreibung der Sudetendeutschen' (n 266), 51 (Russia as "the main successor state" [own translation from German]); Arnauld *Völkerrecht* (n 255) § 2 paras. 104, 110. Epping, '§7. Der Staat als die „Normalperson" des Völkerrechts' (n 2) 185, para. 210 asserts that Russia re-gained its pre-Soviet independent status; Thürer and Burri, 'Secession (2009)' (n 317) para. 35 reject the idea that a "series of secessions" took place.

1227 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation),* 15 October 2008, Order on Provisional Measures, ICJ Rep 2008 353 384 (ICJ); *BVerfG Bodenreform III* (n 602) para. 114; ILA, 'Aspects of the Law of State Succession' (n 616) 15, 27; Anatoli Kolodkin, 'Russia and International Law: New Approaches' (1993), 26(2)

Before 1991, the Russian Soviet Federated Socialist Republic had been one of the 15 socialist republics within the SU.[1228] While the republics formally retained sovereignty, over time the unionist character of the SU had gained an upper hand, and it in fact controlled all the federation's republics.[1229] The disintegration of the SU, from the end of the 1980s to the beginning of the 1990s, began when several republics declared their "sovereignty" or even "independence", the first being the Baltic states Latvia, Estonia, and Lithuania.[1230] The integration of the Baltic states by the SU in 1940 had been seen as a forcible annexation by most Western states and therefore never recognized *de jure*.[1231] In line with that approach, after the demise of the SU, the three states' declarations that they were going to continue their former identity was by and large endorsed by the international community,[1232] but not by Russia, which viewed them as new

RBDI 552 554; Koskenniemi and Lehto (n 255), 189–190, 198, 211; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 525, 530 ("separation"); Zimmermann, 'State Succession in Respect of Treaties' (n 1107) 100; Crawford *The Creation of States* (n 308) 205, 676–678; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 403, 406, 415; Devaney, 'What Happens Next? The Law of State Succession' (n 283) footnote 10 ("separation of some States that had formed the USSR"); Hafner and Kornfeind (n 27), 7, 12 ("separation"); Tancredi, 'Dismemberment of States (2007)' (n 324) para. 16 ("fiction of continuity"); official statements by Belgium and France, cited after Stern, 'La Succession d'États' (n 283), 61, 62; cf. also Klabbers and Koskenniemi, 'Succession in Respect of State Property, Archives and Debts, and Nationality' (n 297) 124; Aust *Modern Treaty Law and Practice* (n 294) 327; Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 476.

1228 In general on the history of Russia Angelika Nußberger, 'Russia (2009)' in: *MPEPIL* (n 2) paras. 76-108.

1229 ibid paras. 81-82. Cf., emphasizing the remaining sovereignty of the republics, Schweisfurth, 'Ausgewählte Fragen der Staatensukzession im Kontext der Auflösung der UdSSR' (n 1225), 100–101, 106.

1230 Nußberger, 'Russia (2009)' (n 1227) paras. 83-88. On the Baltic process Peter van Elsuwege, 'Baltic States (2009)' in: *MPEPIL* (n 2) paras. 25-27.

1231 For an overview of the - varying - recognition practice ibid paras. 15-22; Koskenniemi and Lehto (n 255), 196-19; Lehto (n 902), 206–207. For the uniform US position (against both a *de jure* and *de facto* recognition of the annexation) Cummins and Stewart, David P. (US Office of the Legal Adviser) (n 929) 1169.

1232 Klabbers and Koskenniemi, 'Succession in Respect of State Property, Archives and Debts, and Nationality' (n 297) 124, 126, 128; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 415; Koskenniemi and Lehto (n 255), 211; Lehto (n 902), 208 "virtually unanimous"; Peter van Elsuwege, 'State Continuity and its Consequences: The Case of the Baltic States' (2003), 16(2) LJIL 377 384; in more detail van Elsuwege, 'Baltic States (2009)' (n 1229) paras. 28-30; for Austria cf.

states.[1233] Consequently, the Baltic states did not take part in the further re-integration process of the East-Bloc states.

In the Minsk Agreement of 8 December 1991, Belarus, Ukraine, and Russia founded the Commonwealth of Independent States (CIS),[1234] and agreed that the SU, as a subject of international law, had ceased to exist. That demise was affirmed by eleven former Soviet republics in the Alma-Ata-Declaration of 21 December 1991.[1235] On 24 December 1991, Russia notified the UN that "membership of the Union of Soviet Socialist Republics [...] in the United Nations is being continued by the Russian Federation" and requested that, as of that date, "the name 'Russian Federation' be used in the United Nations in place of the name 'Union of Soviet Socialist Republics'."[1236] All former republics that had signed the Declaration of Alma Ata supported Russia's claim, especially with respect to its permanent seat in the UN Security Council (UNSC).[1237] That rather ambiguous stance - declaring the SU to have ceased to exist, but simultaneously supporting Russia's claim to continue what remained of the SU - contributed to the above-mentioned split in opinion.[1238] Despite these contradictions, in prac-

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Reinisch, 'Das Schicksal des österreichisch-sowjetischen Investitionsschutzabkommens in den Wirren der Staatensukzession' (n 610), 19. On the importance of recognition in cases of continuity, *supra*, Chapter II B) II).

1233 van Elsuwege, 'State Continuity and its Consequences' (n 1231), 798-80; Peter van Elsuwege, *From Soviet Republics to EU Member States: A Legal and Political Assessment of the Baltic States' Accession to the EU* (Nijhoff, Brill 2008) 60–64.

1234 Agreement Establishing the Commonwealth of Independent States (8 December 1991), 31 ILM 143. With the Protocol to the Agreement Establishing the Commonwealth of Independent States (8 December 1991), 31 ILM 147 further eight former republics (Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Uzbekistan) joined the CIS. Georgia joined by the end of 1993 cf. Nußberger, 'Russia (2009)' (n 1227) para. 86, but notified its withdrawal from the organization in 2008, Thürer and Burri, 'Secession (2009)' (n 317) para. 35.

1235 Alma-Ata-Declaration (21 December 1991), 31 ILM 148, 149. This was, according to Schweisfurth, 'Ausgewählte Fragen der Staatensukzession im Kontext der Auflösung der UdSSR' (n 1225), 101–102, the point when the SU ceased to exist, cf. also Nußberger, 'Russia (2009)' (n 1227) paras. 84-85.

1236 Russia, 'Communication' (1991) <https://treaties.un.org/pages/HistoricalInfo.aspx?clang=_en#RussianFederation>.

1237 Decision by the Council of Heads of State of the Commonwealth of Independent States (21 December 1991), 31 ILM 151, 151 No. 1.

1238 On the different arguments Nußberger, 'Russia (2009)' (n 1227) 94–108; Koskenniemi and Lehto (n 255), 184–189. Some authors consider the use of the term "continuator" by Russia of rather political significance, e.g. Schweisfurth, 'Ausgewählte Fragen der Staatensukzession im Kontext der Auflösung der UdSSR' (n 1225), 103,

tice almost all other states accepted Russia as the continuator state,[1239] and Russia in fact took up the SU's position in the UN. That attitude was bolstered by Russia's share in the territory and population of the former SU as well as by the fact that, bearing in mind that Belarus and Ukraine had been independent UN member states since the UN's foundation, it had already mostly been Russia's voice talking through the SU in the UN.[1240] Furthermore, a benefit was seen in keeping Russia without interruption within important international treaties, especially the UNC or arms-control treaties and to consider the Russian Federation as a debtor state with respect to former debts of the SU.[1241]

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cf. also *infra* for a similar discussion with respect to recent changes of the Russian constitution.

1239 Cf. the examples in Koskenniemi and Lehto (n 255), 188–189; official statements by Belgium, France and the UK, cited in Stern, 'La Succession d'États' (n 283), 61-63; the Austrian statement cited in Reinisch and Hafner (n 2) 91, footnote 494, 93/94; but also the ambiguous statement in Cummins and Stewart, David P. (US Office of the Legal Adviser) (n 929) 1170 "The United States viewed each newly created state of the former U.S.S.R. as a successor state, and not a 'continuation' state. However, in certain cases, the United States did endorse the notion that Russia was the continuation of the U.S.S.R., where rights and obligations were indivisible and could not be recreated."

1240 ibid.; cf. also Nußberger, 'Russia (2009)' (n 1227) paras. 100-104.

1241 Cummins and Stewart, David P. (US Office of the Legal Adviser) (n 929) 1170; Tancredi, 'Dismemberment of States (2007)' (n 324) para. 15; for treaties Brigitte Stern, 'General Concluding Remarks' in Brigitte Stern (ed), *Dissolution, Continuation and Succession in Eastern Europe* (Martinus Nijhoff 1998) 197 209. While in the beginning, the CIS states meant to share the debt of the SU, cf. 'Memorandum of Understanding on the Debt to Foreign Creditors of the Union of Soviet Socialist Republics and its Successors', *Reinisch/Hafner Staatensukzession und Schuldenübernahme beim Zerfall der SU* (1991) 21 121–129 and Treaty on Succession With Respect to the State Foreign Debt and Assets of the U.S.S.R. (4 December 1991) in: Reinisch/Hafner Staatensukzession und Schuldenübernahme beim Zerfall der SU (Service-Fachverlag 1995) 123, 121–129 In 1993 it was generally agreed between Russia and the other former SU republics that Russia would take over all debts in exchange for the SU's property and assets which were to be ceded to it, Nußberger, 'Russia (2009)' (n 1227) para. 107; cf. Koskenniemi and Lehto (n 255), 203; Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 480; Ukraine was no party to the agreement; cf. also Reinisch and Hafner (n 2) 110–131; accord sur la répartition de toute la propriété de l'ex-URSS a l'étranger.

Only recently, in 2020, did Russia include a new provision into its constitution:

> "[T]he Russian Federation is the state successor of the USSR on its territory and also state successor (continuator) of the USSR in terms of membership in international organizations and their organs, membership in international treaties, and also when foreseen with international treaties with respect to actions and obligations of the USSR beyond Russian borders."[1242]

Its ambiguous wording, conflating the notions of succession and continuity, was apparently chosen for domestic reasons and to keep utmost room to maneuver with respect to the taking over of rights and duties of the former SU.[1243] This "modern" self-perception ought not be decisive in light of decades of pragmatic diplomatic international and Russian state practice in line with the continuity thesis.[1244]

2) The Baltic States

Estonia, Lithuania, and Latvia each claimed independence from the SU in 1990. As an illegal occupation does not lead to a change in sovereignty

1242 Cited after Lauri Mälksoo, 'International Law and the 2020 Amendments to the Russian Constitution' (2021), 115(1) AJIL 78 83. Another translation is provided by Johannes Socher, 'Farewell to the European Constitutional Tradition: The 2020 Russian Constitutional Amendments' (2020), 80 HJIL 615 630 who only uses the term "continuator".

1243 On the reasons for this choice of words Mälksoo, 'International Law and the 2020 Amendments to the Russian Constitution' (n 1241), 84–85. Cf. Nußberger, 'Russia (2009)' (n 1227) paras. 92, 105-108 opining that the view advanced by Russian legal scholars that Russia was a "continuator state" but not identical with the SU, represented a third, "differentiated" or "pragmatic" view on the issue; also Socher (n 1241), 631. But cf. also the rather straightforward statements by Kolodkin (n 1226), 554 using the term continuator state as meaning continuing the SU's identity.

1244 *See* Mälksoo, 'International Law and the 2020 Amendments to the Russian Constitution' (n 1241), 84; also Paul Kalinichenko and Dimitry V Kochenov, 'Introductory Note to the Amendments to the 1993 Constitution of the Russian Federation Concerning International Law (2020)' (2021), 60(2) ILM 341 341 who – without further discussion of the succession issue – maintain that the provision "consolidates the status of Russia as a legal successor of the Soviet Union" and "[f]rom a strictly dogmatic legal point of view, there was no need for all these amendments to be included in the Constitution. They bring absolutely nothing new."

over the territory,[1245] they purported not to constitute successor states to the SU but to continue or "restore" their identity and independence of the pre-Soviet era.[1246] Their approach shows that the case of the Baltic states is not a clear-cut example of a succession process entailing the question of acquired rights. The main argument would rather go along the line that rights acquired under an unlawful regime could not be held against the lawful sovereign and/or would not be acquired in good faith.[1247] However, even if the continuity thesis was, in principle, accepted by most states (except Russia)[1248] and in academic literature[1249], the claim to "restitution" in practice found its limits.

a) International Treaties

The Baltic states refused to continue either bilateral or multilateral treaties of the SU,[1250] and attempted to re-institute pre-war treaty relations.[1251] Yet, that pattern could not always be followed consistently in practice.[1252] For

1245 Cf. in more detail *supra*, Chapter II B) IV).

1246 For Latvia cf. Declaration on the Renewal of Independence (4 May 1990), 1 Baltic YB Int'l L 245 (Latvia); for Lithuania cf. Sigute Jakstonyte and Michail Cvelich, 'Lithuania - Constitutional and International Documents Concerning the International Legal Status of Lithuania' (2001), 1 Baltic YB Int'l L 301 301–303; for Estonia Eesti Riiklikust Iseseisvusest (20 August 1991) https://www.riigiteataja.ee/akt/13071519 (Estonia).

1247 Cf. Koskenniemi and Lehto (n 255), 193; van Elsuwege, 'State Continuity and its Consequences' (n 1231), 383.

1248 See references in *supra*, footnotes 1230-1232.

1249 Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 482; Stern, 'General Concluding Remarks' (n 1240) 200; with respect to Lithuania Dainius Zalimas, 'Legal Issues on the Continuity of the Republic of Lithuania' (2001), 1 Baltic YB Int'l L 1 10, 19; cf. Hafner and Kornfeind (n 27), 11. Against such doctrine of reversion Reinisch and Hafner (n 2) 108 under the assumption that the rules of state succession can be applied to cases of unlawful occupation as well. See also Pavković and Radan, 'Introduction' (n 392) calling the independence of Latvia and Estonia cases of "secession".

1250 van Elsuwege *From Soviet Republics to EU* (n 1232) 80; van Elsuwege, 'State Continuity and its Consequences' (n 1231), 384; for bilateral treaties Koskenniemi and Lehto (n 255), 211, 216-217.

1251 van Elsuwege *From Soviet Republics to EU* (n 1232) 80; van Elsuwege, 'State Continuity and its Consequences' (n 1231), 384; for Lithuania in particular Jakstonyte and Cvelich (n 1245), 305–310.

1252 For examples of such inconsistency cf. van Elsuwege, 'State Continuity and its Consequences' (n 1231), 387; also Koskenniemi and Lehto (n 255), 216–217. E.g.

example, the Baltic states were not allowed to resume their pre-war membership of several international organizations but had to undergo a new accession process, i.e. were treated like successor states.[1253]

> "[I]nternational state practice led to a general revision of treaties whether they were concluded before or after 1940. In fact, the principle of state continuity served as a basis for negotiations in order to clarify the situation with regard to international law."[1254]

The rejection of the Soviet legal order also concerned border limitations,[1255] which were finally settled by diplomatic means for Latvia in 2007,[1256] while the ratification process for the 2014 border treaty with Estonia is still not completed[1257]. In line with their general understanding, the three states refused to take over debts of the SU and did not claim any SU property abroad.[1258]

Estonia declared several bilateral SU treaties temporarily applicable and several of the pre-1940s bilateral treaties (formally) terminated. On the case per case approach with respect to Latvian bilateral treaties e.g. Ieva Jakobsone, 'Latvia - The Claim for Independence' (2001), 1 Baltic YB Int'l L 233 242–243.

1253 van Elsuwege *From Soviet Republics to EU* (n 1232) 60–64.

1254 van Elsuwege, 'State Continuity and its Consequences' (n 1231), 385 [footnote omitted].

1255 While Lithuania did not seem keen to alter the existing borders at the time of its independence (as it would have lost territory to Russia if relying on the pre-1940 situation), Estonia and Latvia went for territorial re-arrangements according to the treaty of Tartu from 1920, van Elsuwege *From Soviet Republics to EU* (n 1232) 80–85; van Elsuwege, 'State Continuity and its Consequences' (n 1231), 385; Koskenniemi and Lehto (n 255), 194–195; Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 485. Cf. also Art. 122 para. 1 of the Constitution (28 June 1992) https://www.servat.unibe.ch/icl/en00000_.html (Estonia).

1256 Nußberger, 'Russia (2009)' (n 1227) para. 47.

1257 ERR News, 'Postimees: Preparations Underway for Russian Border Agreement Ratification' (11 March 2021) <https://news.err.ee/1608138730/postimees-preparations-underway-for-russian-border-agreement-ratification>; Pekka Vanttinen, 'Russia May Finally Ratify 2014 Border Agreement with Estonia' *Euractiv* (15 November 2021) <https://www.euractiv.com/section/politics/short_news/russia-may-finally-ratify-2014-border-agreement-with-estonia/>; ERR News, 'Russia Shows Interest in Ratifying Estonian Border Agreement' (9 February 2022) <https://news.err.ee/1608493796/russia-shows-interest-in-ratifying-estonian-border-agreement>. Considering the ongoing Russian war in Ukraine a ratification of the treaty in the near future is unlikely.

1258 Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 483 [footnotes omitted].

It is commonly acknowledged that the continuation of the Baltic states' pre-war existence was more a legal fiction than a realistic proposal.[1259] It is often not clear whether its acceptance by other states followed political motives or legal convictions.[1260] Especially with respect to individual rights, the marks of 50 years of SU jurisdiction could not easily be wiped off.

> "There is, in other words, a tendency in public international law to distinguish between the continuity of the Baltic States' legal status on the one hand and the qualified continuity of the legal rights and duties on the other."[1261]

The issue of succession to the SU's human rights treaty obligations did not become too problematic in this respect, as all three states *acceded* to the respective treaties after their independence.[1262] In its Declaration on the Renewal of Independence,[1263] Latvia professed

> "[t]o guarantee citizens of the Republic of Latvia and those of other nations permanently residing in Latvia social, economic, and cultural rights, as well as those political rights and freedoms which are defined in international human rights instruments" and "[t]o apply these rights also to those citizens of the USSR who express the desire to continue living in the territory of Latvia."

1259 ibid 483–484; also van Elsuwege *From Soviet Republics to EU* (n 1232) 66; Koskenniemi and Lehto (n 255), 197; Lehto (n 902), 208. On the inconsistencies in the treatment of the issue by both sides van Elsuwege, 'State Continuity and its Consequences' (n 1231), 387. On the practical limits of reversion Ronen *Transition from Illegal Regimes* (n 14) 185.

1260 Cf. van Elsuwege *From Soviet Republics to EU* (n 1232) 60–64.

1261 van Elsuwege, 'Baltic States (2009)' (n 1229) para. 48; also Koskenniemi and Lehto (n 255), 193 "En clair, l'Etat occupant ne peut pas invoquer un droit établi en fonction d'une occupation dépourvue de base juridique. Mais cette maxime ne s'applique pas automatiquement aux droits qui ont été établis en faveur de l'Etat occupé, de ses nationaux ou d'Etats tiers (et de leurs nationaux)". On this "provisional *de facto* recognition" (Hofmann, 'Annexation (2013)' (n 351) para. 30) already *supra*, Chapter II B) IV).

1262 Koskenniemi and Lehto (n 255), 193; for Latvia Declaration on the Accession to Human Rights Instruments (4 May 1990) https://www.servat.unibe.ch/icl/lg02000_.html (Latvia), reprinted as Annex 5 to Jakobsone (n 1251).

1263 Latvian Declaration on Independence (n 1245) Section 8.

b) Domestic Law

Domestically, in line with the theory of discontinuity, the three states restored their pre-Soviet constitutions or enacted new ones.[1264] All three state constitutions guaranteed the right of property to everyone and foresaw expropriations only in the public interest, according to law and against fair compensation.[1265] Yet, conversely, all of them in principle relied on their pre-independence private domestic legal order.[1266] Section 6 of Latvia's Declaration on the Renewal of Independence,[1267] for example, provided for implementing "during the transition period"

> "those constitutional and other legal acts of the Latvian SSR which are in effect in Latvia when this Declaration is adopted, insofar as they do not contradict Articles 1, 2, 3, and 6 of the Constitution of the Republic of Latvia."

In the same vein, Art. 2 para. 1 of the Law on the Application of the Estonian constitution[1268] stipulated that

> "[l]egal acts currently in force in the Republic of Estonia shall continue to be in force after the Constitution enters into force, insofar as they do not contradict the Constitution or of the Law on the Application of the Constitution and until such a time as they are voided or brought into full accordance with the Constitution."

1264 Koskenniemi and Lehto (n 255), 192; Latvian Declaration on Independence (n 1245) Section 3; Estonian Constitution (n 1254) and Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 484; Constitution (25 October 1992) https://www.servat.unibe.ch/icl/lh00000_.html (Lithuania); an updated and consolidated version is also available at the homepage of the Constitutional Court of Lithuania, https://www.lrkt.lt/en/about-the-court/legal-information/the-constitution/192.

1265 Art. 105 of the Constitution (15 February 1922) https://www.saeima.lv/en/legislative-process/constitution (Latvia); Art. 32 of the Estonian Constitution (n 1254), Art. 23, 46 para. 1 of the Lithuanian Constitution (n 1263). In *Lithuanian Constitutional Court Restoration of Ownership Rights* (n 602) a human right to property was proclaimed.

1266 Ronen *Transition from Illegal Regimes* (n 14) 170–171, 185; for Lithuania Zalimas (n 1248), 18–19.

1267 Latvian Declaration on Independence (n 1245).

1268 Law on the Application of the Constitution (28 June 1992) https://www.servat.unibe.ch/icl/en01000_.html (Estonia).

Finally, Art. 2 of the Lithuanian Law on the Procedure for the Entry into Force of the Constitution[1269] provides that

> "[l]aws, as well as other legal acts or parts thereof, that were in force on the territory of the Republic of Lithuania prior to the adoption of the Constitution of the Republic of Lithuania shall be effective inasmuch as they are not in conflict with the Constitution and this Law, and shall remain in force until they are either declared null and void or brought in line with the provisions of the Constitution."[1270]

While, in the Latvian case, it is not completely clear whether the wording refers to acts enacted by the Latvian socialist republic only, or, more likely, embraces all law in force on Latvian territory at the time of independence, the statements by Estonia and Lithuania clearly encompass all law "in force" on the respective territory and therefore espouse continuity of the pre-independence domestic order. Yet, in specific fields, the Baltic states diverted from that route, mostly for political reasons involving rejection of any impression of being a successor to the SU.

aa) Nationality Legislation and Pertaining Civil Status

In its Declaration on the Renewal of Independence,[1271] Latvia had promised to afford the named civil and social rights from international treaties "also to those citizens of the USSR who express the desire to continue living in the territory of Latvia." However, what became a significant bone of contention after independence was Estonia's and Latvia's new citizenship legislation.[1272] In line with their theory of pre-war continuity, both states revived their citizenship laws and provided for citizenship only for children

1269 The Law on the Procedure for the Entry Into Force of the Constitution (6 November 1992) https://www.lrkt.lt/en/about-the-court/legal-information/the-constitution/192 (Lithuania).

1270 *Lithuanian Constitutional Court Restoration of Ownership Rights* (n 602) mentioned that the Lithuanian "Law on the Reinstatement of the Lithuanian Constitution" stipulated that the re-enactment of the 1938 Constitution did not mean that other laws from that time were reinstalled as well.

1271 Section 8 Latvian Declaration on Independence (n 1245).

1272 For an overview on the different views van Elsuwege *From Soviet Republics to EU* (n 1232) 69–80; for Lithuania van Elsuwege, 'Baltic States (2009)' (n 1229) para. 35; van Elsuwege, 'State Continuity and its Consequences' (n 1231), 383; Nida M Gelazis, 'The European Union and the Statelessness Problem in the Baltic States'

of former citizens.[1273] Taking into account that, during Soviet occupation, large population transfers had taken place,[1274] the revival meant that, at that time, about 40% of the people living in Estonia and Latvia, especially the large minority of Russian-speaking immigrants, were not considered as nationals, some even becoming stateless, and had to go through a naturalization process to become citizens.[1275] International criticism later forced a lowering of these nationalization requirements,[1276] but apart from that criticism, the treatment was by and large accepted by the international community.[1277]

After independence, Latvia had provided social security benefits to all residents who had been entitled to such benefits under the former SU system. But in a 1995 law, it differentiated between the so-called "permanently resident non-citizens" and Latvian nationals with respect to the assessment of time spent working abroad.[1278] In June 2022, the GC of the ECtHR upheld the Latvian law in a controversial decision.[1279] In that judgment, the

(2004), 6(3) EJML 225 227–228; Ronen *Transition from Illegal Regimes* (n 14) 221–223.

1273 In more detail Gelazis (n 1271), 228–232.

1274 On the background of this population shift ibid 226; Ronen *Transition from Illegal Regimes* (n 14) 216–217.

1275 van Elsuwege, 'Baltic States (2009)' (n 1229) paras. 34-35; van Elsuwege, 'State Continuity and its Consequences' (n 1231), 383; for Estonia Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 484. This also meant that those persons were not eligible for EU citizenship, cf. Gelazis (n 1271), 225, 240-242.

1276 On the process van Elsuwege, 'Baltic States (2009)' (n 1229) para. 38; Ronen *Transition from Illegal Regimes* (n 14) 224–225.

1277 On the EtCHR jurisprudence and the (critical) view of some human rights treaty bodies on this topic van Elsuwege, 'Baltic States (2009)' (n 1229) paras. 36-37. Accepting the legislation Koskenniemi and Lehto (n 255), 193. Critizising the Estonian legislation Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 484–485 "both politically doubtful and legally unsound. […] it was not considerations of legal consistency but, rather, the desire to obtain or at least to approximate to ethnic purity that led to such an approach towards citizenship questions in Estonia […] constitutes discrimination."

1278 *Savickis and Others v. Latvia,* Appl. No. 49270/11, 9 June 2022 paras. 64-68 (ECtHR [GC]). Cp. on a similar problem in Germany, *supra*, IV) B) II) 2).

1279 ibid. While ten judges supported the judgment on the merits, seven judges voted against it. See dissenting opinions of judges O'Leary, Grozev and Lemmens and dissenting opinion of judge Seibert-Fohr, joined by judges Turković, Lubarda and Chanturia (from Germany, Croatia, Serbia and Georgia!) *ibid*.

ECtHR not only diverted from its earlier case law[1280] but explicitly accepted as legitimate aim for discrimination on the grounds of nationality both Latvia's policy of continuity and non-recognition of legal acts of an unlawful regime and the goal of "avoid[ing] retrospective approbation of the consequences of the immigration policy practised in the period of unlawful occupation and annexation of the country [...and...] to rebuild the nation's life following the restoration of independence"[1281]. The court emphasized that the case was not comparable to cases of succession, though.[1282]

bb) Non-recognition of SU Nationalization Measures

As a second, significant, exception to the continuity of the pre-independence (Soviet) domestic civil law, Lithuania, Latvia and Estonia did not recognize nationalization measures undertaken by the SU after their incorporation in 1940.[1283] The restitution of nationalized property was an integral part of the states' general privatization measures after independence and in the wake of their turn to market economies. But beyond that, the restitution programs were comprehensive, costly, and pursued mainly for the political reasons of disconnecting them from their SU history and remedying historical injustices.[1284]

Instead of simply providing for the handing back of the property, the Baltic states explicitly re-connected to the legal situation *before* occupation and negated the general validity of expropriation measures undertaken by the SU. For example, in 1991 Lithuania enacted the "Law On the Restoration of Ownership of Citizens"[1285], which repeatedly (e.g., in the Preamble and Art. 1 para. 1) emphasized that it assumed the continuity of existence of the

1280 Cp. *Andrejeva v. Latvia,* App. No. 55707/00, 18 February 2009, ECHR 2009-II 71 (ECtHR [GC]).

1281 *ECtHR Savickis and Others* (n 1277) paras. 198, 211, 216. For the arguments of the Latvian government ibid paras. 98-99, 168-169, 176.

1282 ibid para. 200.

1283 See on this Ronen *Transition from Illegal Regimes* (n 14) 270–279.

1284 ibid 273–274; Frances H Foster, 'Restitution of Expropriated Property: Post-Soviet Lessons for Cuba' (1996), 34(3) Colum J Transnat'l L 621 626. See e.g. § 2 para. 1 of the Estonian "Principles of Ownership Reform Act".

1285 Law On the Restoration of the Rights of Ownership of Citizens to the Existing Real Property (1 July 1997) No VIII-359 (Lithuania), English version available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/949193f215a011e9bd28d9a28a9e9ad9?jfwid=j4ag0vxi.

property nationalized by the SU and was not only reinstating the former situation.[1286] Also the Estonian "Land Reform Act"[1287] in § 2 spoke of "the continuity of rights of former owners". Finally, in Latvia, § 1 of the law "On the Denationalisation of Building Properties in the Republic of Latvia"[1288] tried to achieve the old situation basically by repealing all nationalization laws enacted in Soviet times.

In all three states, the default option was restitution in kind, but monetary compensation was possible and all kinds of restrictions to restitution applied.[1289] All restitution programmes differed in details, e.g., in who was eligible for restitution, what kind of property was protected, and in how far new rights to the estate acquired in good faith would constitute a bar to restitution.[1290] Notably, none of the states completely ignored potential rights acquired in good faith by private persons:[1291] Often restoration was excluded when property had lawfully changed hands to a private person or tenancies were protected for certain interim periods.[1292] Nevertheless, having implemented the most comprehensive restitution programs, Latvia and Estonia even introduced reservations to P I-1 in order to pursue their agenda.[1293] Yet, the restitution process in the Baltic states also showed vividly that the quest for rectification of former injustices could lead to

1286 However, the Lithuanian Supreme Court emphasized that property rights were not established by this law but only when compensation or restitution was granted, cf. *Jurevičius v. Lithuania,* Appl. No. 30165/02, 14 November 2006 para. 20 (ECtHR).

1287 Land Reform Act (17 October 1991) RT 1991, 34, 426 (Estonia), English version available at https://www.riigiteataja.ee/en/eli/529062016001/consolide.

1288 Law On the Denationalisation of Building Properties in the Republic of Latvia (30 October 1991) https://likumi.lv/ta/en/en/id/70829-on-the-denationalisation-of-building-properties-in-the-republic-of-latvia (Latvia).

1289 Foster (n 1283), 633–637.

1290 For more details ibid 627–640; Ronen *Transition from Illegal Regimes* (n 14) 274–275.

1291 Cf. e.g. § 2 para. 2 of Republic of Estonia Principles of Ownership Reform Act (13 June 1991) RT 1991, 21, 257 (Estonia) made clear that "[r]eturn of property to or compensation of former owners or their legal successors for property in the course of ownership reform shall not prejudice the interests protected by law of other persons or cause new injustices".

1292 In more detail Ronen *Transition from Illegal Regimes* (n 14) 275–276.

1293 Reservation to PI-1 (27 June 1997) https://www.coe.int/en/web/conventions/cets-number-/-abridged-title-known?module=declarations-by-treaty&numSte=009&codeNature=2&codePays=LAT (Latvia); Reservation to PI-1 (16 April 1996) https://www.coe.int/en/web/conventions/full-List?module=declarations-by-treaty&numSte=009&codeNature=2&codePays=EST (Estonia).

new injustices as the developments of 50 years could not be eradicated by law.[1294]

3) Russia and the (Other) Successor States of the SU

a) International Treaties

Art. 12 of the Minsk Agreement reads "[t]he High Contracting Parties undertake to discharge the international obligations incumbent on them under treaties and agreements entered into by the former Union of Soviet Socialist Republics." Concordantly, in the Alma Ata Declaration, "[t]he States participating in the Commonwealth guarantee in accordance with their constitutional procedures the discharge of the international obligations deriving from treaties and agreements concluded by the former Union of Soviet Socialist Republics." The Russian Federation, in accordance with its general stance, assumed "full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General ".[1295] What at first sight looks like the espousal of a theory of universal succession[1296] was significantly diminished in the CIS states' "Mémorandum relatif au consensus sur la question de la succession d'Etat, relative aux traités de l'ex-URSS présentant un intérêt mutuel"[1297] of 6 July 1992. There, negotiations in good faith about the SU's international treaties were considered the means of choice. Multilateral treaties, though deemed to be in the "common interest", were subjected to the individual decision of each former republic (no. 1). That understanding held especially true for bilateral treaties, for which merely a general duty to decide anew on their fate was foreseen (no. 2). An exception to the rule was introduced for territorial and/or border treaties, which ought to remain binding on all of the republics (no. 3). Hence, the agreement, while probably being based on a theoretical commitment to

1294 On the ensuing conflicts and problems Ronen *Transition from Illegal Regimes* (n 14) 276–279; Foster (n 1283), 641–648.

1295 Russia, 'Communication' (n 1235); in general Koskenniemi and Lehto (n 255), 211.

1296 In this way ibid 180 "Ainsi, en ce qui concerne la succession d'Etats en matière de traités conclus par l'Union soviétique, les membres de la CEI ont pris comme point de départ officiel de leurs discussions une espèce de principe de succession universelle"; cf. also Reinisch and Hafner (n 2) 83–84.

1297 Reprinted in in Lev Entine, 'Communaute des Etats Independants (CEI) - Chronique de Sa Creation et de Son Evolution' (1992), 26(2) RBDI 614 627.

continuity, in fact rejected the idea of automatic succession of SU treaties. Succession into multilateral treaties of the former SU did not follow a stringent path[1298] and bilateral treaties have regularly been re-negotiated.[1299]

b) Domestic Law

For domestic law, the unclear wording of Art. 11 of the Minsk Agreement, "[f]rom the moment of signature of the present Agreement, application of the laws of third States, including the former Union of Soviet Socialist Republics, shall not be permitted in the territories of the signatory States", has led to divergent interpretations.[1300] It seems to repudiate the assumption of SU law being applicable in the territory of its former republics.

The specific laws for those republics vary but show apparent similarities. Section 2 of the part "Concluding and Transitional Provisions" of the *Russian* constitution from 1993[1301] provided that "[l]aws and other legal acts in effect on the territory of the Russian Federation until the enactment of this Constitution are enforced in so far as they do not contravene the Constitution." In addition, procedural law in criminal matters was upheld according to Section 6. Therefore, in practice, Russia opted for the persistence of statutory SU law unless it violated the Russian constitution,[1302] which was in line with Russia's claim to continuity. In Chapter 9 on "Provisions for the Transitional Period", the constitution of *Armenia* (1995)[1303] provided for the continuity of "[l]aws and other legal acts of the Republic of Armenia

1298 For Belarus and Ukraine Bokor-Szego, 'Continuation et Succession en Matière des Traités Internationaux' (n 610) 51. For human rights treaties see *supra*, Chapter III, C) II) 2) d).

1299 Reinisch and Hafner (n 2) 84; Bokor-Szego, 'Continuation et Succession en Matière des Traités Internationaux' (n 610) 50–51. But see Kirill Guevorguian, 'Comment' in: *Burdeau/Stern Succession en Europe de l'Est* (n 610) 59 60 who sees no difference between multilateral and bilateral treaties of the former SU as both would persist but were subject to renegotiation.

1300 Cf. Koskenniemi and Lehto (n 255), 199; Ger P van den Berg, 'Human Rights in the Legislation and the Draft Constitution of the Russian Federation' (1992), 18(3) RCEEL 197 199.

1301 Constitution (12 December 1993) https://www.servat.unibe.ch/icl/rs00000_.html (Russia).

1302 van den Berg (n 1299), 199; Koskenniemi and Lehto (n 255), 199; Reinisch and Hafner (n 2) 85–86.

1303 Constitution (5 July 1995) https://www.servat.unibe.ch/icl/am00000_.html (Armenia).

[…] to the extent they do not contravene this Constitution", Art. 166 para. 2. Courts and tribunals were supposed to operate on the basis of the old law as long as no new law had entered into force, Art. 116 paras. 7 and 8. The constitution also provided that, until further amendment of the criminal code "current procedures for searches and arrests shall remain in effect", Art. 116 para. 14. The *Azerbaijani* constitution (1995)[1304] also upheld national law valid at the time before acceptance of the new constitution unless contradicting the latter, Transitional Clause 8. While the constitution of *Belarus* (1994)[1305] did not contain explicit provisions on the permanence of domestic rights, Art. 5 of the Belarus Enactment Law[1306] stipulated that even if parts of "laws and other enforceable enactments" were contrary to the constitution, the other parts should be applied. Art. 92 para. 4 of the constitution of *Kazahkstan*[1307] contained an almost identical provision and urged the legislator to ensure the other parts of the law were conform with the constitution within two years. The constitution of *Tajikistan* (1994)[1308] did not contain any provision on transition of former law. Title XV of the constitution of *Ukraine* (1996),[1309] entitled "Transitional Provisions", in No. 1 provided for the continuity of national laws unless contrary to the constitution. No. 13 foresaw that "[t]he effective procedures for arrest, retaining in custody, and detention of persons suspected of a crime, and also for the examination and search of a domicile or other property of a person, are preserved for five years after this Constitution enters into effect." Extraordinarily, the Ukrainian constitution contained a special transitory provision concerning the dedication of military bases on Ukrainian territory, No. 14. *Georgia* is also a special example as, after its independence, it did not claim its emergence as a new state but the restoration of its former

1304 Constitution (12 November 1995) https://www.servat.unibe.ch/icl/aj00000_.html (Azerbaijan).
1305 Constitution (15 March 1994) https://www.servat.unibe.ch/icl/bo__indx.html (Belarus).
1306 Enactment Law (15 March 1994) https://www.servat.unibe.ch/icl/bo01000_.html (Belarus).
1307 Constitution (1995) https://www.constituteproject.org/constitution/Kazakhstan_2017.pdf?lang=en (Kazakhstan).
1308 Constitution (6 November 1994) https://www.servat.unibe.ch/icl/ti00000_.html (Tajikistan).
1309 Constitution (28 June 1996) https://www.servat.unibe.ch/icl/up00000_.html (Ukraine).

existence after unlawful occupation.[1310] Nevertheless, the constitution of Georgia (1995)[1311] in Art. 106 adopted a similar approach to the ones listed above: Legal acts existing prior to the coming into force of the constitution were to have legal force unless contradicting the constitution. Within two years, all normative acts adopted before were to be registered and amended accordingly. Additionally, the legislation constituting the basis of jurisdiction of Georgian courts was upheld in Art. 107. Restitution of nationalized property played no significant role in the SU successor states.[1312]

4) Interim Conclusions

In sum, therefore, while the attitude of the CIS states with respect to international obligations of the former SU was relatively inconsistent, for domestic law, constitutional practice of most SU successor states opted for continuity, even using similar terms.[1313] Some authors infer from the choice that acquired rights posed no problem with respect to SU succession.[1314] In general, modifications of domestic law in the SU successor states and Russia, as well as in Baltic states, seems to have been less incited by SU dismemberment than by the incremental shift from a planned to a free-market economy in the course of the 1990s. For example, arguably, SU law on pensions from 1990 was carried over to the new states and pension reforms only began in the mid-1990s.[1315] Therefore, social reforms are often not discussed in relation to the independence of these states

1310 Act of Restoration of State Independence (9 April 1991) Gazette of the Supreme Council of the Republic of Georgia, 1991, No 4, Art. 291; https://matsne.gov.ge/en/document/view/32362 (Georgia).

1311 Constitution (24 August 1995) https://www.venice.coe.int/webforms/documents/?pdf=CDL(2004)041-e (Georgia); a more recent version (without the transitory provisions) is also available on the website of the Legislative Herald of Georgia, see https://matsne.gov.ge/en/document/view/30346?publication=36.

1312 Foster (n 1283), 625.

1313 For Ukraine and Belarus van den Berg (n 1299), 200; in general for the CIS states Reinisch and Hafner (n 2) 85–86.

1314 Koskenniemi and Lehto (n 255), 199 who base this finding, however, on a thin empirical basis with respect to domestic law; very optimistic also Hasani (n 2), 144 „During the dissolution of the former communist federations, these rights were respected to the greatest possible extent. No hesitation or refusal to apply them ever surfaced".

1315 Cf. Marta de Castello Branco, 'Pension Reform in the Baltics, Russia, and Other Countries of the Former Soviet Union (BRO): IMF Working Paper' (1998) WP/98/11 8.

from the SU but with respect to the demise of socialism in a multitude of - independent - East-Bloc states.[1316] The property system within the SU had already been subject to profound changes by the end of the 1980s, i.e. before the first republics declared their independence.[1317] In March 1990, respective amendments were adopted to the SU constitution, as were several laws such as the "Law on Property", the "Law on Land", and the "Law on Leasing", which all departed from the original socialist model of state property or "socialist property".[1318] Moreover, "[i]nvestment legislation in the Russian Federation has a short history. The two basic laws - the Law on Investment Activity and the Law on Foreign Investments in the Russian Socialist Federal Republic - were enacted in Russia only in 1991, when economic reforms were actively performed."[1319]

Additionally important here is that the mode of succession, dismemberment or separation, lends itself more to an upkeeping of domestic law because that legal system does not have to be reconciled with another one but only updated and amended step-by-step in the years to come. In that respect, of relevance is also that the SU's demise took place relatively smoothly, consensually, and in friendly relations between most of the former members states. Nevertheless, the still existing frictions related to the taking-over of international duties again underlines the potential advantages of a doctrine of acquired rights in the face of non-succession to international instruments containing individual rights. Furthermore, even if the self-perception of and the international reactions to the independence of the Baltic states, and potentially Georgia, do not allow them to be treated as genuine cases of succession, their analysis can be fruitful: If even states that declare non-continuity a necessary requirement of their existence and explicitly cut all international ties to their "predecessor" consciously uphold at least parts of the national legal order implemented by that state, the action can be seen as a strong commitment to legal continuity and conducive

1316 E.g. Katharina Müller, 'From the State to the Market?: Pension Reform Paths in Central–Eastern Europe and the Former Soviet Union' (2002), 36(2) Social Policy & Administration 156.

1317 Richard C Schneider, 'Developments in Soviet Property Law' (1989), 13(4) Fordham Int'l LJ 446.

1318 On all three laws ibid with translations at 468-480.

1319 Natalia Doronina and Natalia Semilutina, 'Russia' in: *Shan Legal Protection of Foreign Investment* (n 598) 579. This is probably the reason why many Western states concluded bilateral investment treaties with the SU still in 1989 and 1990; cf. examples in Schneider (n 1316), 457.

to a theory of acquired rights. On the other hand, in the case of the Baltic states, the limits of such a recognition become obvious.

IV) The Dismemberment of the Socialist Federative Republic of Yugoslavia (1990s)

Besides the dismemberment of the SU, the demise of former Yugoslavia, leading to several successor states and extending over more than a decade, constitutes the second large "wave" of successions in the time frame under scrutiny. Compared to the SU's relatively quiet succession process, the disintegration of Yugoslavia has become stuck in the conscience of mankind due to the ethnic tensions, violence, and human suffering associated with it. Several UN forces were deployed in the course of the conflicts and international organizations, commissions, and courts have had to cope with related international crimes and political deadlocks.[1320]

1) General Background

The Socialist Federative Republic of Yugoslavia (SFRY), a federation consisting of six republics, Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia, emerged after the Second World War out of the former kingdom of Yugoslavia[1321] and was a founding member of the UN. The constitution of the multi-ethnic state accorded its members with the

1320 In order to cope with the international crimes committed on the territory, the UNSC installed the International Criminal Tribunal for the former Yugoslavia (1993-2017) by UNSC, 'Resolution 827: On the Establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991' (25 May 1993) UN Doc. S/RES/827. For an overview of ICJ jurisprudence on the conflict in Yugoslavia cf. Tobias Thienel and Andreas Zimmermann, 'Yugoslavia, Cases and Proceedings before the ICJ (2019)' in: *MPEPIL* (n 2).

1321 Cf. on the historical context Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 1-9; Paula M Pickering and Jelena Subotić, 'Former Yugoslavia and Its Successor States' in Zsuzsa Csergo, Daina S Eglitis and Paula M Pickering (eds), *Central and East European Politics: Changes and Challenges* (5th ed. Rowman & Littlefield 2022) 525 526–530; Lidija Basta Fleiner and Vladimir Djeric, 'Serbia (2012)' in: *MPEPIL* (n 2) paras. 1-8.

right to self-determination and considerable autonomy.[1322] By the end of the 1980's, several of its republics, induced by nationalist movements in Serbia, sought more independence and ethnic quarrels erupted.[1323] That evolution coincided with the federation's central authorities losing power.[1324]

In 1991, Slovenia and Croatia were the first SFRY republics to declare their independence.[1325] When the federal army intervened, the conflict in Slovenia was quickly solved, while the situation in Croatia escalated violently.[1326] To allay the imminent conflict on the ground, the European Communities (EC) initiated a peace conference at The Hague in September 1991.[1327] Due to Serbian opposition, the initiative was not successful.[1328] Yet, the peace conference did manage to install an arbitration commission: The "Badinter Commission"[1329], which issued several "Opinions" that were highly influential in the international legal evaluation of the Yugoslavian situation. Macedonia declared its independence in September 1991,[1330] Bosnia and Herzegovina in April 1992[1331]. Serbia and Montenegro, as the remaining two member states, formed another state, the Federal Republic of Yugoslavia (FRY), comprising considerably less than 50% of the original territory and of the population of the SFRY. Nevertheless, the FRY claimed

1322 Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 1, 6, 8. The scope of the "right to secession" contained in the constitution of the SFRY in fact was a matter of dispute, cp. e.g. Mateja Steinbrück Platiše, 'Slovenia (2013)' in: *MPEPIL* (n 2) para. 8.

1323 Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) para. 14.

1324 ibid paras. 10-13; Pickering and Subotić, 'Former Yugoslavia and Its Successor States' (n 1320) 530.

1325 For Slovenia Steinbrück Platiše, 'Slovenia (2013)' (n 1321) para. 9; for Croatia Maja Sersic, 'Croatia (2011)' in: *MPEPIL* (n 2) para. 4.

1326 Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 15-18, especially on Croatia 34-41; Pickering and Subotić, 'Former Yugoslavia and Its Successor States' (n 1320) 530–531; Sersic, 'Croatia (2011)' (n 1324) paras. 10-12; Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) para. 12.

1327 See relevant documents compiled in (1992) ILM 31(6) 1421-1594 with Paul C Szasz, 'Introductory Note' (1992), 31(6) ILM 1421.

1328 Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) para. 19.

1329 Named after its chairman, Robert Badinter. For more information on the commission see documents compiled in (1992) ILM 31(6) 1488-1526 with Maurizio Ragazzi, 'Introductory Note' (1992), 31(6) ILM 1488, and Malgosia Fitzmaurice, 'Badinter Commission (for the Former Yugoslavia) (2019)' in: *MPEPIL* (n 2).

1330 Michael Wood and Niko Pavlopoulos, 'North Macedonia (2019)' in: *MPEPIL* (n 2) para. 8.

1331 Pickering and Subotić, 'Former Yugoslavia and Its Successor States' (n 1320) 531.

to be the continuator state of the SFRY and considered itself bound by the SFRY international obligations.[1332]

The legal qualification of the chain of events is controversial. From the outset, the declarations of independence of four of the six republics appeared to be secessions from the federation.[1333] After the declarations of independence by Croatia and Slovenia, European states were divided on how to best react to the events.[1334] Eventually, both were recognized by many states in January 1992,[1335] Bosnia-Herzegovina in April 1992,[1336] and all three admitted to the UN in May 1992. Under the name "North Macedonia", the fourth successor state was admitted to the UN in April 1993 and formally recognized by several states successively throughout 1993.[1337] On FRY status, the UN's and states' attitudes were, initially, at least ambivalent.[1338] However, with the unfolding of the war in Bosnia-Herzegov-

1332 Permanent Mission of Yugoslavia to the UN, 'Note dated 27 April 1992' (7 May 1992) UN Doc. A/46/915 2 "strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia". Cf. also Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 32, 100; Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) paras. 17-18. Comprehensively on the pros and cons of this claim Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294) 98–112.

1333 For Croatia and Slovenia Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) para. 99.

1334 ibid paras. 21-22, 87-89.

1335 ibid para. 90; for Slovenia Steinbrück Platiše, 'Slovenia (2013)' (n 1321) paras. 13, 16; for Croatia Sersic, 'Croatia (2011)' (n 1324) para. 9.

1336 Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) para. 30.

1337 On Macedonia's difficult recognition process ibid para. 31.

1338 The UNSC, 'Resolution 757: On Sanctions against Yugoslavia' (30 May 1992) UN Doc. S/RES/757 1454 noted in a preambulatory clause "that the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted"; the ICJ in *Legality of Use of Force (Serbia and Montenegro v. Belgium),* 15 December 2004, Preliminary Objections, ICJ Rep 2004 279 para. 73 (ICJ) took note of the "rather confused and complex state of affairs that obtained within the United Nations surrounding the issue of the legal status of the Federal Republic of Yugoslavia in the Organization during this period". In particular on the depositary practice Rasulov (n 617), 145–146. Cf. also Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) paras. 20-21; Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 101–103; Stern, 'La Succession d'États' (n 283), 46 "continuation suspendue"; Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294) 109–111.

ina, led by Serbian authorities,[1339] the international reaction shifted: The Badinter Commission, while in its Opinion No. 1 merely declaring the SFRY to be "in the process of dissolution"[1340], even in July 1992 stated that "the process of dissolution [...] is now complete and [...] the SFRY no longer exists"[1341] and that "all [new states created on the territory of the former SFRY] are successor states to the former SFRY"[1342]. In September 1992, the UNSC considered that "the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist, [...] the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations" and recommended "to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly"[1343]. The proposal was promptly followed by the UNGA,[1344] which, in December 1993, moreover requested "[m]ember States and the Secretariat [...] to end the de facto working status of Serbia and Montenegro."[1345]

The majority of voices therefore considered the SFRY demise as a complete dismemberment into several successor states (including the FRY) and not as several successive secessions from a "rump-state" (S)FRY.[1346] In

1339 See for a more detailed account of the war in Bosnia-Herzegovina Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 42-58; Pickering and Subotić, 'Former Yugoslavia and Its Successor States' (n 1320) 531–533.

1340 Badinter Commission, 'Opinion No. 1' (n 306), 1497, para. 3.

1341 Badinter Commission, 'Opinion No. 8' (1992), 31(6) ILM 1521 1523.

1342 Badinter Commission, 'Opinion No. 9' (n 616), 1524.

1343 UNSC, 'Resolution 777: On the Question of Membership of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the United Nations' (19 September 1992) UN Doc. S/RES/777 op. cl. 1.

1344 UNGA, 'Recommendation of the Security Council of 19 September 1992' (22 September 1992) UN Doc. A/RES/47/1 para. 1.

1345 UNGA, 'The Situation in Bosnia and Herzegovina' (29 December 1993) UN Doc. A/RES/48/88 para. 19.

1346 Arnauld *Völkerrecht* (n 255) para. 105; Hasani (n 2), 111, 113, 149; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 403, 406, 417; Hafner and Kornfeind (n 27), 1, 14; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 520; Zimmermann, 'State Succession in Respect of Treaties' (n 1107) 102, 104; Tancredi, 'Dismemberment of States (2007)' (n 324) para. 7; Thürer and Burri, 'Secession (2009)' (n 317) para. 36. Differently Theodor Schweisfurth, 'Das Recht der Staatensukzession: Die Staatenpraxis der Nachfolge in völkerrechtliche Verträge, Staatsvermögen, Staatsschulden und Archive in den Teilungsfällen Sowjetunion, Tschechoslowakei und Jugoslawi-

practice, the matter was (only) finally settled when the *Milosevic* regime came to an end and, in 2000, the new Serbian government accepted the FRY's status as a successor state to the former SFRY.[1347] The FRY then was quickly admitted to UN membership on 1 November 2000.[1348]

2) Domestic Regulations of the SFRY Successor States

a) General Preliminary Remarks

Private law used to be a shared competence in the SFRY with the federation only being responsible for the law of obligations and "*basic* relations concerning the law of property; *basic* relations which ensure the unity of the Yugoslav market; *basic* law of property relations […]; copyright […]"[1349] and the federated members enacting their own civil codes or laws on property matters.[1350] Therefore, in the field of private property, independence was not expected to lead to a massive overhaul. Until the beginning of the 1990s, the SFRY property regime was reported as having been considerably steadfast.[1351] In the 1960s, the SFRY departed from the traditional Soviet socialist model – besides others by introducing the concept of "social property" (to be distinguished from state property).[1352] Moreover, it pragmatically

en' (24. Tagung der Deutschen Gesellschaft für Völkerrecht, Leipzig, April 1995) 203; Vladan Kulisic, 'On Principles of Constitution of the Federal Republic of Yugoslavia, Constitution of the Republic of Serbia and the Constitution of the Republic of Montenegro' (2000), 7(1-2) J Const L East & Cen Eur 25-39. Very critical towards the succession thesis Epping, '§7. Der Staat als die „Normalperson" des Völkerrechts' (n 2) 183, para. 208 claiming that "coming from the theory of continuity of a state" this decision was "hardly tenable"; cf. also Stern, 'La Succession d'États' (n 283), 46 speaking of a "continuation suspendue"; Pavković and Radan, 'Introduction' (n 392).

1347 Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) para. 22; Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 33, 103.

1348 UNGA, 'Admission of the Federal Republic of Yugoslavia to Membership in the United Nation' (10 November 2000) UN Doc. A/RES/55/12.

1349 Art. 281 (4) of Constitution of the Socialist Federal Republic of Yugoslavia (Jugoslovenski Pregled 1989) (SFRY) [emphasis added].

1350 Marco Roccia, 'Reforming Property Law in Kosovo: A Clash of Legal Orders' (2015), 23(4) European Review 566 566-567.

1351 Milica Uvalić, *Investment and Property Rights in Yugoslavia: The Long Transition to a Market Economy* (CUP 1992) 9 "probably the most constant feature of the Yugoslav system over the last forty years".

1352 ibid 5–6; Gashi (n 1195) 77.

acknowledged to a limited extent the need for the existence of private property, also relating to real estate.[1353] Comparable to Yemen or Germany, particular post-succession issues were the privatization or "de-nationalization" of property and the restitution of property nationalized by the SFRY after the Second World War,[1354] and its consequences for those having acquired rights in relation to such property.[1355]

In the case of the SFRY, an analysis of changes in private law, especially the law of property, after independence is subject to several caveats. First, comparable to the situation in the SU, the demise of the SFRY went hand-in-hand with the demise of the socialist economic order. The SFRY economy had been one of the most modern and, for quite some time, most successful socialist economies in the world. Nevertheless, as early as the 1980s, it started to falter and finally all SFRY successor states had, even before their independence, introduced new systems more or less modelled on a market economy and western traditions of private property.[1356] Dissociating the measures undertaken as a consequence of state succession from those taken due to independent economic reforms is therefore impossible. Second, as mentioned, the independence processes of the former SFRY republics were not always peaceful. Especially states having to cope with enduring war activities and flows of refugees on their territories often enacted (purportedly temporary) emergency legislation also related to allocating real property.[1357] Additionally, in some of the successor states shortly after their independence, international forces were deployed to administer the territory. Here, the potential deprivation or preservation of rights cannot always be directly attributed to the new state and is not necessarily a direct consequence of the succession process but rather one of the violent conflict behind that process.

1353 UN-HABITAT, 'Housing and Property Rights in Bosnia and Herzegovina, Croatia and Serbia and Montenegro: Security of Tenure in Post-Conflict Societies' (2005) 17–20 <https://unhabitat.org/sites/default/files/download-manager-files/Housing%20and%20Property%20Rights%20-%20Bosnia%20and%20Herzegovina%2C%20Croatia%20and%20Serbia%20and%20Montenegro.pdf>.

1354 On privatization and resitution ibid 20, 88.

1355 For three of the successor states ibid 2, 13; for the example of the Roma population in Bosnia and Herzegovina ibid 53–56.

1356 For an overview of the economic reforms before independence Uvalić (n 1350) 11-15, 176–209; see also Gashi (n 1195) 77–78.

1357 For Croatia and Bosnia and Herzegovina *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 1–2.

b) Domestic Law of Slovenia

The four legal acts of most relevance for regulating the attitude of independent Slovenia towards the previous legal order are the Basic Constitutional Charter (CC) on the Sovereignty and Independence of the Republic of Slovenia[1358], enacted on the declaration of independence on 25 June 1991, complemented by the Constitutional Act Implementing the CC (Implementation Act CC)[1359], as well as the Constitution of the Republic of Slovenia,[1360] enacted on 23 December 1991 and the corresponding Implementation Act (Implementation Act Constitution).[1361] Questions concerning the transmission of acquired positions were generally regulated by the Implementation Acts rather than by the CC or the constitution, which contain relatively few provisions on the topic.

aa) Continuity of the Legal Order in General

Art. 3 of the Implementation Act CC provided that "[t]reaties concluded by Yugoslavia which apply to the Republic of Slovenia remain in force on the territory of the Republic of Slovenia". Slovenia is reported as having succeeded to "most of the bilateral and multilateral treaties to which the

1358 Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (25 June 1991) OG of Slovenia 1/1991 1 (Slovenia) (English translation on HeinOnline https://heinonline-org).

1359 Constitutional Act Implementing the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (25 June 1991) OG of Slovenia 1/1991 2 (Slovenia), English translation available at https://www.dz-rs.si/wps/wcm/connect/en/dz%20documents_en/politicnisistem/ustava%20republike%20slovenije/ustavni%20zakoni%20za%20izvedbo/d118b71c-e164-4a27-8ec7-f8ca4f4b112c.

1360 Constitution (23 December 1991) OG of Slovenia No. 33/91-I (Slovenia), an English translation is available at the webside of the National Assembly of Slovenia at https://www.dz-rs.si/wps/portal/en/Home/!ut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfIjo8zinfyCTD293Q0N3L2cTAwCjf19nYLMgwwNA030wwkpiAJKG-AAjgb6BbmhigCxzCxp/dz/d5/L2dBISEvZ0FBIS9nQSEh/.

1361 Constitutional Act Implementing the Constitution of the Republic of Slovenia (23 December 1991) OG of Slovenia 33/1991 1386 (Slovenia), English translation available at https://www.dz-rs.si/wps/wcm/connect/en/dz%20documents_en/politicnisistem/ustava%20republike%20slovenije/ustavni%20zakoni%20za%20izvedbo/e0ff961a-130e-402b-b74d-baf2c1aaf69d#_ftn1.

former SFRY was a party, and which were of relevance to Slovenia"[1362]. Art. 8 of the Slovenian constitution postulated the supremacy of "generally accepted principles of international law" and international treaties over national laws and regulations and provided for direct application of such treaties. Therefore, in theory, all international rights guaranteed by Slovenia before its independence continued to be in force, also domestically.

Analogically, Art. 4 para. 1 of the Implementation Act CC provided for the continuity of "those federal regulations that were in force in the Republic of Slovenia when this Act entered into force" which, until new regulations were made by Slovenia, were to "be applied mutatis mutandis as regulations of the Republic of Slovenia, insofar as they are not contrary to the legal order of the Republic of Slovenia and unless otherwise provided by this Act". Furthermore, "[a]ll judicial and administrative proceedings initiated before the authorities of the SFRY shall continue before the competent authorities of the Republic of Slovenia", Art. 8 para. 1 Implementation Act CC. Individual legal acts of the SFRY or other republics dating prior to independence were to remain enforceable subject to reciprocity and congruency with the Slovenian legal order, Art. 8 para. 2 Implementation Act CC.[1363] Slovenia therefore opted for legal continuity as the default rule. That rule was subject, however, to the broad prerequisite of compliance with the whole corpus of the "new" Slovenian law, allowing SFRY law to be modified at any point in time. Six months later, the Slovenian constitution did not add much to that stipulation: The corresponding Implementation Act provided in Art. 1 for the preservation of "regulations and other general acts on the day of the promulgation of the Constitution" and therefore again for continuity. In contrast to the Implementation Act CC, for an interim period until 31 December 1993, the continuity was not contingent on compliance with the constitution.

bb) Private Rights

None of the mentioned documents contained explicit provisions on the permanence of individual rights acquired before independence in particular, but Art. 3 CC guaranteed in general terms "the protection of human

1362 Steinbrück Platiše, 'Slovenia (2013)' (n 1321) para. 20; cf. also UNSG, 'Depositary Notification on Succession by Slovenia' (28 October 1992) UN Doc. C.N.240.1992.

1363 Legal acts issued after that date were treated like foreign acts, Art. 8 para. 3 Implementation Act CC (n 1358).

rights and fundamental freedoms to all persons in the territory of the Republic of Slovenia irrespective of their national origin, without any discrimination whatsoever, in accordance with the Constitution of the Republic of Slovenia and the treaties in force."

i. The "Erased"

In the implementation of that seemingly generous constitutional provision, pursuant to Art. 13 Implementation Act CC, citizens of other former SFRY republics were eligible to the same rights as Slovenian citizens if they had been registered as permanent residents of Slovenia and actually lived there on the date of the Slovenian independence plebiscite. But such a status was only guaranteed by Art. 13 until those citizens "acquire citizenship of the Republic of Slovenia […] or until the expiry of the time limits determined" under national law. That reservation became one of the most problematic provisions of the Slovenian transition process, being challenged before the Slovenian Constitutional Court and eventually before the ECtHR because it impaired the status previously held by citizens of other SFRY republics.

During the existence of the SFRY, all of its citizens held two nationalities - the federal Yugoslavian nationality and the nationality of one of its republics.[1364] Yugoslav citizens had been allowed to travel freely between and within the constituent republics and to settle in any one of them. The exercise of civil, economic, social, and political rights was tied to a registered permanent residence in one of the republics. The pertaining registration procedure was the same for all citizens of the SFRY republics but differed for third-country nationals. In that time, about 200,000 citizens of other SFRY republics took residence in Slovenia. After independence, Slovenia enacted the legislation foreseen by Art. 13 Implementation Act CC setting out a procedure to apply for Slovenian citizenship. In 1992, Slovenian authorities deleted from the register of permanent residents all persons who had not applied for Slovenian citizenship within the time limit provided for or whose application was denied. In that way, around 25,000 former SFRY citizens were re-registered as foreigners in Slovenia and not only lost their residence permit in Slovenia but with it in fact any status they had before. Some of these so-called "erased" became stateless, were deported, did not receive passports or travel documents, were unable to

1364 Cf. Art. 249 SFRY Constitution (n 1348).

lease a flat, apply for social assistance or a driver's license, or to find employment.[1365] The Slovenian Constitutional Court in 1999 rendered its first judgment on the treatment of the "erased" and found that the actions of Slovenia had violated "the principle of protection of confidence in the law, as one of the basic principles of the rule of law".[1366] According to the court, an interpretation of the relevant legislation revealed that it did not embrace former SFRY citizens, but only third-country nationals. The status of the "erased" was thus left in limbo. The reasoning is worth citing in length:

> "The principle of protection of confidence in the law guarantees an individual, that the state shall not impair his/her legal status without a justified reason. […] In its Independence Acts, Slovenia, as a new country, obliged itself to ensure protection of human rights and fundamental freedoms to all the persons in the territory of the Republic of Slovenia, regardless of their nationality, without any discrimination and in accordance with the Constitution of the Republic of Slovenia and the valid international law […]. According to the a.m. Independence Acts, *the citizens of other republics, who had not applied for the citizenship of the Republic of Slovenia or whose applications were rejected, were quite justified to expect, that this circumstance should not essentially impair their status and that they should be permitted to continue their permanent residing in the Republic of Slovenia if they wish to do so*. Furthermore, these persons were quite justified to expect […] that they [sic] legal status would be regulated according to the international law. Thus, Article 12 of the International Covenant on Civil and Political Rights […] stipulates, that all the persons who are legally residing in a territory of a state, have the right to move freely in the territory and to chose their residence freely, and that this right can only be limited due to specific reasons".[1367]

After additionally finding a violation of the principle of equality,[1368] the court declared the respective law unconstitutional and required the legislator to rectify the legal lacuna. The court's reference to Art. 12 ICCPR may be contestable since, after independence, Slovenia itself constituted a new

1365 On the history and background of the "erasure" *Kurić and Others v. Slovenia,* Appl. No. 26828/06, 26 June 2012, ECHR 2012-IV 1 paras. 16-39, 69 (ECtHR [GC]).

1366 *The Erased,* U-I-284/94, 4 February 1999, Procedure for Verification of Constitutionality para. 15 (Slovenian Constitutional Court).

1367 ibid para. 16 [emphasis added].

1368 Oddly, third country nationals' permanent residence permits acquired before independence were recognized.

state free to regulate the lawful residence within its borders. Nevertheless, its reliance on the potential expectations of the SFRY citizens towards the permanence of their status is remarkable. The judgment accords crucial significance to confidence in the survival of rights when there is a legal void, i.e. when a successor state has not regulated the issue. In the aftermath of the judgment, the Slovenian legislator enacted a new law, which in 2003 was again declared partly unconstitutional by the Supreme Court.[1369] The newly reformed law, due to a referendum opposing it and after years of only incomplete implementation of the court's decisions, only came into force in 2010.[1370]

Before the ECtHR, where a complaint against the "erasure" had been lodged, the Slovenian government relied heavily on the exceptionality of the succession situation. It argued that

> "the events in 1991 had involved the historic creation of a new State and that it had therefore been necessary, on the one hand, to establish rapidly a corpus of citizens in view of parliamentary elections and, on the other hand, to regulate the status of aliens, including that of citizens of the other former republics of the SFRY with permanent residence in Slovenia. This pivotal time for the establishment of a new State called for the quick adoption of decisions owing to the pressing social need."[1371]

The procedure of nationalization in Slovenia was accepted by the court as furthering the legitimate aim of protecting "the interests of the country's national security".[1372] But in a judgment that became a milestone for acquired rights protection, both a chamber and the GC of the ECtHR found Slovenia in violation of Art. 8 ECHR, the right to private and family life, as the treatment was not "in accordance with the law".[1373]

> "[A]t least until 2010, the domestic legal system failed to regulate clearly the consequences of the "erasure" and the residence status of those who had been subjected to it. Therefore, not only were the applicants not in a

1369 The new law had required the issuance of the permits *ex tunc*, not *ex nunc*. On the history of the legislative enactments *ECtHR Kurić and Others* (n 1364) paras. 49-61.

1370 On the cumbersome legislative and administrative history of the case ibid paras. 62-83.

1371 ibid 325.

1372 ibid 353.

1373 As this was seen as a "continuing" violation, the fact that Slovenia only became party to the ECHR on 28 June 1995, was no bar to the Court's jurisdiction, ibid para. 339.

position to foresee the measure complained of, but they were also unable to envisage its repercussions on their private or family life or both."[1374]

Additionally, since the ECtHR did not deem it necessary to bereave the applicants of their residence permit in order to establish a "corpus of citizens", it declared the actions not to be "necessary in a democratic society".[1375] When weighing the interests of the "erased" individuals against the purported state interests, here, the ECtHR did not accord much leeway to the Slovenian authorities but served a reminder that "there may be positive obligations inherent in effective 'respect' for private or family life or both, in particular in the case of long-term migrants such as the applicants"[1376]. It therefore held that Slovenia was under an obligation to "regularize […] the residence status of former SFRY citizens". Hence, the court developed a right for citizens to maintain an acquired status from Art. 8 ECHR even when a state becomes independent *and irrespective of the grant of nationality*. As one of the rare decisions finding a violation of human rights through the curtailment of a domestic status in a succession case, the judgment can be considered a veritable "fork in the road" for the development and acceptance of the doctrine of acquired rights.

ii. Property

The right of private property and inheritance was explicitly mentioned in Art. 33, 67, and 69 of the Slovenian constitution.[1377] As the domestic private property law was simply continued after succession (see above), rights to movable property remained intact. For immovable property, the original version of Art. 68 of the constitution stipulated that "[a]liens may acquire ownership rights to real estate under conditions provided by law. Aliens may not acquire title to land except by inheritance, under the condition of reciprocity."[1378] Those provisions were meant to protect the relatively new

1374 ibid para. 348.
1375 ibid paras. 354-359.
1376 ibid para. 358.
1377 For the content of the right reference is made to statutory law. Art. 60 of the constitution includes the protection of intellectual property rights. The Slovenian constitution does not refer to the Hull-formula. See also Art. 70 (Public Good and Natural Resources) and Art. 71 (Protection of Land).
1378 Cf. also Art. 9 of the Implementation Act Constitution (n 1360) "[u]ntil the adoption of the law referred to in Art. 68 of the Slovenian Constitution (n 1359), aliens

country from a sellout by western investors.[1379] Yet, importantly, also for aliens, "ownership rights and other real rights to real estate" were guaranteed on the basis of reciprocity "to the same extent as on the entry into force of this Act". Thus, while the (future) right of aliens *to acquire* real estate was not protected on a constitutional basis in Slovenia, *already acquired* real property rights were. That protection was underscored by Art. 68's exception for inheritated property, which protected the *already acquired* rights of another person, the descendent. The rule was approved by Art. 16 Implementation Act CC.

While privatization had already started in 1988, after independence Slovenia enacted its own privatization laws.[1380] People living in residential houses under "social property" were then allowed to buy the premises at a reduced price.[1381] When privatizing social property, Slovenia paid particular attention to restitution for former owners who were expropriated under communism.[1382] Restitution in kind was the priority, but it could also take place through compensation for reasons of public good.[1383]

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may not acquire ownership rights to real estate." Also under Art. 16 Implementation Act CC (n 1358) foreigners were not allowed to acquire ownership rights or real rights to real estate, "except on the basis of inheritance and on condition of actual reciprocity". In the later (2006) version of Art. 68 "[a]liens may acquire ownership rights to real estate under conditions provided by law or a treaty ratified by the National Assembly."

1379 Gisbert H Flanz, 'The Republic of Slovenia: Introduction' in Gisbert H Flanz and Albert P Blaustein (eds), *Constitutions of the Countries of the World: A Series of Updated Texts, Constitutional Chronologies and Annotated Bibliographies - Vol. 16* (Oceana Publ) v vi.

1380 In detail Gashi (n 1195) 78; on the privatization of enterprises ibid 78–82.

1381 ibid 78.

1382 ibid 79, 108-109. See on denationalization also (albeit not deciding the material questions) *Attems and Others v. Slovenia,* Appl. No. 48374/99, 4 January 2008, Decision on Admissibility (ECtHR).

1383 Gashi (n 1195) 108–109.

c) Domestic Law of Croatia

aa) Continuity of the Legal Order in General

In Art. 3 para. 2 of Croatia's "Declaration on the Proclamation of the Sovereign and Independent Republic of Croatia",[1384]

> "[t]he Republic of Croatia guarantees, in accordance with the rules of international law, to other states and international organizations that it will fully and conscientiously exercise all rights and obligations as the legal successor of the former SFRY in the part relating to the Republic of Croatia."

Pursuant to Art. 3 of its "Constitutional Decision on the Sovereignty and Independence",[1385] it took on all obligations from international treaties of the SFRY if they were in line with the legal order of Croatia.[1386] With respect to domestic law, according to Art. 4 of the Constitutional Decision,[1387] Croatia upheld not only its own law but also federal laws unless they had been withdrawn.[1388]

1384 Declaration on the Proclamation of the Sovereign and Independent Republic of Croatia (25 June 1991) OG of Croatia 31/1991 875 (Croatia). I am very grateful to Dr. Mateja S. Platise, Max Planck Institute for International Law Heidelberg, for checking the linguistic accuracy of all translations from Croatian original sources in this section c). All mistakes of course remain with me.

1385 Constitutional Decision on the Sovereignty and Independence (25 June 1991) OG of Croatia 31/1991 872 (Croatia), cf. also Siniša Petrović and Petar Ceronja, 'Croatia' in: *Shan Legal Protection of Foreign Investment* (n 598) 287 292.

1386 The provision even alluded to the international rules of state succession. Cf. also Sersic, 'Croatia (2011)' (n 1324) para. 14. See also Art. 29 of the Law on the Conclusion and Enforcement of International Treaties (20 April 1996) OG of Croatia 28/96 542 (Croatia). "The Republic of Croatia shall apply the relevant rules of international law to succession in respect of international agreements of the predecessor state if such agreements are not in conflict with the Constitution of the Republic of Croatia and the legal order of the Republic of Croatia"; Petrović and Ceronja, 'Croatia' (n 1384) 292.

1387 Croatian Decision on Independence (n 1384).

1388 Similarly, Art. 4 of the Croatian Declaration of Independence (n 1383) explained that "In the territory of the Republic of Croatia, only laws passed by the Parliament of the Republic of Croatia are valid, and until the end of the dissolution, federal regulations that have not been repealed."

bb) Private Rights

Art. 48 para. 1 and 4 of Croatia's constitution, enacted in 1990,[1389] contained a protection of property. That right was qualified by general welfare considerations, para. 2, and foreigners were only allowed to acquire ownership "under conditions spelled out by law", para. 3. Art. 48 para. 4 protected the right to inheritance. Possible limitations to property rights were subject to law, public interest, and "indemnity equal to its market value", Art. 50 para. 1. Notably, even then "[e]ntrepreneurial and market freedom" were explicitly named as the basis of the Croatian economic system, Art. 49 para. 1, and entrepreneurs', Art. 49 paras. 2, Art. 50 para. 2, and foreign investors', Art. 49 para. 5, property was specially protected. Art. 49 para. 4 even stipulated that "[t]he rights acquired through the investment of capital may not be lessened by law, nor by any other legal act". In the Declaration, the inviolability of property was said to be one of the "highest values of the constitutional order" on a level with principles such as the rule of law, democracy, and human rights.

Croatia started its privatization process in 1990 but until 1995 was hindered in finalizing it in all parts of the country by the war.[1390] While, in rural areas, apartments were mostly privately owned,[1391] especially in the urban areas, apartments had regularly been occupied on the basis of so-called "occupancy rights" or "specially protected tenancies", which gave holders a right to live in the apartment for life unless the apartment remained uninhabited for more than six months on "unjustified" grounds.[1392] Normally, in the process of privatization, such occupancy rights of socially owned apartments were transformed into lease agreements unless the hold-

1389 Constitution (22 December 1990) OG of Croatia 56/1990 (Croatia) reprinted in Ivan Bekavac (ed), *Zbirka pravnih propisa* (1993) 344; an English tranlsation can be found online at https://www.servat.unibe.ch/icl/hr01000_.html; a consolidated 2014 English version is available online at the homepage of the Croatian Constitutional Court https://www.usud.hr/en.

1390 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 1, 66, 69; see on the privatization of public enterprises Gashi (n 1195) 82–86.

1391 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 78.

1392 On the content of such tenancy rights Petar Đurić, 'The Right to Restitution of Tenancy Rights in Croatia: In Search of Redress for Violations of Individual and Minority Rights of Ethnic Serbs' (2014), 13 European Yearbook of Minority Issues 321 322.

er of the right chose to buy the apartment at favorable conditions.[1393] Yet, occupancy rights with respect to private property were transformed into lease agreements.[1394] That transformation can be interpreted as a means for protecting owner interests in property as well. Furthermore, Croatia instituted restitution procedures for property lost in the SFRY.[1395] While, in principle, restitution in kind was owed, only compensation could be claimed in cases of good faith acquisition of property by a third person.[1396]

However, in the following period, the war erupting in Croatia shortly after its independence profoundly influenced the further protection of property, especially for minority populations on the territory. During the military conflict in the Serb-populated border region, there were massive flows of refugees from one part of the country to the other.[1397] Those flights left many houses and apartments, especially those owned by people of non-Croatian ethnicity, in particular Serbs, empty; but thousands of people who had fled the border region, especially of Croatian ethnicity, became homeless. Croatia then enacted legislation according those refugees the right to house in the abandoned apartments.[1398] Thus, the new occupants of the houses were mostly of Croatian ethnicity, the former rights' holders, who had fled the country, were mostly of another ethnicity. Even during, but also after the war, occupancy rights of the original owners were cancelled as their absence was considered "unjustified"[1399] and the institute of

1393 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 84–86; Đurić (n 1391), 324.

1394 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 85–86; cf. European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo: Study' (15 March 2010) PE 419.632 92; for construction land ibid 93.

1395 Gashi (n 1195) 110–113.

1396 ibid 111.

1397 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 68.

1398 Đurić (n 1391), 323; *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 69, 73-74.

1399 ibid 65, 69-72, 83-84. *Blečić v. Croatia,* Appl. No. 59532/00, 29 July 2004, Decision on the Merits (ECtHR) had declared this practice to be within Croatia's margin of appreciation. In this judgment, the court, however, did not talk about any discriminatory application of the procedure. The case was referred to the GC which (in a six to eleven votes split bench) declined its jurisdiction *ratione temporis*, cf. *Blečić v. Croatia,* Application No. 59532/00, 8 March 2006, ECHR 2006-III 51 (ECtHR [GC]). Very critical on the judgments Đurić (n 1391), 346. In light of the content of an occupancy right and since Croatian domestic legislation had given the rights-holder the possibility to buy the socially owned apartment, the curtailment of these rights can be considered an expropriation, cf. ibid 328; *UN-HABITAT 2005*

occupancy rights was abolished altogether in 1996.[1400] Furthermore, abandoned property was put under state administration.[1401]

Due to short application deadlines for the sale of the apartments or restitution of property, which could hardly be met by displaced people residing in other countries,[1402] the consequences of what initially was meant to constitute an "emergency measure" were substantially perpetuated, also after the war. Despite the UNSC reaffirming "the right of all refugees and displaced persons originating from the Republic of Croatia to return to their homes of origin throughout the Republic of Croatia" and calling upon Croatia to "remove legal obstacles and other impediments to two-way returns, including through the resolution of property issues",[1403] many people, mostly ethnic Serbians, lost their rights without any compensation. Croatia seems to be the only former Yugoslav republic that did not restitute occupancy rights.[1404] For the private property taken under administration and not given back after the war, Croatia was prepared to enact a new law giving former owners more possibilities to regain their property, but only after considerable international pressure. Yet, rights of the new occupants of the apartments were often still given more weight than the property rights of former owners. Despite several decisions by international institutions such as the Human Rights Committee[1405] and the European Committee of

Housing and Property Rights (n 1352) 72, 75; Tom Allen and Benedict Douglas, 'Closing the Door on Restitution' in Antoine Buyse and Michael Hamilton (eds), *Transitional Jurisprudence and the European Convention on Human Rights: Justice, Politics and Rights* (CUP 2011) 208 218–220.

1400 Đurić (n 1391), 323.

1401 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 73–74.

1402 Đurić (n 1391), 323–324. On the openly discriminatory intent ibid 331–332; *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 74–75.

1403 UNSC, 'Resolution 1145: On the Establishment of a Support Group of Civilian Police Monitors in the Danube Region' (19 December 1997) UN Doc. S/RES/1145 (1997) para. 7.

1404 Đurić (n 1391), 324; *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 83–84.

1405 On the loss of occupancy rights *Vojnovic v. Croatia,* UN Doc. CCPR/C/95/D/1510/2006, 30 March 2009 (Human Rights Committee).

Social Rights[1406] finding Croatia's acts in violation of international law, the issue has not yet been completely solved.[1407]

d) Domestic Law of Macedonia

For Macedonia,[1408] the constitution[1409] did not illuminate the relationship to the SFRY's legal order, but guidance can be found in the pertaining Implementation Law[1410]. Art. 4 of the Implementation Law clarified that Macedonia considered itself as "an equal legal successor" to the SFRY, therefore undertaking "the rights and the duties arising from the establishment of the Socialist Federal Republic of Yugoslavia" which - unless an international agreement was concluded - "shall be determined in conformity with the general rules of International Law" and the Vienna Conventions.

It basically opted for succession to the international treaties relevant for its territory as foreseen in Art. 34 VCSST. According to Art. 118 of the Macedonian constitution, those treaties automatically became part of the domestic law and ranked higher than statutory law. For domestic law, Art. 5 of the Implementation Law determined that "existing federal legal acts" should become legal acts of Macedonia.[1411] Art. 30 of the constitution

1406 *Centre on Housing Rights and Evictions (COHRE) v. Croatia,* Complaint No. 52/2008, 22 June 2010, Decision on the Merits (European Committee of Social Rights), which found a violation of Art. 16 European Social Charter (The Right of the Family to Social, Legal and Economic Protection).

1407 In more detail on this process *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 73–82, 84; European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 96–107. Still in 2015 the Human Rights Committee, 'Concluding Observations on the Third Periodic Report of Croatia' (30 April 2015) UN Doc. CCPR/C/HRV/CO/3 para. 13 remained "concerned that a considerable number of refugees, returnees and internally displaced persons have still not been resettled and continue to reside in collective shelters."

1408 The state was originally admitted to the UN under the name of "Fomer Yugsolav Republic of Macedonia (FYROM)". Later, a dispute with Greece ensued about the name which was only settled in 2019. Since then the state is officially named "Republic of North Macedonia". On this dispute and the choice of words Wood and Pavlopoulos, 'North Macedonia (2019)' (n 1329).

1409 Constitution (17 November 1991) OG No. 52/1991 (Macedonia).

1410 Constitutional Law on the Implementation of the Constitution OG No. 52/91 (Macedonia).

1411 Excluded are "federal legal acts which regulate the organization and the competencies of the bodies of the Federation".

protected the "right to ownership of property and the right of inheritance". As ownership "should serve the well-being of both the individual and the community", expropriations could only take place in the public interest and compensation of at least its market value had to be provided for. Foreigners could acquire ownership only under special conditions determined by law, Art. 31. Similar to Croatia, Art. 59 of the Macedonian constitution explicitly protected foreign investors and their rights acquired "on the basis of invested capital". Privatization had already started during the SFRY period.[1412] Restitution legislation was not linked to that process but enacted only in 1998, years after independence.[1413] Restitution in kind was foreseen as the primary remedy, which, however, was substituted by compensation when another person had acquired ownership in goof faith.[1414]

e) Domestic Law of Bosnia-Herzegovina

Only shortly after the independence of the Republic of Bosnia and Herzegovina, the country was ravaged by a war that lasted until 1995, when NATO forces intervened.[1415] The Bosnian war was formally ended by the Dayton Agreement,[1416] concluded under international supervision in December 1995 between the Republic of Bosnia-Herzegovina, the Republic of Croatia and the newly built FRY. The new constitution of Bosnia and Herzegovina was appended as Annex 4 to the Dayton Agreement. Its content was therefore strongly internationally influenced. The "Dayton Constitution" changed the name of the state from "Republic of Bosnia and Herzegovina" to "Bosnia and Herzegovina", Art. 1 para. 1, and re-arranged its inner constitution: From then on, the state of Bosnia and Herzegovina was composed of the Federation of Bosnia and Herzegovina (FBH) and the Republika Srpska (RS).[1417] Art. 1 para. 3. Art. 1 para. 1 of the constitution provided that

1412 Gashi (n 1195) 86–90.
1413 ibid 113–114.
1414 ibid 115.
1415 On the military conflict Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 42-52; Pickering and Subotić, 'Former Yugoslavia and Its Successor States' (n 1320) 531–533.
1416 Dayton Agreement (n 1084).
1417 The constitution was approved by Bosnia and Herzegovina and its two constituent parts, respectively.

> "[t]he Republic of Bosnia and Herzegovina, the official name of which shall henceforth be 'Bosnia and Herzegovina,' shall continue its legal existence under international law as a state […]. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations."

Thus, the Dayton Constitution deals with Bosnia and Herzegovina not as a successor state to the SFRY but as a *continuator* state to the *Republic* of Bosnia and Herzegovina. Resultingly, only limited inferences can be drawn from the Dayton Constitution on the question as to which consequences a *change* in sovereignty entails for the rights of individuals. However, the Republic of Bosnia and Herzegovina had enacted its own constitution (still as a republic of the federation of the SFRY) in 1974 and changed it several times but apparently, after its independence, never enacted a new constitution.[1418] As the coming into force of the Dayton Constitution was not in line with the amendment procedure of the foregoing constitution it is to be assumed that the foregoing constitution was replaced, not amended.[1419] Art. XII para. 1 of the Dayton Constitution maintained that it was "*amending* and *superseding* the Constitution of the Republic of Bosnia and Herzegovina" [emphasis added] and hence does not clearly answer the issue. While the continuity of a state and the complete replacement of its constitution are not necessarily mutually exclusive,[1420] it is still questionable whether the expression to "continue" correctly described the state of affairs. Under the assumption that Bosnia-Herzegovina *continued* the *Republic* of Bosnia and Herzegovina, continuity of the legal system would have been a matter of course and the partly detailed provisions on "transitional arrangements" in the Dayton Constitution hardly explicable. Of significance remains, therefore, how the first Bosnian Herzegovinian constitution after independence treated the issue of private rights.

1418 Also Sienho Yee, 'The New Constitution of Bosnia and Herzegovina' (1996), 7(2) EJIL 176 176, especially footnote 6.
1419 ibid 179.
1420 ibid.

aa) Continuity of the Legal Order in General

With respect to international agreements, Art. 2 para. 7 of the constitution stipulates that Bosnia and Herzegovina will "remain" party to the human rights treaties listed in Annex I to the constitution. Other treaties ratified by Bosnia and Herzegovina between 1 January 1992 and the entry into force of the constitution were subject to revision, Art. 5 Annex II to the constitution. The date referred to is remarkable as it was before the declaration of independence by the republic, the state it was supposed to refer to. While, for treaties with a humanitarian character, continuity was provided for, the fate of other treaties concluded before the mentioned date was left in limbo. Strikingly, the constitution did not contain a provision dealing with treaties of the SFRY concluded before 1 January 1992. Even with respect to treaties concluded by the Republic of Bosnia and Herzegovina, continuity of the treaties was subject to approval by the new government and parliament, a relatively clear sign of discontinuity. According to Art. III para. 3 lit. b, "[t]he general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities." Further transitional arrangements, in particular with respect to domestic law, were explicitly provided for in Annex II. Art. 2 of that Annex contained a general rule:

> "All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina",

thereby stipulating a continuity rule. Court or administrative proceedings within Bosnia and Herzegovina were to continue as well, Art. 3 Annex II to the constitution.

bb) Private Rights

Even in its preamble, the constitution underlined the desire "to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy". The ECHR rights were

made part of national law of highest rank, Art. 2 para. 2. All those rights,[1421] including the right of property and rights emanating from international agreements still in force for Bosnia and Herzegovina were to be guaranteed on a non-discriminatory basis to all persons "in Bosnia and Herzegovina", i.e. irrespective of their nationality, Art. 2 paras. 3 and 4, and were secured from any constitutional abrogation or curtailment, Art. 10 para. 2 of the constitution.

In the implementation of its privatization policy, Bosnia-Herzegovina, similar to Croatia, from the beginning was severely impeded by the war on its territory.[1422] During the military conflict, the country was the setting scene of massive inflows of refugees, practices of ethnic cleansing, and a mass exodus of ethnic minorities.[1423] It enacted "emergency laws" to accommodate the housing needs of refugees by letting them occupy abandoned houses of Bosnian displaced people. After the war was over, Bosnian authorities took no steps to undo the policy, set unattainable deadlines for claims to recover ownership or occupancy rights or tended to protect the new users of the property.[1424] The institute of social ownership was abandoned during the war.[1425] The ethnic minority owners or occupancy rights holders who had been expelled during the war were, thus, expropriated without compensation, thereby perpetuating the ethnic reversal of the population.[1426] The first genuine "ordinary" de-nationalization laws were

1421 Annex 6 [Agreement on Human Rights], Chapter 1, Article I almost verbally reiterated these commitments.

1422 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 1. For an overview of the privatization process in Bosnia and Herzegovina European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 62 and Enisa Salimović, 'Privatisation in Bosnia and Herzegovina' (1999), 2(3) SEER 163, who mentions that first attempts at privatization were already undertaken by Bosnia and Herzegovina as a republic of the SFRY in 1990.

1423 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 27; Hans van Houtte, 'Commission for Real Property Claims of Displaced Persons and Refugees (2019)' in: *MPEPIL* (n 2) para. 5; *Mago and Others v. Bosnia and Herzegovina,* Appl. Nos. 12959/05, 19724/05, 47860/06 et al. 3 May 2012 para. 53 (ECtHR).

1424 ibid.; European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 63, 70, 74, 75, 80 "misuse"; for construction land ibid 65.

1425 *ECtHR Mago and Others* (n 1422) para. 8.

1426 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 31–35; cf. European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 75 and the facts reported in *ECtHR Mago and Others* (n 1422).

enacted by the FBH and the RS in 1997.[1427] Generally, former holders of occupancy rights of socially owned apartments were allowed to buy them; if they did not, the occupancy rights were transformed into a lease.[1428] Yet, the discriminatory practice and taking of former occupancy rights eventually also meant that, after the privatization process was resumed, such former bearers of occupancy rights often were not entitled to acquire a premise.[1429]

The Dayton Peace Agreements had attempted to counter such development. Art. 5 of the Dayton Constitution [Refugees and Displaced Persons] maintained that

> "[a]ll refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void."

The mentioned Annex 7 was devoted to elaborating such a right. That right of return, linked to a right to restitution of property, was meant to reverse the ethnic homogenization and was seen as an important step in settling the conflict.[1430] Annex 7, Chapter One, Art. 1 para. 1, besides almost verbally reiterating Art. 5 of the constitution, spelt out that objective clearly. In order to enforce such a right, Chapter II of Annex 7 established a "Commission for Displaced Persons and Refugees", which was later re-named as the "Commission for Real Property Claims" (CRPC).[1431] Its mandate was to "receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return", Art. XI of Annex 7. In carrying out

1427 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 1, 46 Salimović (n 1421), 164.

1428 In detail ibid 174–176; *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 46–51.

1429 European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 64, 75.

1430 Cf. also van Houtte, 'Commission for Real Property Claims of Displaced Persons and Refugees (2019)' (n 1422) para. 7.

1431 In detail on this commission, its mandate and working methods ibid.

these functions, "the Commission shall consider domestic laws on property rights", Art. XV Annex 7.

In the course of its work, the CRPC also assumed jurisdiction over occupancy rights.[1432] While the international supervision of the restitution process helped the cause of restitution of property immensely and made it more effective than in the case of Croatia,[1433] the warring political and ethnic fractions within the country thwarted any effective implementation of the scheme, and displaced persons longing to return to their home of origin were still facing discrimination and harassment.[1434] The deadlock was overcome when the High Representative for Bosnia and Herzegovina intervened in 1999 and, in line with the powers conferred on him by the Dayton Agreement, enacted laws for implementing the restitution, and former property or occupancy rights holders were restituted or compensated.[1435] However, the regulations enforced by the Representative were imprecise and indiscriminately cancelled all occupancy rights acquired between 1 April 1992 and 7 February 1998, even if the acquisition had to be considered having taken place in good faith.[1436]

f) Domestic Law of the FRY

After independence of the aforementioned four republics, a referendum in Montenegro in 1992 saw 62% of the voters opting to stay with Serbia.[1437] The remaining two Yugoslav republics therefore formed the FRY - at that

1432 ibid para. 36.

1433 Cf. *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 46.

1434 ibid 36–37, 41-42.

1435 ibid 37, 42-46; van Houtte, 'Commission for Real Property Claims of Displaced Persons and Refugees (2019)' (n 1422) paras. 66-68. See in general on property legislation during and after the war *Đokić v. Bosnia and Herzegovina,* Appl. No. 6518/04, 27 May 2010 paras. 5-10 (ECtHR) where the ECtHR upheld the duty to restitute even in cases of members of the former Yugoslav army. But for persisting implementation deficits see *Orlović and Others v. Bosnia and Herzegovina,* Appl. No. 16332/18, 1 October 2019 (ECtHR).

1436 European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 76. On the same problem with the CRPC ibid 82.

1437 Tuerk, 'Montenegro (2007)' (n 673) para. 9; Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) para. 49. On the background of this referendum Kenneth Morrison, 'Change, Continuity and Crisis. Montenegro's Political Trajectory (1988-2016)' (2018), 66(2) Südosteuropa 153 156–157.

time under the explicit assumption of continuing the SFRY. The FRY's constitution from 1992[1438] was, therefore, enacted according to the amendment procedure contained in Art. 398 - 304 of the SFRY constitution,[1439] and did not contain any transitory provisions. Other SFRY statutory laws, in principle, remained in place.[1440]

According to Art. 77 no. 5 of the FRY constitution "the principles of the system of property relations" are within its jurisdiction.[1441] The constitution protected the rights of property and inheritance, Art. 51, but made them explicitly subject to definition by (statutory) law. While "property shall be inviolable", expropriations were possible in the public interest, according to the law, and against compensation of, at least, its market value, Art 69. Special regulations existed for real estate, natural resources, agricultural land, forests and timberland, and property in the public domain, Art. 72. Comparable to some of the other states' constitutions, the acquisition of property by aliens was made subject to further regulation by law and reciprocity and was excluded for "immovable property of cultural significance", Art. 70.[1442]

1438 Constitution (27 April 1992) in: Ile Kovačević (ed), Ustavi Savezne Republike Jugoslavije, Srbije i Crne Gore: The Constitutions of the Federal Republic of Yugoslavia, Serbia and Montenegro (Jugoslovenski Pregled 2001) 5 (FRY), also available online at https://www.refworld.org/docid/3ae6b54e10.html; see also Kulisic (n 1345).

1439 ibid 27-28.

1440 Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294) 98/99.

1441 This provision took priority (Art. 6 para. 2, Art. 115 of the FRY Constitution (n 1437)), over potentially conflicting provisions in the member republics' constitutions.

1442 Stateless persons were even excluded from acquisition of immovable property/property rights to land, Art. 70 ibid.

Both Serbia[1443] and Montenegro started their privatization processes at the beginning of the 1990s.[1444] In Serbia, occupancy rights holders were generally eligible to buy their formerly socially owned apartments, but private owners were allowed to evict occupants from their apartments by offering alternative accommodation.[1445] In 1992, occupancy rights were abolished.[1446] In Montenegro, occupancy rights were already abolished by law in 1990, which at the same time, gave the occupancy rights holders the right to buy the apartment or (mostly when the owner of the building was a private person) to transform the occupancy right into a lease.[1447]

3) The 2001 Agreement on Succession Issues

When the FRY finally gave up its claim to continue the SFRY, it paved the way for the 2001 Agreement on Succession Issues (Succession Agreement),[1448] concluded between Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia and the

1443 In fact, Art. 55 of the 'Constitution (1990)' in Ile Kovačević (ed), *Ustavi Savezne Republike Jugoslavije, Srbije i Crne Gore: The Constitutions of the Federal Republic of Yugoslavia, Serbia and Montenegro* (Jugoslovenski Pregled 1990) 49 stipulated that Serbia's economic and social order was "based on a free market economy with all forms of ownership". The Serbian legal system for a long time combined various legal forms of property. The Serbian constitution contained an extensive part entitled "Economic and Social Order" regulating several forms of ownership and objects of property. Cf. in particular Art. 56 of the constitution which pronounced that "Social, state, private and cooperative property and other forms of ownership shall be guaranteed. All forms of ownership enjoy equal protection of law". Cf. also *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 108.

1444 ibid 1, 107, 112. For an overview of the Serbian privatization process Ile Kovačević, 'Privatisation in Serbia 1989-2003' (2003), XLIV(4) Survey Serbia and Montenegro 69.

1445 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 108–110.

1446 ibid 110–112.

1447 ibid 112–113.

1448 Agreement on Succession Issues Between the Five Successor States of the Former State of Yugoslavia (29 June 2001) UNTS 2262 251, 41 ILM 3. On the agreement in general Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410); Mirjam Škrk, Ana Petrič Polak and Marko Rakovec, 'The Agreement on Succession Issues and Some Dilemmas Regarding Its Implementation' (2015), 75 Zbornik Znanstvenih Razprav 213; Hasani (n 2), 122–146.

FRY.[1449] That agreement was one of the most important documents in the process of SFRY dismemberment. Concluded "to resolve questions of State succession arising upon the break-up of the former Socialist Federal Republic of Yugoslavia", the Succession Agreement set out in some detail the agreed consequences of the demise of the federation for the successor states. Despite being drawn up with the support of the International Peace Conference on Yugoslavia, the Agreement may furnish proof of the *opinio juris* of several states involved in one of the largest and most recent waves of state succession about how to cope with such events.

Not included in the Succession Agreement were the topics of succession to international treaties and citizenship, both of which were dealt with outside the agreement on a bilateral basis.[1450] According to Art. 10, no reservations to the Succession Agreement were allowed. Nevertheless, throughout the agreement, several provisions explicitly provided for the prevalence of potential bilateral agreements on covered issues (e.g., Art. 3 Annex E, Art. 5 Annex G). Often reflecting the least common denominator, the instrument did not contain one but many decisive dates referring to different points in time during the succession process.[1451] Art. 8 of the Succession Agreement set out that each state was obliged "on the basis of reciprocity" to ensure that the provisions of the agreement" were recognized and effective in courts".

1449 Cf. Škrk, Petrič Polak and Rakovec (n 1447), 214, 218; Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 379–381; Hasani (n 2), 119–120. The agreement's preamble spoke of the treaty partners as "being in sovereign equality the five successor States to the former Socialist Federal Republic of Yugoslavia" and therefore definitively repudiated the continuity thesis of the FRY. At the same time, the agreement was remarkably imprecise with respect to the actual form of succession having taken place and did not use the words "dissolution" or "secession", Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 382; Škrk, Petrič Polak and Rakovec (n 1447), 222.

1450 ibid 223-224.

1451 Cf. also ibid 225. On the problematic complexity of the dates referred to in the agreement Ana Stanic, 'Financial Aspects of State Succession: The Case of Yugoslavia' (2001), 12(4) EJIL 751 755–758.

a) Private Property and Acquired Rights

Annex G is of particular importance for this analysis as it is explicitly dedicated to protecting "Private Property and Acquired Rights", cf. also Art. 1.[1452] That dedication is remarkable as such explicit reference to "acquired rights" is unique in modern international instruments relating to succession.[1453] Beyond the uniqueness, it furnishes proof of the fact that, despite the far-reaching acceptance of or "succession" to the SFRY's international obligations by the five successor states and the often generous continuity provisions in their national (constitutional) laws, those states considered there was still room and a need for protecting acquired rights.

Art. 1 of Annex G distinguished between "private property rights" and "acquired rights", therefore according acquired rights a different or broader meaning than those of private property. Furthermore, the same provision designated "citizens or other legal persons of the SFRY" as the holders of those rights. Third party nationals were explicitly excluded and had to rely on the law of foreigners. Annex G, therefore, especially targeted individuals who could not rely on the law of foreigners and diplomatic protection by their home state or whose eligibility could at least be contested as they had been SFRY nationals.

Art. 2 para. 1 lit. a) stipulated that

> "[t]he rights to movable and immovable property located in a successor State and to which citizens or other legal persons of the SFRY were entitled on 31 December 1990 shall be recognised, and protected and restored by that State in accordance with established standards and norms of international law and *irrespective of the nationality, citizenship, residence or domicile of those persons*. This shall include persons who, after 31 December 1990, acquired the citizenship of or established domicile or residence in a State other than a successor State. Persons unable to realize such rights shall be entitled to compensation in accordance with civil and international legal norms." [emphasis added]

That quote is a relatively straightforward expression of the traditional acquired rights theory concerning private property. Notably, such acquired

1452 Cf. for more information on the original draft text Škrk, Petrič Polak and Rakovec (n 1447), 247–248.

1453 Comparing the agreement to the VCSSPAD Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 397.

property should not only be recognized and protected; it should be restored. Compensation was only an alternative when restitution was not possible. Under what circumstance restoration was "impossible", especially if rights of other individuals were relevant, was not detailed any further. Importantly, while the link to the SFRY on 31 December 1990 was crucial, a *later* change of nationality or residence was of no relevance. That restriction paid tribute to nationality being fluent after a change of sovereignty. The provision therefore included persons who may have acquired the nationality of the expropriating state. According to Art. 2 para. 1 lit. b) in combination with lit. a), any transfer of property after 1990 "concluded under duress" or contrary to "established standards and norms of international law" "shall be null and void". That stipulation must be understood in light of ethnic cleansing and forced displacement during the Yugoslav wars.[1454] Interestingly, the cut-off date for recognizing the legal situation, 31 December 1990, was different from the one for pension claims and also even lay before the declarations of independence by Slovenia and Croatia. Seemingly, 1990 was chosen since it was the last year in which all republics and provinces were duly represented in the SFRY organs.[1455] While such a reference to an objective early date was conducive to legal security, it excluded from protection much of the property that changed hands legally after 1990 but later still fell victim to succession regulations. Analogically, pursuant to Art. 2 para. 2,

> "[a]ll contracts concluded by citizens or other legal persons of the SFRY as of 31 December 1990, including those concluded by public enterprises, shall be respected on a non-discriminatory basis. The successor States shall provide for the carrying out of obligations under such contracts, where the performance of such contracts was prevented by the break-up of the SFRY."[1456]

1454 Cf. ibid 396; Škrk, Petrič Polak and Rakovec (n 1447), 248.

1455 Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 396; Degan (n 2), 180.

1456 It is disputed whether the words "as of" mean "up to" or "from…on" and therefore whether contracts concluded before or after 31 December 1990 are encompassed (Škrk, Petrič Polak and Rakovec (n 1447), 248–249 with further references). A comparison with the disparate wording in para. 1 could support the second reading. Also the following sentences support the latter interpretation: Only the performance of such contracts could be prevented by the "break-up" of the SFRY which had already been in place when the break-up began. Additionally, it is not convincing to apply a different approach to property rights than to contractual

Art. 3 of Annex G extended protection to intellectual property rights such as "patents, trade marks, copyrights, and other allied rights (e.g., royalties)". Article 4 obliged the treaty members to ensure the effective application of the obligations under Annex G.[1457] That provision was remarkable as it added to the general obligation under Art. 8 of the Succession Agreement. In the same vein, Art. 7 of Annex G maintained that "[a]ll natural and legal persons from each successor State shall, on the basis of reciprocity, have the same right of access to the courts, administrative tribunals and agencies, of that State and of the other successor States for the purpose of realising the protection of their rights." Art 7 was, thus, an important step fostering the enforcement of acquired rights.

In addition to the foregoing provisions, which routinely prohibited any differentiation on grounds of ethnic origin or nationality,[1458] Art. 6 of Annex G required states to apply domestic legislation concerning "dwelling rights […] equally to persons who were citizens of the SFRY and who had such rights, without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Finally, pursuant to Art. 8, "[t]he […] provisions of this Annex are without prejudice to any guarantees of non-discrimination related to private property and acquired rights that exist in the domestic legislation of the successor States".

b) Pensions

The topic of retirement plans was dealt with under Annex E, and hence also explicitly separately from the topic of acquired rights.[1459] In socialist times, each of the Yugoslav republics was, in principle, independently responsible

rights. However, an analogy with para. 1 would lead to the conclusion that the *status quo* at that point in time should be preserved, also ibid 249.

1457 According to ibid. this extends to providing for "the right to have access to the court, the right to ensure an effective legal remedy, an independent judiciary, the right to equality of arms, etc".

1458 Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 382, 396 also alludes to the special importance of the principle of non-discrimination in the Succession Agreement.

1459 But see ibid 395 who discusses Annex E under the heading of "private property and acquired rights".

for paying pensions.[1460] Now, pursuant to Art. 1 Annex E, each state should "assume responsibility for and regularly pay legally grounded pensions" funded when it was still a republic of the SFRY. The payment was to be made in particular without regard to "nationality, citizenship, residence or domicile of the beneficiary". In comparison, SFRY civil or military servants, whose pensions were formerly funded from the federal budget, were to be paid pensions by their respective state of nationality, Art. 2 no. (i), irrespective of their place of residency or domicile. Only for a person who held more than one nationality but was not domiciled in one of the successor states should payment of the pension "be made by the State in the territory of which that person was resident on 1 June 1991". Hence, pension claims were upheld on a non-discriminatory basis and paid to those who had been eligible before dismemberment. The liability of the state of nationality for civil or especially military servants' pensions seems sensible in light of the hostile and violent ethnic conflicts in the SFRY. It has been reported that "[t]his Annex is the only one where the implementation is satisfactory and almost complete."[1461]

c) External Debts of the SFRY, Especially Foreign Currency Accounts

In the wake of the SFRY demise, probably one of the most important questions that touched upon individuals' acquired rights was how to cope with the former federation's debts. The largest part of the SFRY's external debt was settled before and outside the Succession Agreement, partly on a bilateral basis, under agreements with international organizations, groups of states, or private commercial banks, cf. Art. 3 paras. 1 and 2 of Annex C.[1462] Unallocated debts were distributed according to a key initially introduced for debts owed to the International Monetary Fund (IMF)[1463], and allocated debts were attributed to the territory directly benefitting from

1460 Kneihs (n 1222), 525.

1461 Škrk, Petrič Polak and Rakovec (n 1447), 247; more sceptical Kneihs (n 1222), 522–534.

1462 In detail Stanic (n 1450), 758–763.

1463 Hasani (n 2), 137–140. This represented an interesting application of the equitable proportion rule contained in Art. 41 VCSSPAD (n 22), cf. Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 397.

the loan[1464]. Those settlements were not meant to be touched upon by the Succession Agreement, Art. 3 para. 3 of Annex C.[1465]

Such general frames of debt allocation did not account for the individual perspective, though. A related issue of utmost controversy while the agreement was being negotiated,[1466] the liability for the foreign currency accounts of private persons "frozen" after the dismemberment, is thus of particular relevance for this research.[1467] When, in the 1970s/80s, the SFRY's economy began to falter, its foreign currency depots especially were diminished. The SFRY therefore offered its citizens highly profitable interest rates if they deposited their foreign currency in Yugoslavian bank accounts. The SFRY undertook to guarantee the payment of those savings if a local bank went bankrupt or suffered "manifest insolvency".[1468] In the wake of economic reforms in the years 1989/1990, the local currency was declared convertible. To hinder an uncontrolled withdrawal of foreign currency, the SFRY enacted legislation obstructing withdrawal of those assets from the Yugoslav banks and hence "froze" the accounts.[1469] After the SFRY demise, each successor state applied a different approach towards the claims of owners of such "old" foreign currency accounts.[1470] In that way, thousands of individuals who had deposited large parts of their savings in

1464 Annex C Art. 2 para. 1 lit. (b) Succession Agreement (n 1447), cf. Stanic (n 1450), 758–763. According to Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 397, while basically, the Succession Agreement (n 1447) aligned with the VCSSPAD (n 22), that "final beneficiary rule" represented a novelty.

1465 Škrk, Petrič Polak and Rakovec (n 1447), 232–233.

1466 ibid 237; Janja Hojnik, 'Individuals' Right to Property under International Succession Law: Reimbursement of Bank Deposits After the Collapse of the SFR Yugoslavia' (2017), 30 HgYbIL 157.

1467 Apparently, states disagreed as to whether the issue of "old" foreign currency accounts should be dealt with under Annex C (Financial Assets and Liabilities) or Annex G (Private Property and Acquired Rights), cf. *Ališić et al. v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia,* Appl. No. 60642/08, 16 July 2014, ECHR 2014-IV 213 para. 62 (ECtHR [GC]).

1468 In detail on the background of the freezing ibid paras. 13-20; Hojnik, 'Individuals' Right to Property under International Succession Law' (n 1465), 160–165.

1469 *ECtHR Ališić* (n 1466) paras. 21-22.

1470 Hojnik, 'Individuals' Right to Property under International Succession Law' (n 1465), 170–173, 177-179; *ECtHR Ališić* (n 1466) paras. 24-52.

Yugoslav bank accounts during the SFRY period were denied repayment for decades.[1471]

Strikingly, all SFRY successor states seemed to have been of the opinion that the money should be paid back but had divergent views of how to distribute liability for the payments.[1472] While some states considered the issue to be a primarily "civil law question" to be solved between depositor and bank (and hence attributable under civil law regimes to the state that had restricted the possibility of withdrawal for the specific bank),[1473] others advocated for a more "public law" solution[1474], distributing the debts according to succession rules and hence amongst all successor states.[1475] The conceivably broad compromise formula of Art. 7 of Annex C of the Succession Agreement that the issue should "be negotiated without delay taking into account in particular the necessity of protecting the hard currency savings of individuals" is evidence of the pivotal nature of the question but, at the same time, of the unfeasibility of finding a solution within the agreement.[1476] Despite long negotiations,[1477] no final agreement was reached, even after 2001.

It was exactly those lines of argument along which both sides advocated in the case of *Ališić*[1478] before the ECtHR, when several applicants brought

1471 On the general background, with extensive citation to the relevant domestic and international law *Kovačić and Others v. Slovenia,* Appl. No. 44574/98, 45133/98 and 48316/99, 3 October 2008 paras. 26-111, 164-188 (ECtHR [GC]).

1472 Cf. *ECtHR Ališić* (n 1466) para. 77 with reference to *Ališić et al. v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia,* Application No. 60642/08, 17 October 2011, Decision on Admissibility para. 54 (ECtHR).

1473 E.g. Bosnia and Herzegovina, Croatia and Macedonia. *see ECtHR Ališić* (n 1466) paras. 57, 85, 87-88, 96.

1474 E.g. Slovenia and Serbia ibid paras. 54, 56, 58, 89, 91-92 arguing that there was only a duty to negotiate in good faith.

1475 Škrk, Petrič Polak and Rakovec (n 1447), 237.

1476 According to Hojnik, 'Individuals' Right to Property under International Succession Law' (n 1465), 175, it was "surprising" that the agreement "recognised the issue" of the old foreign currency deposits "as a succession issue at all".

1477 On the history of negotiations before the ECtHR entered the scene Škrk, Petrič Polak and Rakovec (n 1447), 238–239; Hojnik, 'Individuals' Right to Property under International Succession Law' (n 1465), 176–177.

1478 *ECtHR Ališić* (n 1466). Critically evaluating the judgment Škrk, Petrič Polak and Rakovec (n 1447), 243, 252; Hojnik, 'Individuals' Right to Property under International Succession Law' (n 1465), 206–207 and *Ališić et al. v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia,*

cases against all SFRY successor states[1479] for the payment of their "old" foreign currency accounts. In line with the findings above, all states agreed that the assets should be paid to their owners, but while Slovenia and Serbia argued for distributing liabilities to all successor states, all other states denied liability and advocated for attribution of liability to those states in which the headquarters of the respective banks were located, Slovenia and Serbia. In a pilot judgment procedure, the ECtHR, considering the circumstances rather unsurprisingly, unanimously held that there had been a violation of P-I 1.[1480] The clear majority of the GC solved the case by following the second strain of argument and attributing the liabilities of national banks to Serbia and Slovenia,[1481] while determining that all other successor states therefore had not breached the ECHR.[1482] Even if especially Slovenia was badly struck by the judgment, both states implemented it.[1483]

Appl. No. 60642/08, 16 July 2014, Partly Dissenting Opinion Judge Nußberger, ECHR 2014-IV 279 (ECtHR [GC]).

1479 Montenegro was not included in the list of respondents as by the time the application was lodged Montenegro had seceded from Serbia and the latter had assumed the role of the sole continuator state of the former union. Cf. on the status of Montenegro in more detail *infra*, section 4) b).

1480 By Serbia and Slovenia *ECtHR Ališić* (n 1466) para. 125, dispositif 2 and 3. Those two states were also held to have violated Art. 13 ECHR, ibid para. 136, dispositif 5 and 6.

1481 ibid paras. 109-117. This was termed "civil law approach" by *ECtHR Ališić - Dissenting Opinion Nußberger* (n 1477) 279 that severely criticized the judgment. Judge Nußberger would have preferred a "public law approach" holding all respondent states collectively responsible for the violations; ibid 281–283, 287.

1482 *ECtHR Ališić* (n 1466) para. 125.

1483 On the financial ramifications for Slovenia Škrk, Petrič Polak and Rakovec (n 1447), 241. On the political and juridical follow-up of the judgment Janja Hojnik, 'Slovenia v. Croatia: The First EU Inter-State Case before the ECtHR' *EJIL Talk!* (17 October 2016) <https://www.ejiltalk.org/slovenia-v-croatia-the-first-eu-inter-state-case-before-the-ecthr/>; Hojnik, 'Individuals' Right to Property under International Succession Law' (n 1465), 191–194; cf. also Council of Europe - Committee of Ministers, 'Resolution: Execution of the Judgment of the European Court of Human Rights Ališić against Serbia and Slovenia (Slovenia)' (15 March 2018) CM/ResDH(2018)111 <https://hudoc.echr.coe.int/eng?i=001-181978>. On the Slovenian law implementing the decision http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7238. On Serbia Hojnik, 'Individuals' Right to Property under International Succession Law' (n 1465), 194–196; Council of Europe - Committee of Ministers, 'Resolution: Execution of the Judgments of the European Court of Human Rights Ališić and Others against Serbia and Slovenia (Serbia)' (3 September 2020) CM/ResDH(2020)184 <https://hudoc.exec.coe.int/eng?i=001-204668>.

The judgment has been criticized for its approach, which to some seemed too simple, too undifferentiated, and not sensitive enough to the historical, social, and economic circumstances of socialist times.[1484] Be that as it may, the ruling is a vivid example of the vigor and potential of an acquired rights theory (even if the term was not used by the ECtHR itself in this case) in a human rights case. The GC assumed that - in the absence of any legislation to the contrary - the domestic law of the successor states upheld the legal relations originating in the SFRY's legal order. There was no need to "affirm" or "revive" them:

> "[T]he legislation of the successor States had never extinguished the applicants' claims or deprived them of legal validity in any other manner and there had never been any doubt that some or all of the successor States would in the end have to repay the applicants".[1485]

It was the permanence of civil law obligations between bank and private consumer that ensured the existence of any "property" to which access could be obstructed by the successor states. The SFRY never had been party to the ECHR, and all its successors only became members years after the SFRY demise.[1486] Therefore, at the time the accounts were "frozen", they had not qualified as property under P-I 1. In most of the already mentioned succession cases and the ensuing massive overhaul of the economic and social systems, the ECtHR had accorded a huge margin of appreciation to the state parties concerning how to reconcile the public interest with the potential legitimate expectations of the individual owners concerned.[1487] In some cases where the predecessor state had not been a party to the ECHR, the court had denied any actionable position at all if the new state had not affirmed the curtailment of rights or introduced a compensation scheme on its own motion.[1488] That strategy was underlined by judge *Nußberger*, who would have preferred an approach taking into account the "public law background" of the case and questioned the value of the accounts at the

1484 *ECtHR Ališić - Dissenting Opinion Nußberger* (n 1477) 280.
1485 *ECtHR Ališić* (n 1466) para. 77.
1486 Ratification dates: Serbia 2004, Montenegro 2004, Slovenia 1994, Croatia 1997, Bosnia-Herzegovina 2002, Macedonia 1997, for more information cf. https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005.
1487 See e.g. *ECtHR [GC] Jahn and others* (n 1069) even justifying an uncompensated expropriation or cp. *ECtHR Blečić v. Croatia* (n 1398).
1488 See *ECtHR Maltzan and others* (n 1069) paras. 77, 79; cp. also *ECtHR [GC] Blečić v. Croatia* (n 1398).

time the SFRY was dismembered. Following her approach, states would have had more leeway in compensating and would have had to negotiate the distribution of the potential debts towards the private owners. That "public law approach" probably would not have led to any definite claim of the complainants against a single state but only led to a verdict of violation and potentially a "joint and several liability". The majority's approach gave the claimants a much more forceful tool than the malleable "equitable proportion" option applied between states. Were it not for that approach, the claimants probably would not have recovered their full savings plus interest. Therefore, the acquired rights perspective has entered the distribution and attribution of liability for debts towards individuals through the vehicle of ECtHR litigation, rather than through the Succession Agreement. Viewed through that lens, it has shown its special potential to broaden and enforce the strength of the human right of property in practice.

d) Interim Conclusions

Shortly after the conclusion of the Succession Agreement, *Stahn* opined that it

> "may be invoked in support of the emergence of a rule of customary international law that imposes an obligation in principle on the successor state to respect acquired rights existing on the date of the succession, and a duty to enter into the necessary arrangements with the states concerned."[1489]

Even if proclaiming a customary international norm of acquired rights at the time may have been mistaken,[1490] the Agreement on Succession Issues is definitely a mark in the history of the doctrine. The agreement was then probably the only important multilateral international treaty that not only

1489 Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 395 [footnotes omitted]; see also Hasani (n 2), 144 "During the dissolution of the former communist federations, these rights were respected to the greatest possible extent. No hesitation or refusal to apply them ever surfaced […] The application of acquired rights is connected to respect for universal human rights values, which had been incorporated in the national legislation of the former Communist countries." [footnote omitted].

1490 But apparently also of this opinion ibid 147.

explicitly mentioned acquired rights but regulated them in more detail.[1491] It therefore revived the topic and showed that there was room as well as a need for its application. After the war, and against the background of a situation of complete dismemberment not condoned by the federation, crucial issues arose: ethnic cleansing and the displacement of large parts of the SFRY population, restitution, continuity of legal orders or at least the coordination of different domestic legal systems. Those issues had to be solved to build new states and prevent new social unrest within the communities. That need may explain the explicit and elaborate inclusion of Annex G in the agreement.

While in principle adhering to a traditional idea of acquired rights as rights vested in an individual by a domestic legal order, the Succession Agreement added three further aspects. First, the protection of acquired rights under Annex G of the agreement decoupled the doctrine of acquired rights from the law on the protection of foreigners. It explicitly protected former SFRY citizens irrespective of their new nationality. Non-discrimination on the basis of nationality was a recurrent theme through the agreement and represented an acknowledgement of the fluidity of citizenship in cases of state succession. Second, the agreement did not stop there but contained special provisions for member states implementing their acquired rights obligations. It inter-linked the material rights with procedural rights in order to enforce them. Although both these duties, of course, still constituted international obligations not directly enforceable before national courts, the evolution was remarkable. It showed a sensitivity of the participating states for the weakness of international rights under domestic law and tried to rectify the drawback. Even if such a clause cannot really guarantee domestic implementation, it was further proof of a remarkable *opinio juris* to secure such private rights. Finally, the Succession Agreement explicitly did not use "acquired rights" as a synonym for property rights. In fact, by referring to acquired dwelling rights as positions to be protected under the new national laws on a non-discriminatory basis, it enlarged the scope beyond "rights of a monetary value". On the other hand, the agreement explicitly separated the protection of pensions rights (Annex E) from the protection of acquired rights, the latter being defined as "pri-

1491 Cp. Annex 7, especially Chapter One Dayton Agreement (n 1084) which provided for the right to return and to restitution for persons displaced during the war. However, those accords were not concerned with the regulation of a succession situation but resembled a peace treaty.

vate rights". The Succession Agreement therefore endorsed the traditional distinction between rights acquired under "private" or "public law", with private law meaning relations between private individuals. Yet, not only the ECtHR's *Ališić* case showed that it is illusory to neatly distinguish both areas, especially in the field of state debts. The pension systems were also upheld in all parts of the former federation.

4) The Independence of Montenegro from the State Union of Serbia and Montenegro

a) Serbia and Montenegro

In 2003, Serbia and Montenegro, the constituent republics of the FRY, adopted a new constitutional basis of their relationship, the "Constitutional Charter of the State Union of Serbia and Montenegro" (CC),[1492] and the international entity was renamed the "State Union of Serbia and Montenegro".[1493] Since those processes were internal and did not change the international personality of the state itself, no succession took place.[1494] It is therefore surprising that the CC and the Law on the Implementation of the CC[1495] contained a relatively extensive catalogue of transitional provisions on FRY law. Probably due to that background, the CC did not contain a provision dealing in particular with the international obligations of the FRY; instead Art. 23 para. 2 CC stipulated in general terms that "[o]nce this Constitutional Charter comes into force, all rights and responsibilities of the Federal Republic of Yugoslavia shall be *transferred* to Serbia and Montenegro" [emphasis added]. Art. 23 paras. 3 and 4 CC maintained that

> "[t]he laws of the Federal Republic of Yugoslavia shall be applied in the affairs of Serbia and Montenegro as the law of Serbia and Montenegro.

1492 Constitutional Charter of the State Union of Serbia and Montenegro (27 January 2003) 2002 Rev.Int'l Aff. No. 1108 I, 2003 Rivista di Studi Politici Internazionali 70(2) 292 (Serbia and Montenegro). On the content of the CC Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) paras. 49-51.

1493 On the tensions between both states and the international involvement in the making of their new constitutional basis Tuerk, 'Montenegro (2007)' (n 673) paras. 14-16; Morrison (n 1436), 157-15.

1494 Arnauld *Völkerrecht* (n 255) para. 105; Tuerk, 'Montenegro (2007)' (n 673) para. 16.

1495 Law on the Implementation of the Constitutional Charter (27 January 2003) Rev.Int'l Aff. 2002, No. 1108, VII (Serbia and Montenegro).

> The laws of the Federal Republic of Yugoslavia beyond the scope of the affairs of Serbia and Montenegro shall be applied as the laws of the member states until the adoption of new regulations by the member states except for laws whose application the assembly of a member state shall decide against."[1496]

Art. 12 of the Implementation Law regulated the takeover of open cases by the courts of Serbia and Montenegro. As member states, both Serbia and Montenegro were supposed to amend their own constitutions to bring them in line with the CC within six months, para. 5. Persons "who have acquired the Yugoslav citizenship before the Constitutional Charter comes into effect shall retain the citizenship and the right to use existing public documents until a law governing this matter is passed", Art. 25 Implementation Law, and "[t]he current money, securities and other documents shall be valid even after the Constitutional Charter comes into effect", Art. 27 Implementation Law.

The CC text itself did not provide for an individual right of property,[1497] but Art. 9 para. 1 CC incorporated a Human Rights Charter[1498] into the CC.[1499] Art. 23 of the Charter protected the right of property and inheritance but again put it under the reservation of regulation by law. Expropria-

1496 Similarly, according to Article 20 para. 1 of the Implementation Law CC "The federal laws and other federal regulations in the fields that fall within the jurisdiction of institutions of Serbia and Montenegro under the Constitutional Charter, shall be applied as legal acts of the State Union of Serbia and Montenegro, except in the parts that are contrary to the provisions of the Constitutional Charter." However, Art. 20 paras. 2 - 4 of the Implementation Law accorded transition periods to the member states and the federal public institutions to bring the law in line with the CC and potentially international agreements. Art. 20 para. 4 stipulated that "The acts referred to in paragraph 1 above, which do not fall within the fields which the Constitutional Charter has defined as the jurisdiction of the State Union of Serbia and Montenegro, shall be applied after the Constitutional Charter goes into effect as general regulations of the Member States until their relevant bodies declare them null and void, except in parts contrary to the provisions of the Constitutional Charter and in fields that have already been regulated by the regulations of a Member State."

1497 It contained only a provision on state property, Art. 24 CC, and a general reference to the protection of property as basis of the economic relations between Serbia and Montenegro in Art. 6 para. 1 CC.

1498 Charter on Human and Minority Rights and Fundamental Freedoms Liberties (26-02.2003) Rev.Int'l Aff. 2002, No. 1108, XII (Serbia and Montenegro).

1499 According to Art. 9 paras. 2, 4 CC the member states shall "govern, ensure and protect" these rights, while the union has only a monitoring and residual competence.

tions could only take place in the public interest, if prescribed by law and against compensation of at least the market value.[1500] Art. 9 para. 5 CC contains a guarantee not to diminish the existing level of human rights protection in the union. That right was elaborated even further in Art. 57 of the Charter, which provided that

> "[t]he achieved level of human and minority rights, individual and collective, may not be reduced.
> This Charter shall not revoke or alter the rights vested in members of national minorities by the regulations that were in force prior to the effective date of this Charter, as well as the rights acquired on the basis of international treaties to which the Federal Republic of Yugoslavia had acceded."

Hence, Art. 57 secured the level of human rights protection acquired on the national as well as on the *international* level, *before* the CC came into effect. That far-reaching continuity is more evident in cases of continuity, such as Serbia and Montenegro continuing the FRY (which purported to continue the SFRY). Finally, pursuant to Art. 10 para. 3 CC, "[t]he ratified international treaties and generally accepted rules of international law shall have precedence over the law of Serbia and Montenegro and the laws of the member states."

b) Montenegro

Art. 25 of the CC of the State Union of Serbia and Montenegro had prepared for a right of separation for both member states of the union and provided that, if Montenegro became independent, it would not continue the personality of the state union. After a new referendum, Montenegro on 3 June 2006 in fact declared its independence[1501] and enacted a new

1500 Art. 34 of the 'Constitution (1990)' (n 1442) in a more general fashion guaranteed the right of property and inheritance. 'Constitution (1992)' in: *Kovačević Collection of Constitutions* (n 1442) 87The Constitution of the Republic of Montenegro (12.10.1992)' in: *Kovačević Collection of Constitutions* (n 1439) 87 contained equivalent guarantees of property and inheritance in Art. 45 and 46.

1501 Cf. Tuerk, 'Montenegro (2007)' (n 673) paras. 19-20; Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) para. 33; Thürer and Burri, 'Secession (2009)' (n 317) para. 36. Since this development was foreseen in the CC, it is open to discussion whether it had to be considered as a secession (in this way Arnauld *Völkerrecht* (n

constitution[1502] and the corresponding constitutional law for its implementation[1503].

aa) International Treaties

Montenegro declared its *succession* (not accession) to international agreements concluded by the State Union.[1504] As already alluded to, under the CC of Serbia and Montenegro, both states had been allowed to conclude own international agreements. Art. 5 of the Implementation Law now stipulated that "[p]rovisions of international agreements on human rights and freedoms, to which Montenegro acceded before 3 June 2006 shall be applied to legal relations that have arisen after the signature."[1505] That stipulation becomes especially significant when read in combination with Art. 9 of the constitution which accords ratified international agreements and "generally accepted rules of international law" not only direct legal force within the Montenegrin national legal order but also supremacy over conflicting national legislation.[1506]

255) para. 105), but it definitely constitutes a case of separation (also Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 406).

1502 'Constitution (2007)' in Gisbert H Flanz and Albert P Blaustein (eds), *Constitutions of the Countries of the World: A Series of Updated Texts, Constitutional Chronologies and Annotated Bibliographies- Vol. 12* (Oceana Publ 2007) 1, with further information by Rainer Grote, 'The Republic of Montenegro: Introductory Note' in: *Flanz/Blaustein Constitutions Vol. 12* (n 1501) 1.

1503 'The Constitutional Law for the Implementation of the Constitution' in: *Flanz/Blaustein Constitutions Vol. 12* (n 1501) 41.

1504 Tuerk, 'Montenegro (2007)' (n 673) para. 22. See also the collection of UNSG depositary notifications, https://treaties.un.org/pages/CNs.aspx?cnTab=tab2&clang=_en.

1505 It has to be borne in mind that the SFRY had been a party to the VCSST which had come into force in 1996. Even if the binding force of this international treaty for Montenegro as a new state is doubtful, it cannot be ruled out that this circumstance played a role in Montenegro's decision.

1506 According to Grote, 'The Republic of Montenegro' (n 1501) 2 this supremacy does not apply with respect to constitutional law.

bb) Domestic Law

With respect to domestic law, it has to be borne in mind that, since 2003 as part of the bargain for remaining within the state union, Montenegro had been accorded far-reaching legislative sovereignty, especially in internal matters, and only few, mostly external, competences had remained in the hands of Serbia and Montenegro.[1507] Article 6 of the Montenegrin Implementation Law[1508] stipulated that "[l]aws and other regulations shall remain into [sic] force until they have been harmonized with the Constitution within the delays stipulated by this Law." In turn, the implementation law sets out a timeline along which several new laws were to be adopted according to their priority. The most "urgent" laws enlisted in Art. 7 were to be adopted within two months of the Implementation Law entering into force.[1509] Other laws should only be "harmonized" with the constitution, which meant they, in principle, remained in place, Art. 8-10 Implementation Law.[1510] In comparison, "[r]egulations of the State Union of Serbia and Montenegro shall be applied with the modifications required by the circumstances, providing they are not contrary to legal order *and interests* of Montenegro, until adequate regulations of Montenegro are adopted", Art. 11 Implementation Law [emphasis added]. That stipulation obviously introduced a sweeping reservation, which, as mentioned, did not become too relevant for the domestic law of Montenegro.

There were no specific provisions on the persistence of individual rights. Art. 58 of the constitution of Montenegro guaranteed the rights to property and made expropriations subject to public interest and "rightful" compensation. Notably, "[n]atural wealth and goods in general use shall be owned by the state". Foreign nationals could also acquire property "in accordance with the law", Art. 61 of the constitution. Art. 60 protected the right to

1507 Tuerk, 'Montenegro (2007)' (n 673) para. 17; cf. Jure Vidmar, 'Montenegro's Path to Independence: A Study of Self-Determination, Statehood and Recognition' (2007), 3(1) Hanse Law Review 73 96.

1508 'The Constitutional Law for the Implementation of the Constitution' (n 1502).

1509 These are *inter alia* laws on citizenship, travel and identification documents and residence.

1510 Amongst the laws which shall be harmonized in the rather short period of three months and therefore with specific urgency, Art. 8, are the "Law on Expropriation" and the "Law on Minority Rights and Freedoms".

inheritance. Reportedly, a social security agreement concerning pensions was concluded with Serbia.[1511]

c) Serbia

Serbia, as the "rump state" of the former state union with Montenegro, is generally seen as continuing the personality of the union,[1512] even if the wording of its official statements was sometimes equivocal and leaves room for interpretation.[1513] It therefore continued the membership in international organizations and international treaties.[1514] Resultingly, no transitional provisions can be found in Serbia's new constitution, adopted in 2006,[1515] which in large parts was in the tradition of the foregoing ones.[1516]

According to Art. 16 paras. 2 and 3 and 194 paras. 4 and 5 of the Serbian constitution, ratified international treaties and "generally accepted rules of international law" were directly applicable within Serbia and stood beyond statutory laws.[1517] Pursuant to Art. 17, in principle, foreigners should have had the same rights as citizens unless the constitution accorded some rights explicitly to Serbian citizens. The long list of "human and minority rights and freedoms"[1518] in Art. 18 *et seqq.* guaranteed the protection of "[p]eaceful tenure of a person's own property and other property rights acquired by the law", Art. 58 para. 1, which "may be revoked or restricted only in the public interest established by the law and with compensation which may not be less than market value", para. 2. The possible usage of property was to be defined by law, para. 3. The same rules applied to the right to inheritance, guaranteed by Art. 59 para. 1. The acquisition of real property

1511 Tuerk, 'Montenegro (2007)' (n 673) para. 21.
1512 Cf. Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) para. 33.
1513 Tuerk, 'Montenegro (2007)' (n 673) para. 21.
1514 Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) para. 52.
1515 'Constitution (2006)' in: *Flanz/Blaustein Constitutions Vol. 16* (n 1378) 1, also available online at . Cf. on the constitution's drafting history and content Rainer Grote, 'The Republic of Serbia: Introductory Note' in: *Flanz/Blaustein Constitutions Vol. 16* (n 1378) 3; Christoph Hofstätter and Marko Stanković, 'Die Verfassung der Republik Serbien' (2006), 62(3) Osteuropa Recht 272.
1516 Grote, 'The Republic of Serbia' (n 1514) 4; Hofstätter and Stanković (n 1514), 274.
1517 Critical because of the missing possibility to refer the question of constitutionality of treaties to a court before ratification Grote, 'The Republic of Serbia' (n 1514) 6–7.
1518 Art. 20 para. 2 of the Serbian constitution (2006) again contains a "non-regression clause", stipulating that the "Attained level of human and minority rights may not be lowered".

by foreigners was possible but subject to regulation by law or "international contract", Art. 85 para. 1. For the acquisition of "concession rights for natural resources and goods", no such requirements were stipulated, Art. 85 para. 2. As mentioned, Serbia also already had the competence to independently regulate its domestic law before Montenegro's independence.

5) The Independence of Kosovo

Under the 1974 SFRY constitution, Kosovo had been accorded the status of an autonomous province within Serbia with far-reaching autonomy rights almost equaling those of the republics.[1519] In particular, Kosovo was in charge of its own property laws.[1520] The independent status was effectively abolished by the Serbian government in 1989-1990,[1521] and the following opposition from the Kosovar population was violently suppressed by the Serbian authorities. That suppression led to the Kosovo war with egregious massacres against Kosovo Albanians, followed by violent retaliation from Kosovo's independence movements,[1522] and again massive flows of refugees and hundreds of thousands of displaced persons.[1523] In March 1999, after cease-fire negotiations with the Serbian regime had failed, NATO states intervened in the conflict without a mandate from the UNSC. Despite that "unilateral" use of force, NATO's actions were not denounced by the UNSC in the aftermath, but UNSC Resolution 1244 (1999) installed the UN Security Force "Kosovo Force" (KFOR) on the territory and established the United Nations Interim Administration Mission in Kosovo (UNMIK).[1524] When it became clear that no consensual solution of the conflict was in sight, Kosovo declared its independence on 17 February 2008.[1525] As

1519 Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) para. 8; Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) para. 10.

1520 Gashi (n 1195) 159.

1521 Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) paras. 9-11. On the background of the loss of independence Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor' (n 1081), 116–117.

1522 Pickering and Subotić, 'Former Yugoslavia and Its Successor States' (n 1320) 533.

1523 For numbers cf. European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 110.

1524 On the history of the separation Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) paras. 38-45, 55; Margaret Cordial and Knut Røsandhaug, *Post-Conflict Property Restitution: The Approach in Kosovo and Lessons Learned for Future International Practice (Vol. I)* (Martinus Nijhoff 2009) 20–21; Sterio (n 392) 119–122.

1525 Kosovo Declaration of Independence (n 701).

independence was declared without Serbian consent, the declaration can be referred to as an attempt to secession.[1526] Today, it is still not clear whether the attempt was successful and Kosovo can be considered a new state. According to Kosovar information, so far, 117 states have recognized it as an independent state,[1527] but it has not yet become a UN member state.[1528] An advisory opinion by the ICJ did not conclusively solve the issue.[1529]

Since 2001, authority has gradually been given back from UNMIK to Kosovo.[1530] According to UNMIK Regulation 1999/1, during the time of its deployment, UNMIK was given "[a]ll legislative and executive authority with respect to Kosovo".[1531] According to Section 6 of the same regulation, "UNMIK shall administer movable or immovable property, including monies, bank accounts, and other property of, or registered in the name of the Federal Republic of Yugoslavia or the Republic of Serbia or any of its organs, which is in the territory of Kosovo." Since UNMIK had made ample use of its law-making power during the years of its operation,[1532] over time it had materially changed the legal landscape. Therefore, in the following, even if this book does not deal with occupation scenarios,[1533] a short reference is made to the legal situation under UNMIK deployment in

1526 Arnauld *Völkerrecht* (n 255) § 2 para. 105; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 406.

1527 As of 1 January 2024, cf. https://mfa-ks.net/lista-e-njohjeve/.

1528 On Kosovo's attempts to accede to the Council of Europe Andrew Forde, 'Setting the Cat amongst Pigeons: Kosovo's Application for Membership of the Council of Europe' *EJIL Talk!* (17 May 2022) <https://www.ejiltalk.org/setting-the-cat-amongst-pigeons-kosovos-application-for-membership-of-the-council-of-europe/>.

1529 See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* 22 July 2010, Advisory Opinion, ICJ Rep 2010 403 (ICJ).

1530 Cordial and Røsandhaug (n 1523).

1531 Section 1 of UNMIK, 'Regulation 1991/1: On the Authority of the Interim Administration in Kosovo' (25 July 1999) UN Doc. UNMIK/REG/1999/1. The status of Kosovo under the UNMIK mandate is described as a UN "protectorate" by Cordial and Røsandhaug (n 1523) 20–21. In general on the Interim Administration of Kosovo Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor' (n 1081); Juli Zeh, *Das Übergangsrecht: Zur Rechtsetzungstätigkeit von Übergangsverwaltungen am Beispiel von UNMIK im Kosovo und dem OHR in Bosnien-Herzegowina* (Nomos 2011).

1532 Cf. for an overview of the UNMIK reforms Maj Grasten and Luca J Uberti, 'The Politics of Law in a Post-Conflict UN Protectorate: Privatisation and Property Rights in Kosovo (1999–2008)' (2017), 20(1) JIntRelatDev 162.

1533 *Supra*, Chapter II B) IV).

order to set the frame for the changes after Kosovo's independence, which happened while UNMIK was still on the ground.

a) The Legal Landscape Under UNMIK Administration

aa) Continuity of the Legal Order in General

With respect to international treaties, Section 1.3 of UNMIK Regulation 1999/1 ("On the Authority of the Interim Administration in Kosovo") from July 1999 listed several international human rights treaties that all official authorities were bound to.[1534] It did not refer to further international obligations of Serbia or the SFRY. Furthermore, Section 3 provided that

> "[t]he laws applicable in the territory of Kosovo *prior to 24 March 1999* shall continue to apply in Kosovo insofar as they do not conflict with standards referred to in section 2 [human rights and non-discrimination standards], the fulfillment of the mandate given to UNMIK under United Nations Security Council Resolution 1244 (1999), or the present or any other regulation issued by UNMIK."[1535]

In principle, UNMIK therefore upheld the state of the law prior to the start of the NATO bombing campaign on 24 March 1999. That upholding seems natural given UNMIK's function as an external *interim* administration force. According to Section 7, UNMIK Regulation 1999/1 was supposed to have entered into force on 10 June 1999, the day of adoption of S/RES/1244. Yet, in December 1999, UNMIK Regulation No. 1999/24 "On the Law Applicable in Kosovo" specified in Section 1.1 that

> "the law applicable in Kosovo shall be
> (a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and
> (b) The law in force in Kosovo on *22 March 1989*.

1534 Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor' (n 1081), 163 even insinuates automatic succession of UNMIK into existing human rights treaties.

1535 UNMIK, 'Regulation 1991/1' (n 1530) section 3 [emphasis added].

> In case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence."[1536]

According to Section 1.2 of that Regulation, "Law in force in Kosovo *after* 22 March 1989" [emphasis added] could be applied only on an *exceptional* basis to fill gaps in the domestic legal system and only if the laws were not discriminatory and in line with human rights standards. A further exception was contained in Section 1.4 sentence 2 in criminal matters - the law the most benevolent to the accused/defendant *since* 22 March 1989 had to be applied. Thus, the legal situation changed in two ways. First, it was primarily the regulations by the Special Representative that were relevant and, second, the relevant point in time for Kosovar law dated back to 22 March 1989. On that date, the parliament of the formerly autonomous province of Kosovo approved the loss of its autonomy status. Changes in the law of Kosovo from then on seem to have been considered as illegitimate or even illegal to such an extent that they were not recognized by the international community. The legal order prior to international intervention was not upheld, but, partly comparable to the case of the Baltic states, Kosovo's status was *restituted*. The law enacted by Serbian authorities after Kosovo lost its autonomy was only applicable on the basis of exception.[1537] As Regulation 1999/24 superseded UNMIK Regulation 1999/1,[1538] Serbian law was generally deemed not to have been in force since the UNMIK had authority. Yet, crucially, Section 4 of Regulation 1999/24 stipulated that

> "[a]ll legal acts, including judicial decisions, and the legal effects of events which occurred, during the period from 10 June 1999 up to the date of the present regulation, pursuant to the laws in force during that period under section 3 of UNMIK Regulation No. 1999/1 of 25 July 1999, shall remain valid, insofar as they do not conflict with the standards referred to in section 1 of the present regulation or any UNMIK regulation in force at the time of such acts."

Hence, legal acts emanating from the law applicable at the time they occurred were upheld. While that stipulation was obviously inserted in the

1536 UNMIK, 'Regulation No. 1999/24: On the Law Applicable in Kosovo' (12 December 1999) UN Doc. UNMIK/REG/1999/24 [emphasis added].

1537 This is again in line with the duty of non-recognition of situations brought about by the illegal use of force, see *supra*, Chapter II B) IV).

1538 According to section 3 Regulation 1999/24 was supposed to have entered into force on 10 June 1999.

interest of legal security, it was less a decision concerning acquired rights in a state succession case and more an application of the principle of non-retroactivity of laws.[1539] Section 1.3 of Regulation No. 1999/24 again contains a list of international instruments the administration had to abide by, but did not refer to any previous legal commitments.

Summarily, the UNMIK administration declared its own regulations and the former law enacted during the time of the existence of the Kosovar autonomous province applicable. Thereby UNMIK "restituted" a legal system dating back more than ten years and, in principle, did not recognize the changes in the law made afterwards under Serbian rule, with exceptions in cases of legal lacunae and criminal matters.

bb) Private Rights

Originally, Kosovo's own housing laws knew occupancy rights in the same form as in the Yugoslav republics. i.e. as a law close to ownership.[1540] However, from the time Kosovo lost its autonomy, Kosovar people protesting against Serbia were bereaved of their occupancy rights and could therefore not avail themselves of the privatization process that started in 1992.[1541] Apartments of former occupancy rights holders changed owners.[1542] Furthermore, racial discrimination was widespread when it came to the sale of property, so that many property transactions by Kosovars were conducted outside the official registers.[1543] Additionally, estimates show that about 800,000 Kosovo-Albanians fled their homes during the ethnic conflict in 1999.[1544] When they returned, it was the Serbian minority that was dispelled. Many houses had been destroyed by NATO's bombing campaigns. In the wake of the conflict, again, thousands of people had been displaced,

1539 Neither regulations gave direct insight on how rights acquired between 22 March 1989 and 10 June 1999 were supposed to be handled.

1540 Cordial and Røsandhaug (n 1523) 17–18.

1541 ibid 18–19; European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 113.

1542 Cordial and Røsandhaug (n 1523) 18–19.

1543 ibid 19–20; European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 111.

1544 Cordial and Røsandhaug (n 1523) 20; cf. European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 110.

a myriad of opposing property claims had been filed and illegal occupations of houses and apartments were rampant - a situation only exacerbated by the incomplete property register.[1545]

In S/RES/1244,[1546] the UNSC had already reaffirmed "the right of all refugees and displaced persons to return to their homes in safety". Through regulation 1999/23,[1547] UNMIK installed a mechanism to adjudicate disputes on the restitution of housing premises. The rules on which that mechanism was based were included in UNMIK regulation 2000/60.[1548]

> "Chapter I: Substantive Provisions
> Section 2 General Principles
> 2.1 Any property right which was validly acquired *according to the law applicable at the time of its acquisition remains valid* notwithstanding the change in the applicable law in Kosovo, except where the present regulation provides otherwise.
> 2.2 Any person whose property right was lost between 23 March 1989 and 24 March 1999 *as a result of discrimination* has a *right to restitution* in accordance with the present regulation. Restitution may take the form of restoration of the property right (hereafter "restitution in kind") or compensation.
> 2.3 Any property transaction which took place between 23 March 1989 and 13 October 1999, which was unlawful under […] *discriminatory law*, and which would otherwise have been a lawful transaction, is valid.
> 2.4 Any person who acquired the ownership of a property *through an informal transaction based on the free will of the parties* between 23 March 1989 and 13 October 1999 is entitled to an order from the Directorate or Commission for the registration of his/her ownership in the appropriate

1545 Cordial and Røsandhaug (n 1523) 23–26; European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 111, 116.

1546 UNSC, 'Resolution 1244: On the Deployment of International Civil and Security Presences in Kosovo' (10 June 1999) UN Doc. S/RES/1244.

1547 UNMIK, 'Regulation 1999/23: On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission' (15 November 1999) UN Doc. UNMIK/REG/1999/23. In detail on the mechanism, working methods and jurisdiction of the commission and in general on property restitution in Kosovo Cordial and Røsandhaug (n 1523).

1548 UNMIK, 'Regulation 2000/60: On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission' (31 October 2000) UN Doc. UNMIK/REG/2000/60.

public record. Such an order does not affect any obligation to pay any tax or charge in connection with the property or the property transaction." [emphasis added]

The term "property right" included "any right of ownership of, lawful possession of, right of use of or occupancy right to, property", Section 1. Hence, the basic principle was that the law in force at the time of acquisition had to be applied unless that law was discriminatory. Restitution was owed when property had been lost "as a result of discrimination" or when its acquisition was denied due to the NATO bombing campaign[1549]. Conversely, legal transactions that had been invalid solely due to discriminating Serbian legislation were to be considered as valid.[1550] By upholding the former law in a limited fashion, the UNMIK Regulation upheld acquired rights. But, at the same time, UNMIK tried to acknowledge rights acquired under the previous Kosovar legal order. Hence, if "the ownership of the property [had] been acquired by a natural person through a valid voluntary transaction for value before the date this regulation entered into force", the former owner was only entitled to compensation instead of restitution.[1551] When occupancy rights had been lost for discriminatory reasons, the protection of the former holders of such occupancy rights went so far that they were entitled to restitution against the new owner if adequate payment was given.[1552] Furthermore, according to Section 2.5, "[a]ny refugee or displaced person with a right to property has a right to return to the property, or to dispose of it in accordance with the law, subject to the present regulation." Restitution *in rem* was preferred, and monetary compensation only awarded where there were competing claims.[1553] The UNMIK Regulation No. 1999/23[1554] established a "Housing and Property Directorate" and a "Housing and Property Claims Commission" to solve the issues pertaining to restitution and to give individuals a forum to enforce those claims.

Therefore, the restitution scheme under UNMIK, while trying to remedy the results of ethnic cleansing and discrimination, did not completely overhaul the property system. Furthermore, rights acquired by new owners

1549 For the latter ibid., section 2.6; see Cordial and Røsandhaug (n 1523) 163–164.
1550 Section 2.3 of UNMIK, 'Regulation 2000/60' (n 1547) .
1551 ibid., section 3.3.
1552 ibid., section 4.2 This, however, did not apply against a second new owner, Cordial and Røsandhaug (n 1523) 175–176.
1553 European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 127.
1554 UNMIK, 'Regulation 1999/23' (n 1546).

under Serbian law were protected or compensation paid in the exceptional cases of restitution of former property. It seems that it was only the excesses of discrimination that were meant to be reversed. Occupancy rights or property acquired under Serbian rule were therefore accepted to a considerable extent, but an attempt was made to distinguish between "politically tainted" and "neutral" acquisitions.

b) The Legal Landscape After Independence

In its "Declaration of Independence", Kosovo vowed to

> "undertake the international obligations of Kosovo, including those *concluded on our behalf 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"[1555].

Hence, first of all, Kosovo considered itself as a successor to the SFRY. Second, it considered that UNMIK had acted on its behalf. But it did not feel bound by international obligations of Serbia, from which it had actually separated. Art. 145 para. 1 of the new Kosovar constitution of 2008[1556] postulated that

> "[i]nternational agreements and other acts relating to international cooperation [...] will continue to be *respected until* such agreements or acts are renegotiated or withdrawn from in accordance with their terms or until they are superseded by new international agreements or acts covering the same subject areas and adopted pursuant to this Constitution" [emphasis added].

The ambiguous phrasing "to respect" leaves open whether Kosovo felt legally bound by the agreements. However, that such international obligations were considered as only terminable consensually with the other treaty partners or in accordance with the terms of the agreement tends to militate in favor of genuine bindingness.[1557]

1555 Kosovo Declaration of Independence (n 701) [emphasis added].
1556 Constitution (15 April 2008) https://www.refworld.org/docid/5b43009f4.html (Kosovo).
1557 Here as well, the SFRY's ratification of the VCSST might have played a role.

That ambiguity mirrors the treatment of legal continuity issues in Kosovar domestic law. For the domestic sphere, pursuant to Art. 145 para. 2 of the constitution, "[l]egislation applicable on the date of the entry into force of this Constitution shall continue to apply to the extent it is in conformity with this Constitution until repealed, superseded or amended in accordance with this Constitution", therefore, providing for qualified continuity of domestic legislation as shaped by UNMIK. More recent domestic Kosovar legislation, i.e. statutory laws enacted after its independence, in fact, assumed the permanence of the previous domestic private order.[1558] Crucially, the respective Kosovar law again connects back to the time of Kosovar autonomy, and therefore assumes the continuity of law adopted at the time of the SFRY, and not Serbian law. Modern Kosovar property law thus consists of a mixture of "old" law, dating back to SFRY times, UNMIK law, and "new" law enacted by the Kosovar authorities. The legal basis with respect to property issues is therefore often confused.[1559] And, to add to the confusion, rights acquired under Serbian rule are not completely ignored but recognized on a case-by-case basis.

As an example, the Kosovar Law No. 03/L-154 on Property and Other Real Rights,[1560] in principle only applies to legal acts taking place *after* its coming into force, Art. 282 para. 1. Yet, part VII ("Transitional Provisions") stipulates that, while deeds to ownership of immovable property issued before 23 March 1989 are recognized, Art. 286 para. 1, and can only be extinguished by a court decision, para. 2, later deeds have to be verified by a court to become recognized, para. 3. Similarly, according to Art. 288 of the law, if property of movable things was involuntarily lost at the time of Serbian rule, no acquisitive prescription could take place. Remarkably, even if the law favored rights or situations existing before 23 March 1989, it did not completely deny the existence of rights acquired under Serbian rule. Those rights were merely subject to review. Therefore, even if the

1558 Roccia (n 1349), 568.

1559 Gashi (n 1195) 193; European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 122. For an overview of the rather complex legal situation with respect to property rights in Kosovo Roccia (n 1349).

1560 Law on Property and Other Real Rights (4 August 2009) OG of the Republic of Kosovo Year IV/No. 57, Law No. 03/L-154, https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2643 (Kosovo). The document could only be retrieved in original language and was translated by an online translation machine. Thus, the translation could not be checked for its complete accurateness. This disclaimer applies to all content related to Law No. 03/L-154.

new Kosovar law was not completely blind to the political background and may have even rejected rights acquired under a discriminatory policy, it was in principle open to recognition of private rights acquired under the (previous) Serbian legal order. That approach is similar to that of UNMIK.

Art. 7 para. 1 of the constitution of Kosovo denotes the right of property as one of its founding values. Art. 46 protects the "right to own property" (including intellectual property, para. 5), but, as usual, "[u]se of property is regulated by law in accordance with the public interest", para. 2, and the types of property are also defined by law, Art. 121 para. 1. Expropriations are only allowed for a public purpose, if authorized by law, and against "adequate" compensation, Art. 46 para. 3. Foreigners may acquire property and concession rights in Kosovo, Art. 121 paras 2 and 3. Natural resources and goods of "special cultural, historic, economic and ecologic importance" are subject to special protection, Art. 122, para. 2. As one of the diverse provisions contained in Chapter XIV "Transitional Provisions", Art. 156 explicitly requires the promotion and facilitation of "the safe and dignified return of refugees and internally displaced persons" and that they are assisted "in recovering their property and possession".

Art. 160 regulated that all "publicly owned" enterprises should come under the ownership of the state of Kosovo or one of its municipalities. Conversely, all "socially owned" enterprises should be privatized and all "socially owned interests in property and enterprises in Kosovo" should be the property of Kosovo. Here, assessment was again linked to the state of the law at the beginning of privatization in 1989, but transformations conducted by Serbia during 1989-1999 could be recognized if they did not violate relevant human rights law or UNMIK regulations.[1561] Unlike in the other SFRY successor states, there is no Kosovar law on restitution of property nationalized during communist rule, as restitution of property lost due to the war was given priority.[1562] Finally, the fact that the large majority of enterprises in Kosovo have been privatized and that, now, many rights have been acquired in good faith, make further restitution even more improbable.[1563]

1561 Gashi (n 1195) 193–194.

1562 ibid 197–198. That priority, in combination with a lack of clear documentation of property relations, has made it difficult for Kosovo Albanians to recover their property and can again lead to an advantage for the Serbian population (ibid 197–200).

1563 ibid 205.

6) Interim Conclusions

The disintegration of the former SFRY does not constitute a singular situation; it constitutes a process spanning almost two decades replete with controversies about statehood, recognition, and succession. Even though all SFRY successor states shared a common history, their independence took place under extremely disparate circumstances.

There are five direct successor states of the SFRY (the "first wave" of successions): Slovenia, Croatia, Macedonia, Bosnia-Herzegovina, and Serbia-Montenegro (formerly the FRY). All of those states enacted far-reaching continuity clauses and therefore upheld the domestic legal system of the SFRY. However, that continuity was stipulated on a general basis and in broad terms, giving the state authorities much leeway in specific cases. Furthermore, several substantial reservations existed, e.g., that of "congruency" with the new constitutions, sometimes even with the whole new legal order, or reciprocity. Moreover, while all successor states' constitutions contained a fundamental rights catalogue, including a right of property protecting against unlawful expropriation, in fact the definition of those guarantees was subject to significant referrals to statutory law. In practice, in many cases, the successor states did not abide by their generous promises but attempted to restrict rights, especially those of non-nationals. That restriction was an obvious issue since, at the time of the SFRY, much of the population had lived under the common roof of SFRY nationality and only became "foreign" due to SFRY dismemberment. For example, while Slovenia seems to have protected its own nationals before and after succession in a relatively consistent manner, after succession other former SFRY nationals were treated as "alien" residents and subjected to a special legal regime. Yet, the exclusion of large parts of a society from the enjoyment of civil status simply due to a lack of formal re-registration was accepted neither by the Slovenian Constitutional Court nor by the ECtHR. While the constitutional court drew heavily on arguments of legitimate expectation, the ECtHR, in its groundbreaking *Kurić* decision, relied more on proportionality considerations.

Both Croatia and Bosnia-Herzegovina, war-ridden shortly after their independence and simultaneously refuge to thousands of displaced persons, applied discriminatory policies on allocation of property. In those cases, the dwelling aspect of property protection became obvious. That aspect was prevalent against the background of the UNSC arguing for the emergence

of a "right to return" for displaced persons after the end of the war activities.[1564]

Besides the primary object of reversing policies of racial discrimination and ethnic cleansing, such a right also included the idea of restitution of former property relations. Even if the "right to return" was mostly based on human rights guarantees such as Art. 8 ECHR (the right to respect for private and family life), it connotes the general idea of persistence of (property) rights even in cases of upheaval such as those provoked by state successions. Here, not only the connection between the doctrine of acquired rights and minority issues but also the doctrine's relevance and openness in protecting immaterial values become manifest.

Additionally, all five successor states at the time of their independence and in the process of transformation to market economies had to tackle the problem of privatization, partly conducted through restitution, of state or "social" property. Within that process, the question of how to deal with already acquired rights to such property, in particular so-called "occupancy rights", became pivotal. With the exception of Croatia, all SFRY successor states in the end seem to have acknowledged prior rights and to have mediated between opposing interests, even if sometimes only after international intervention. By and large, acquired rights were recognized and protected in the process.

The Agreement on Succession Issues concluded in 2001 between the five successor states is an international instrument of particular importance for this research. It contains an explicit section on "acquired rights", acknowledging the doctrine's relevance under modern international law. That acknowledgement is even more significant in light of the far-reaching domestic legislation providing for continuity of the former legal order in the member states. While primarily endorsing the traditional definition of acquired rights, crucially, the agreement provided for the irrelevance of a *new* nationality after succession for former SFRY nationals and extended the scope of protection beyond pure property rights. A question not settled in the agreement was dealt with by the ECtHR in 2014 - liability for foreign currency accounts "frozen" at the collapse of the SFRY. The

1564 Cf. UNSC, 'Resolution 1088: On Authorization of the Establishment of a Multinational Stabilization Force (SFOR) and Extension of the Mandate of the UN Mission in Bosnia and Herzegovina' (12 December 1996) UN Doc. S/RES/1088, op. para. 11 (on Bosnia-Herzegovina); UNSC, 'Resolution 1145' (n 1402) op. para. 7 (on Croatia); UNSC, 'Resolution 1244' (n 1545) (on Kosovo). On the background and basis of the "right to return" in international law Quigley (n 372).

(not uncontroversial) judgment of the GC in *Ališić* showed vividly how a question of separation of state debts could be dealt with from a "private law" perspective, states being held liable not only to a certain percentage of the state debt of the predecessor but also to specific claims of individuals.

The separation of Serbia and Montenegro can be separated from the first wave of successions. Both constituent members had already been accorded far-reaching autonomy, in particular with respect to private law and property issues, and because Serbia continued the personality of the SFRY, continuity of the domestic legal order was the more natural outcome for both states.

Finally, the secession of the Kosovo from Serbia took place after a devastating war with international involvement and almost a decade of external administration of the territory. Apart from the fact that the international legal status of the Kosovo is still not settled, its peculiar history led to two (intermingled) "anomalies" with respect to attitudes to the previous legal order. First, major changes in the Kosovar legal system were, in fact, brought about by the UNMIK administration. Notably, the interim administration (re-)set in force the law of the formerly autonomous province of the Kosovo, thereby almost completely eclipsing Serbian law. However, UNMIK also installed mechanisms declaring *rights* acquired under the former Serbian legal order still valid and enforceable yet subject to re-assessment for discriminatory intent. The continuity of the "old" Kosovar legal order is reminiscent of the attitudes of the Baltic states. Its relevance for the analysis of acquired rights in cases of *state succession* is therefore diminished. But it is remarkable that, even in that situation, individual rights acquired during Serbian rule were not completely disregarded. When the country regained its sovereign rights, the independent Kosovo, in principle, continued the policy.

Overall, states involved in the dismembering of the SFRY showed a remarkable regard for continuity of their respective domestic legal order. Acquired rights of individuals mostly were protected through the upkeeping of domestic law. That protection was partly due to the republics' far-reaching pre-independence autonomy in internal matters, especially domestic private law. Exceptions, such as in the case of Kosovo, were due to illegal annexation. Those legal continuity provisions were, however, not always followed in practice, their implementation being tainted by political motives and ethnic discrimination.

V) The Dissolution of Czechoslovakia (1992/1993)

1) General Background

Since 1968, the state of the Czech and Slovak Federal Republic (CSFR or Czechoslovakia) had been a federal republic in line with a socialist pattern that had accorded certain autonomy to its constituent republics. In the following years, there were tensions in the political relationship between both parts, especially due to the (perceived) supremacy of the Czech Republic. When it came to new discussions about the federation's future status, especially in the aftermath of elections in June 1992, independence of the Republic of Slovakia was finally considered the most feasible option.[1565] On 17 July 1992, the Slovak parliament declared the sovereignty of Slovakia.[1566] During the negotiation phase leading to the separation of the federation, both members of the federation concluded several bilateral agreements supposed to govern their post-independence relationship.[1567] The "Constitutional Law on the Dissolution of the Czech and Slovak Federal Republic"[1568] in Art. 1 para. 1 set the date for the dissolution of the federation as 31 December 1992 and declared in Art. 1 para. 2 the Czech Republic and the Slovak Republic to be successor states.

1565 On the history of the Czechoslovak state and its dissolution Mahulena Hofmann, 'Czechoslovakia, Dissolution of (2009)' in: *MPEPIL* (n 2) paras. 1-4. On the immediate historical and social background of the dissolution Darina Mackova, 'Some Legal Aspects of the Dissolution of Former Czechslovakia (1993)' (2003), 53(2) Zbornik PFZ 375 375–379; Hošková, 'Die Selbstauflösung der ČSFR. Ausgewählte rechtliche Aspekte' (n 703), 689–690; Sharon L Wolchik, 'The Czech and Slovak Republics' in: *Csergo/Eglitis et al. Central and East European Politics* (n 1320) 333 341.

1566 Hošková, 'Die Selbstauflösung der ČSFR. Ausgewählte rechtliche Aspekte' (n 703), 691.

1567 For an overview of those agreements ibid 693–699.

1568 'Constitutional Law on the Dissolution of the Czech and Slovak Federal Republic (25 November 1992)' in Vratislav Pechota (ed), *Central & Eastern European Legal Materials (CEEL): Vol. 2: Czechoslovakia* (Loose Leaf. Transnational Juris Publishing 1992) Release 19, July 1993.

At the same time, both republics enacted new constitutions.[1569] While the Czech constitution[1570] according to Art. 113 was to come into force on the day of independence, i.e. 1 January 1993, the new Slovak Constitution[1571] came into force on 1 October 1992.[1572] Furthermore, its Art. 152 para. 1 provided for the continuity of previous law *unless* it conflicted with the *new* (Slovak) constitution. That stipulation was at odds with the superiority claim of the - then - still valid CSFR constitution.[1573] While, according to some authors, that chain of events brought the independence of Slovakia closer to a case of separation from the CSFR and the supposition of the Czech state as the continuator of the CSFR,[1574] commonly, the demise of the CSFR is considered as a case of (voluntary) dissolution (or dismem-

1569 For more information on both constitutions Eric Stein, 'Out of the Ashes of a Federation, Two New Constitutions' (1997), 45(1) AmJCompL 45; Pavel Holländer, 'Die Verfassungen der Tschechischen und der Slowakischen Republik im Vergleich' in Joseph Marko and others (eds), *Revolution und Recht: Systemtransformation und Verfassungsentwicklung in der Tschechischen und Slowakischen Republik* (Lang 2000) 285; Hošková, 'Die Selbstauflösung der ČSFR. Ausgewählte rechtliche Aspekte' (n 703), 699–715.

1570 'Constitution (16 December 1992)' in Vratislav Pechota (ed), *Central & Eastern European Legal Materials (CEEL): Vol. 2A: Czech Republic, Slovenia* (Loose Leaf. Transnational Juris Publishing 1992), Release 20, September 1993.

1571 'Constitution of Slovakia' in: *Pechota Central & Eastern European Legal Materials Vol. 2a* (n 1569), Release 17, March 1993.

1572 Holländer, 'Die Verfassungen der Tschechischen und der Slowakischen Republik im Vergleich' (n 1568) 285; Jiri Malenovsky, 'Problèmes Juridiques Liés à la Partition de la Tchécoslovaquie, y Compris Tracé de la Frontière' (1993), 39(1) AFDI 305 315.

1573 Art. 1 of the Constitution (29 February 1920), 12 Current History 727 (Czechoslovakia); Holländer, 'Die Verfassungen der Tschechischen und der Slowakischen Republik im Vergleich' (n 1568) 285; Malenovsky (n 1571), 317.

1574 Cf. e.g. ibid 317–323; for Slovakia as an independent state before 1 January 1993 also Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 5; Pavel Holländer, 'Revolution und Recht in der Tschechoslowakei 1989 bis 1992' in: *Marko/Ableitinger et al. Revolution und Recht* (n 1568) 29 49–50; supposedly also Aleksandar Pavković, 'Peaceful Secessions: Norway, Iceland and Slovakia' in: *Pavković/Radan Secession Research Companion* (n 392), who, however, does not distinguish secession from dissolution. However, while a unilateral separation of Slovakia by way of referendum was foreseen in a constitutional law, apparently both sides consciously avoided this avenue, Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 5.

berment) with two successor states.[1575] That view also aligned with the self-perceptions of the Czech and the Slovak Republics.[1576]

2) The Continuity of the Legal Order in General

After the dissolution, both states as far as possible opted for the continuity of the legal regime.[1577] With respect to international law, Article 153 of the Slovak Constitution determined Slovakia as successor to international treaties of the CSFR "to the extent laid down by a constitutional law of the Czech and Slovak Federal Republic or to the extent agreed between the Slovak Republic and the Czech Republic." The Czech Republic regulated the issue in Art. 4 and 5 para. 2 of the "Constitutional Act on Measures Related to the Dissolution of the Czech and Slovak Federative Republic"[1578], which provided that the Czech Republic would, in principle, succeed to all rights and obligations of the CSFR with respect to the Czech territory. This decision is in line with Art. 34 VCSST. Both the Czech Republic and the Slovak Republic, which became parties to the VCSST in 1999 and 1995, respectively, declared that they would retroactively apply the VCSST

1575 Tancredi, 'Dismemberment of States (2007)' (n 324) para. 7; Crawford *The Creation of States* (n 308) 706; Arnauld *Völkerrecht* (n 255) § 2 para. 104; Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 8; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 520, 529; Hafner and Kornfeind (n 27), 1, 15; Hošková, 'Die Selbstauflösung der ČSFR. Ausgewählte rechtliche Aspekte' (n 703), 716, 732, 733; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 398, 406, 418; ILA, 'Aspects of the Law of State Succession' (n 616) 10,11, 27; Devaney, 'What Happens Next? The Law of State Succession' (n 283) footnote 11; Bedjaoui (n 35); Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 8; Shaw *International Law* (n 266) 980.

1576 As expressed e.g. in Art. 1 paras. 1 and 3 of the 'Constitutional Law on the Dissolution of the Czech and Slovak Federal Republic (25 November 1992)' (n 1567). That the CSFR dissolved was later also the position of Slovakia in the case of *ICJ Gabčíkovo-Nagymaros Project* (n 616) para. 121. On the (consensual) distribution of state debts cf. Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 15.

1577 Also Mackova (n 1564), 381; for Slovakia Lucia Žitňanská, 'Die Wirtschaftsverfassung der Slowakischen Republik' in: *Marko/Ableitinger et al. Revolution und Recht* (n 1568) 207 207.

1578 Constitutional Act on Measures Related to the Dissolution of the Czech and Slovak Federative Republic (15 December 1992) Constitutional Act No. 4-1993 Coll. of the Czech National Council (Czech Republic).

to their own succession.[1579] Both states thus opted for continuity of their multilateral treaties[1580] and all obligations under the human rights treaties of the CSFR were taken over by the two successor states.[1581] The continuity of bilateral treaties, however, was subject to negotiations with the treaty partners.[1582]

The question of what would happen with CSFR *domestic* law was regulated by Slovakia within its new constitution, especially in Chapter IX on "Transitional and Final Provisions". As mentioned above, Art. 152 para. 1 determined that "[c]onstitutional laws, laws, and other generally binding legal regulations remain in force in the Slovak Republic unless they conflict with this Constitution. They can be amended and abolished by the relevant bodies of the Slovak Republic."[1583] The Czech Republic, in Art. 1 para. 1 of the Constitutional Act on Measures Related to the Dissolution of the Czech and Slovak Federative Republic,[1584] stipulated that "[t]he constitutional acts, acts of law and other legal regulations of the Czech and Slovak Federative Republic valid on the date of dissolution of the Czech and Slovak Federative Republic in the territory of the Czech Republic shall remain valid and effective. However, it is not possible to use those provisions which are contingent only on the existence of the Czech and Slovak Federative Republic and on the integration of the Czech Republic in it."

According to Article 2,

> "[i]n the event of any discrepancy between the legal regulations of the Czech Republic adopted before the dissolution of the Czech and Slovak Federative Republic and the legal regulations of the same virtue specified in Article 1, Section 1 herein, the legal regulations of the Czech Republic shall prevail."

1579 See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&clang=_en#EndDec. Both states did not become parties to the VCSSPAD.

1580 Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 10; Hošková, 'Die Selbstauflösung der ČSFR. Ausgewählte rechtliche Aspekte' (n 703), 716–718, 719-720.

1581 Malenovsky (n 1571), 330; for Slovakia Mackova (n 1564), 383.

1582 Malenovsky (n 1571), 330; Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 11; see also (n 965). For further examples Malenovsky (n 1571), 330.

1583 "The interpretation and application of constitutional laws, laws, and other generally binding legal regulations must be in harmony with this Constitution.", Art. 152 para. 4 'Constitution of Slovakia' (n 1570).

1584 (n 1577).

Hence, also domestically, the successor states opted for the continuity of the legal regime while keeping leeway to change the laws.

It has to be noted that, comparable to the case of the SU, changes in private law in the Czech or Slovak territories were connected more to converting the socialist economies into capitalist market economies than to their successions. The change of economic systems and the accompanying privatization measures were a general development starting years before the coming into existence of the two independent states and continuing after the separation.[1585] Restitution of property nationalized under the CSFR authority was one pillar of that privatization.[1586] The comprehensive program favored restitution in kind,[1587] and paid attention to rights acquired in good faith by private persons, who had to be compensated and offered alternative accommodation.[1588] A number of important laws with respect to subjects such as private law, trade law, restitution laws, and investment law were enacted even before the June 1992 elections.[1589] Relevant amendments to the Civil Code took place before dissolution of the CSFR and then again only some years after 1993.[1590]

3) Private Rights

There were no particular provisions on the permanence of private rights of individuals. Under Art. 112 para. 1 of its constitution, the Czech Republic upheld the CSFR "Charter of Fundamental Rights and Freedoms" and hence the protection of property and inheritance under Art. 11 of the Charter. The protection of property in Art. 20 of the Slovak Constitution was

1585 Gashi (n 1195) 66–69, 99-102; Mackova (n 1564), 385; Žitňanská, 'Die Wirtschaftsverfassung der Slowakischen Republik' (n 1576).

1586 For an overview of the privatization process Gashi (n 1195) 66–69.

1587 ibid 99–101.

1588 See statement of the Czech government *Pincová and Pinc v. the Czech Republic,* Appl. No. 36548/97, 5 November 2002, ECHR 2002-VIII 311 para. 54 (ECtHR) but on the unproportionality of the state acts ibid paras. 61-64.

1589 For an overview Holländer, 'Revolution und Recht in der Tschechoslowakei 1989 bis 1992' (n 1573) 29–36; Mahulena Hošková, 'The Evolving Regime of the New Property Law in the Czech and Slovak Federal Republic' (1992), 7(3) AmUJInt'l L& Pol'y 605; cf. also Gashi (n 1195) 100.

1590 Cf. David Falada, 'Codification of Private Law in the Czech Republic' (2009), 15(1) Fundamina 38 64–68.

almost identical to property protection under the Charter.[1591] It underlined the importance of regulation by statutory law, para. 2, the need to exercise the right of property in conformity with society's needs, para. 3, and the possibility of expropriation for public purposes, on a statutory basis and against compensation (without, however, mentioning an explicit standard), para. 4. The constitutional core of property therefore stayed the same as before the dissolution. Art. 11 of the Slovak constitution accorded international human rights treaties priority over its own law.

The split of the CSFR was conducted without any formal vote of one of the parliaments of its constituent republics and without a referendum.[1592] Interestingly enough, the ramifications of that "deficit" for the obligation to uphold individual positions acquired under the CSFR pension system led to a dispute between the highest courts of the Czech Republic eventually involving the CJEU.[1593] After the dissolution of the CSFR, the Czech and Slovak republics had agreed to uphold the pensions claims of citizens formerly employed in the CSFR. Each state was responsible for pensions of employees having worked for an employer that had its headquarters on the respective state's territory "either on the day of the dissolution, or on the last day before that date"[1594]. Due to separate economic development and legislation after 1 January 1993, the "Slovak pensions" were

1591 Hošková, 'Die Selbstauflösung der ČSFR. Ausgewählte rechtliche Aspekte' (n 703), 703. However, the Slovak version of the constitution referred to 'Constitution of Slovakia' (n 1570) does not contain the last paragraph on taxes and fees.

1592 On this "democratic deficit" Mackova (n 1564), 379–380; Malenovsky (n 1571), 323–325.

1593 *Marie Landtová v Česká správa socialního zabezpečení. Nejvyšší správní soud,* C-399/09, 22 June 2011, Reference For a Preliminary Ruling, ECR 2011 I-05573 (CJEU), which was followed by an open refusal of the Czech Constitutional Court to abide by the CJEU judgment which was considered *ultra vires*, see *Slovak Pensions Case,* PL. ÚS 5/12, 31 January 2012 (Constitutional Court of the Czech Republic). In more detail on the "saga" of the "Slovak Pensions Cases" Agata B Capik and Martin Petschko, 'One Says the Things Which One Feels the Need to Say, and Watch the Other Will Not Understand: Slovak Pension Cases before the CJEU and Czech Courts' (2013), 9 Croatian YB Eur L & Pol'y 61; Pavel Molek, 'The Court That Roared: The Czech Constitutional Court Declaring War of Independence against the ECJ' (2012), 6 ELR 162 <https://www.academia.edu/7695251/The_Court_That_Roared_The_Czech_Constitutional_Court_Declaring_War_of_Independence_against_the_ECJ>; Jan Komarek, 'Playing With Matches: The Czech Constitutional Court's Ultra Vires Revolution' *verfassungsblog* (22 February 2012) <https://verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution/>.

1594 Cited after *CJEU Marie Landtová* (n 1592) para. 9.

worth less than those paid by the Czech Republic[1595] and several former CSFR employees living in the Czech Republic but having worked for a company headquartered in the Slovak Republic sued the Czech pension authorities. Reportedly, the Czech Constitutional Court's case law considered the Czech authorities obliged to accord all Czechs living on its territory the same amount of pension no matter which employer they worked for.[1596] It seemed that the finding was implicitly undergirded by the idea that a change in sovereignty not agreed to by the population should not have any negative consequence on individual positions.[1597] In opposition to the finding, the Czech Supreme Administrative Court and the pensions authorities considered the succession into the CSFR's position a manifest reason for justified differential treatment of both parts of the population after independence.[1598] As an aside, the latter opinion seems more in line with the traditional idea of acquired rights protecting merely a *status quo* but not expectations of or opportunities for a certain sum in a later pension; states under international law are, in principle, free to alter legislation with effect for the future. In line with the argumentation of the Supreme Administrative Court and the pensions authorities, the value of the pension installments accrued until dissolution of the CSFR was to be accounted for, but it was not necessary to guarantee that those installments would lead to a certain sum of money in the future. In that respect, it seems important that the claims before the Constitutional Court were based not on the right of property but on the right to social security in old age and on the Czech Constitution's prohibition of discrimination.[1599]

4) Interim Conclusions

Authors have underlined that, especially compared to the cases of the dismemberment of the former SFRY, the dissolution of the CSFR was an

1595 Capik and Petschko (n 1592), 63; however, this changed some years later, see Molek (n 1592), 167; Komarek (n 1592).
1596 *CJEU Marie Landtová* (n 1592) paras. 12-13; Capik and Petschko (n 1592), 64.
1597 Molek (n 1592), 162–163; Capik and Petschko (n 1592), 71.
1598 The CJEU, to which a reference proceeding was launched by the Czech Supreme Administrative Court in *CJEU Marie Landtová* (n 1592) did not comment on the succession issue.
1599 Molek (n 1592), 164.

example of a particular consensual and peaceful succession scenario.[1600] It therefore led to relatively little friction, also within the domestic legal system. Several issues of relevance for individual rights were regulated by bilateral agreement.[1601] Acquired rights thus did not pose as much of a challenge as in other countries under scrutiny.

VI) The Independence of Eritrea from Ethiopia (1993)

1) General Background

In the context of assessing acquired rights and state successions, several difficulties are associated with grasping the significance of the evolution of the Eritrean state in 1993. Historically, power over Eritrea moved in 1941 from Italy to Great Britain.[1602] However, after the Second World War, the victorious powers could not agree on a plan for the territory, and in 1952 the UN installed a loose federation between Eritrea and Ethiopia.[1603] Yet, this installment was thwarted in the following years by Ethiopia, which in 1962 finally incorporated the territory of Eritrea as a republic into its own state.[1604] 30 years of civil war for Eritrean independence followed. Finally, in 1991 the Eritrean armed opposition won the upper hand and erected a *de-facto* autonomous state.[1605] After negotiating the terms of independence with Ethiopia, a UN-monitored referendum took place in which 99.8% of

1600 E.g. Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 17; Hošková, 'Die Selbstauflösung der ČSFR. Ausgewählte rechtliche Aspekte' (n 703), 733.

1601 For examples Mackova (n 1564), 388–389.

1602 Verena Wiesner, 'Eritrea (2009)' in: *MPEPIL* (n 2) paras. 1-3; Gregory Fox, 'Eritrea' in: *Walter/Ungern-Sternberg Self-Determination and Secession* (n 386) 273 274–275; Raymond Goy, 'L'Indépendance de l'Erythrée' (1993), 39(1) AFDI 337 338–339; Albano A Troco, 'Between Domestic and Global Politics: The Determinants of Eritrea's Successful Secession' (2019), 4(8) Brazilian Journal of African Studies 9 14–15.

1603 Wiesner, 'Eritrea (2009)' (n 1601) paras. 4-15; Goy, 'L'Indépendance de l'Erythrée' (n 1601), 339–340; Troco (n 1601), 15.

1604 Fox, 'Eritrea' (n 1601) 277–278; Goy, 'L'Indépendance de l'Erythrée' (n 1601), 340–341; Troco (n 1601), 15–17. Cf. Wiesner, 'Eritrea (2009)' (n 1601) paras. 19-20, who rejects the term "annexation" in this case as Eritrea at that time was not an independent state.

1605 Fox, 'Eritrea' (n 1601) 278–279; Goy, 'L'Indépendance de l'Erythrée' (n 1601), 341–346; Troco (n 1601), 17–20.

the electorate supported Eritrean independence.[1606] The state of Eritrea was admitted to the UN on 28 May 1993.[1607]

The emergence of Eritrea as an independent state can therefore be considered a separation (or secession), i.e. a typical form of succession,[1608] and Eritreans eligible only to "internal" self-determination.[1609] Yet, because of its particular history - the federation with Ethiopia being forged out of two colonies by the UN, a construction that later was, illegally,[1610] disregarded by Ethiopia - that emergence can also be viewed as the last step of a decolonization process of a people entitled to "external" self-determination.[1611] A comparison with the other cases under scrutiny thus has to be made with caution.

2) The Continuity of the Legal Order in General

The colonial background and the pertaining Eritrean claim to independence based on the principle of self-determination were mirrored in the new state's attitude towards the previous legal order, which had been multi-patterned and influenced by colonial, Eritrean, and Ethiopian law. First, with respect to multilateral international agreements of Ethiopia, succession does not have seemed to be an option for Eritrea - it only *acceded*

1606 Fox, 'Eritrea' (n 1601) 279–280; Goy, 'L'Indépendance de l'Erythrée' (n 1601), 346–348. In more detail on the reasons for the separation's success Troco (n 1601), 20–27.

1607 UNGA, 'Resolution 47/230: Admission of Eritrea to Membership in the United Nations' (28 May 1993) UN Doc. A/RES/47/230.

1608 Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294) 852; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 519, 526; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 406; Crawford *The Creation of States* (n 308) 375, 402.

1609 This seems to have been the position of the UN, see Wiesner, 'Eritrea (2009)' (n 1601) paras. 27-30.

1610 On the legality and especially on the binding force of the GA Resolution for Ethiopia ibid paras. 16-18, 20-25.

1611 Sterio (n 392) 72–73 "sui generis" or "de facto secession"; cf. Thürer and Burri, 'Secession (2009)' (n 317) para. 32 with further arguments; Kathryn Sturman, 'Eritrea: A Belated Post-Colonial Secession' in: *Pavković/Radan Secession Research Companion* (n 392); Goy, 'L'Indépendance de l'Erythrée' (n 1601), 338, 342-343; cp. also Wiesner, 'Eritrea (2009)' (n 1601) paras. 27-30. On the different basis of Eritrean claims to self-determination Fox, 'Eritrea' (n 1601) 280–289.

to *some* of the conventions.[1612] For bilateral treaties, continuity depended on the attitude of the other state party and was considered on a case-by-case basis.[1613] In general, the domestic status of international law in the Eritrean legal system is not settled.[1614]

Furthermore, Eritrea's *domestic* legal order did not provide much reliable information on the actual state of the law. There was no explicit provision discernible in Eritrean law dealing with the relation to the former legal order. The law-making process in Eritrea is marked by intransparency and obfuscation of competences.[1615] A constitution enacted in 1997[1616] provided for a right of property in Art. 23 para. 1. According to Art. 23 para. 3 of the constitution "[t]he State may, in the national or public interest, take property, subject to the payment of just compensation and in accordance with due process of law". However, the constitution has not yet been implemented, and the announced revision process has, so far, not yielded tangible results.[1617] Transitional civil and criminal laws were adopted in 1991,[1618] i.e.

1612 Cf. on non-succession to the Geneva Conventions *EECC - Award on Prisoners of War* (n 616) paras. 33-35. The UN database on UNSG depositary notifications does not contain one hit with respect to succession of Eritrea to a multilateral convention. There was even no accession to the Genocide Convention (n 518) to which Ethiopia at the time of independence had been a party. Additionally, many accessions only took place long after independence, e.g. to the CAT (n 516) in 2014; cf. also Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 526.

1613 The US opted for a provisional continuity of bilateral treaties concluded with Ethiopia as towards Eritrea, cf. US Department of State (Nash, Marian), 'Contemporary Practice of the United States relating to International Law' (1993), 87(4) AJIL 95 598.

1614 Luwam Dirar and Tesfagabir K Teweldebirhan, 'Introduction to Eritrean Legal System and Research' (07/2023) at 8.5 <https://www.nyulawglobal.org/globalex/Eritrea1.html>. See also with respect to the procedure of ratification and incorporation Simon M Weldehaimanot and Daniel R Mekonnen, 'The Nebulous Lawmaking Process in Eritrea' (2009), 53(2) J Afr L 171 186–189.

1615 ibid especially 179-184.

1616 Constitution (23 May 1997) https://www.servat.unibe.ch/icl/er00000_.html (Eritrea).

1617 Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Eritrea' (1 June 2015) UN Doc. A/HRC/29/41 para. 19; Human Rights Committee, 'Concluding Observations on Eritrea in the Absence of its Initial Report' (3 May 2019) UN Doc. CCPR/C/ERI/CO/1 para. 7; *see also* Dirar and Teweldebirhan (n 1613) at 6.1.

1618 E.g. the Transitional Civil Law 2/1991 (15 September 1991) (Eritrea); Transitional Civil Procedure Law 3/1991 (15 September 1991) (Eritrea); Transitional Criminal Law 4/1991 (15 September 1991) (Eritrea); Transitional Criminal Procedure Law

before formal independence. Crucially, those laws were based on *Ethiopian* codifications from the 1960s.[1619] Even if they were enacted on a transitional basis only, they reportedly stayed in place until 2015.[1620] Hence, there was at least some measure of factual continuity under domestic law.

3) Private Rights

a) Land Reform

The land tenure system before independence was surprisingly steadfast and survived colonial times, occupation, and federation with only a few changes.[1621] That constancy might also have been due to the land tenure's customary basis, in which land was attributed to tribes and communities.[1622] Shortly after independence, Eritrea proclaimed an important land reform abolishing the customary land tenure system.[1623] The relevant Proclamation No. 58/1994[1624] involved a purely governmental act not in-

5/1991 (15 September 1991) (Eritrea); Transitional Commercial Law 6/1991 (15 September 1991) (Eritrea); Transitional Maritime Law 7/1991 (15 September 1991) (Eritrea); Transitional Labor Law 8/1991 (15 September 1991) (Eritrea); all available (only in Eritrean language) online at the website of the Library of Congress https://www.loc.gov/.

1619 Dirar and Teweldebirhan (n 1613) at 6.5; Weldehaimanot and Mekonnen (n 1613), 180.

1620 Dirar and Teweldebirhan (n 1613) at 6.5.

1621 Gaim Kibreab, 'Land Policy in Post-Independence Eritrea: A Critical Reflection' (2009), 27(1) Journal of Contemporary African Studies 37 39–40; Jason R Wilson, 'Eritrean Land Reform: The Forgotten Masses' (1999), 24(2) NCJ Int'l L 497 502–507.

1622 Cf. in detail on the customary systems Kibreab (n 1620), 37–39; Wilson (n 1620), 497–502.

1623 In more detail Kibreab (n 1620), especially 40-42.

1624 Proclamation No. 58/1994 - A Proclamation to Reform the Sytem of Land Tenure in Eritrea, to Determine the Manner of Exprorpriating Land for Purposes of Developmet and National Reconstruction, and to Determine the Powers and Duties of the Land Commission (24 August 1994) http://extwprlegs1.fao.org/docs/pdf/eri8227.pdf (Eritrea), also available at the website of the International Labour Organization https://natlex.ilo.org/dyn/natlex2/r/natlex/fe/details?p3_isn=91368&cs=1sU7YfgkZYalqerwVDaUvHjIUZBgfkRF7H50CnC6vuHvlaoAQ_amWThxdQ2O-C-l8_RHvXC8G_i2Ny8v8jdbUlA; or (in Eritrean language) at the website of the Library of Congress https://www.loc.gov/.

volving parliament.[1625] It was to "supersede all laws, regulations, customs, and systems pertaining to land, Art. 58 para. 1: "All laws, regulations, directives, and systems which are inconsistent with the content and spirit of this Proclamation shall be repealed", Art. 58 para. 2.[1626] Most importantly, and as also envisaged by Art. 23 para. 2 of the later Eritrean constitution,[1627] the proclamation stipulated that land could only be owned by the state, Art. 3 para. 1. While individuals could acquire usufruct rights to land, such rights were dependent on government approval, Art. 4 para. 1, Art. 3 paras. 2 and 3. Usufructuary rights could be expropriated by the government against payment of a compensation, Art. 50, 51. The decision to expropriate was final and not subject to appeal, Art. 50 para. 3. In any case, "[i]llegally acquired state land", which was defined as land *inter alia* "illegally allotted due to war or the past colonial regime" under Art. 53 para. 1, had to be surrendered to the government without any prospect of compensation. That stipulation meant that Eritrea would not recognize many formerly granted usufructuary or ownership rights or at least paid no compensation when land was expropriated.[1628] For urban land, Art. 5 para. 3 of the proclamation even states that compensation was only due for expropriation of usufruct rights granted under the proclamation. Hence, all former usufruct rights seemingly could be abolished without compensation. Finally, Art. 43 para. 2 contains a rather peculiar provision making the proclamation's legal force dependent upon its factual implementation:

> "The land laws and tenure system that existed at the time of Eritrean independence shall remain in force until such time that the proclamation

1625 See also Dirar and Teweldebirhan (n 1613) under 6.3 explaining the "disappearance" of the national (legislative) assembly.

1626 Somehow redundantly, Art. 39 para. 2 of Proclamation No. 58/1994 maintained that "[e]xcept for laws, customs and systems explicitly preserved by this proclamation, all land tenure systems previously in application, […] together with their laws and customary procedures are hereby repealed and replaced by this proclamation." and in para. 2 that "[a]ll improvements or systems pertaining to land distribution or administration introduced on the prior system of land tenure in Eritrea by colonial regimes or forces of the Eritrean revolution shall be repealed by this proclamation". See also Art. 42 of the proclamation that contains further repealed provisions.

1627 Constitution of Eritra (n 1615) "All land and all natural resources below and above the surface of the territory of Eritrea belongs [sic] to the State."

1628 Furthermore, there seems to be no independent judicial review process, but the final appeal will go to the "Land Commission", which is directly accountable to the President, Art. 44 and Art. 57 para. 1 Proclamation No. 58/1994.

is implemented in areas of the country in which this proclamation has not yet been implemented".

That regulation, taken at face value, would mean that Eritrea did not consider pre-independence law to have fallen by the way automatically but that it persisted until the new law was implemented. Whether such a provision is in line with the principle of legal security can be questioned. Beyond that, there are serious doubts whether the general procedure of land reform was in line with due process of law. The extent to which practice followed formal law is not clear, and arbitrary execution of the law seemed to be frequent.[1629] In the same vein, Eritrea did not feel bound by concession agreements concluded by Ethiopia and cancelled or re-negotiated them.[1630]

b) Other Issues before the Eritrea-Ethiopia Claims Commission

In 1998, a border war erupted between Eritrea and Ethiopia. To settle civil claims after the conflict, the Eritrea-Ethiopia Claims Commission[1631] (EECC) was established in 2000. As its jurisdiction was confined to the armed conflict, and the commission therefore looked at the cases through

1629 Cf. also critical Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Eritrea' (n 1616) para. 39 "without a clear definition of the purposes and the recognition of applicable human rights standards, reference to prior notification, legal recourse for disputing land expropriation, recognition of the need to find alternatives especially in situations where people are rendered homeless or vulnerable, as well as a process of transparency and participation amongst others, the practice of land expropriations have been rampant and arbitrary in Eritrea." The named legislation has led to serious shortages in an already tense market for accommodation. For an overview see Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Eritrea' (11 May 2020) UN Doc. A/HRC/44/23 paras. 40-42.

1630 Goy, 'L'Indépendance de l'Erythrée' (n 1601), 355. Relevant laws did not contain conclusive provisions for former concessions, but only general rules, see Legal Notice No. 24/1999 Regulations on Petroleum Operations (22 July 1995) OG of Eritrea 5/1995 No. 8 (Eritrea); Legal Notice No. 19/1995 Regulations on Mining Operations (20 March 1995) (Eritrea); Proclamation No. 40/1993 to Govern Petroleum Operations (1 August 1993) (Eritrea); see also Investment Proclamation 18/1991 (31 December 1991) Gazette of Eritrean Laws 1/1991 No. 4 (Eritrea), all available on the website of the Library of Congress https://www.loc.gov/.

1631 For an overview on the Commission Natalie Klein, 'Eritrea-Ethiopia Claims Commission (2013)' in: *MPEPIL* (n 2).

the particular *ius in bello* glasses,[1632] the insights with respect to state succession issues are often limited. Yet, during the war, both states enforced some of the laws they had enacted before or only shortly after independence, i.e. in peace times: The states had been awaiting agreement on final legislation, which was prevented by the outbreak of the war. They thus independently reverted to (previous) laws, which, however, curtailed rights and freedom of individuals and, hence, also came under EECC scrutiny although they had a legal basis outside the war, too. Two points especially are of potential relevance to the topic of acquired rights: property rights of Eritrean and Ethiopian nationals and pensions of Ethiopian civil servants.

aa) Citizenship and Property Rights

When Eritrea was still part of Ethiopia, populations of both entities intermingled on the territory - Eritreans on Ethiopian territory often generating and gaining considerable wealth,[1633] while the economic situation of Ethiopians in Eritrea seems to have been mixed.[1634] Although exact numbers are disputed, it is estimated that, at the beginning of the war, about 100,000 Ethiopians were living on Eritrean territory[1635] and about 500,000 persons of Eritrean ancestry were in the territory of today's Ethiopia[1636]. During the border conflict, both states forcefully evicted thousands of people of the other ethnicity from their territory.[1637] Routinely associated with the evictions were severe restrictions on the property of those deported,[1638] such as the obligation to sell immovable property within short notice as, according to an Ethiopian law from the 1960s, foreigners were not allowed

1632 Cf. *Decision No. 1: The Commission's Mandate/ Temporal Scope of Jurisdiction,* 15 August 2001, UNRIAA XXVI 3 (EECC); *Civilians Claims, Ethiopia's Claim 5,* Partial Award of 17 December 2004, UNRIAA XXVI 249 para. 17 (EECC).

1633 *Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32,* Partial Award of 17 December 2004, UNRIAA XXVI 195 paras. 8-9 (EECC).

1634 *EECC Civilians Claims, Ethiopia's Claim* (n 1631) para. 11.

1635 ibid paras. 6, 71.

1636 *EECC Civilians Claims, Eritrea's Claims* (n 1632) para. 8.

1637 Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Eritrea' (n 1616) para. 46; *EECC Civilians Claims, Eritrea's Claims* (n 1632) paras. 10-11; *EECC Civilians Claims, Ethiopia's Claim* (n 1631) para. 121.

1638 For an overview of all restrictions on property *EECC Civilians Claims, Eritrea's Claims* (n 1632) paras. 123-157.

to own immovable property in Ethiopia.[1639] Sometimes, a 100% "location tax" was imposed on the sales price.[1640] That tax was partly justified by arguing that "persons who acquired land in the course of privatization after the fall of the Mengistu regime in 1991 did not pay for it and so should not benefit from its sale."[1641] When Eritrea complained before the EECC about Ethiopia's ill-treatment of individuals, Ethiopia justified such actions by

> "contend[ing] that, pursuant to its law, the Ethiopian nationality of all Ethiopians who had obtained Eritrean nationality had been terminated and that those expelled were Eritrean nationals, and hence nationals of an enemy State in a time of international armed conflict. It contended that all of those expelled had acquired Eritrean nationality, most by qualifying to participate in the 1993 Referendum. […] its security services identified each expellee as having belonged to certain organizations or engaged in certain types of activities that justified regarding the person as a threat to Ethiopia's security."[1642]

The EECC also found that "[k]ey issues in this claim are rooted in the emergence of the new State of Eritrea, particularly the April 1993 Referendum on Eritrean independence."[1643] Eritrea argued that the mere application for and receipt of the required "Eritrean Nationality Identity Card"[1644] in order to take part in the referendum could not confer nationality on the applicants as Eritrea, at that time, was no independent state.[1645] Furthermore, Ethiopia had actively encouraged participation in the referendum without pointing to the supposed legal consequences.[1646] In fact, until the outbreak of the war, Ethiopia had not attached any consequences to the voting and did not enforce its nationality law.[1647]

The EECC found that the cumulative effects of those measures in many cases meant that people lost virtually all property they had previously owned.[1648] Despite the massive human plight experienced by many deport-

1639 ibid para. 134.
1640 ibid paras. 137-138.
1641 ibid para. 139.
1642 ibid para. 11.
1643 ibid para. 39.
1644 On the background ibid paras. 39-42.
1645 ibid para. 44.
1646 ibid para. 46.
1647 ibid paras. 46, 47.
1648 ibid para. 152.

ed individuals, some of whom had spent their entire lives in the territory of later Ethiopia and had not foreseen the consequences of their participation in the referendum, the commission came to the conclusion that "nationality is ultimately a legal status"[1649] and found that those participating in the referendum had become dual nationals.[1650] Determining that states are free to deport foreigners, also bi-nationals, in times of war, the EECC did not find the deportations themselves to have violated international law, but specific surrounding circumstances to be in violation of international law.[1651] For the property restrictions, the EECC finally concluded that the "cumulative effect" of all of them was contrary to international law.[1652]

Regrettably, as mentioned, the EECC only looked at the measures from the perspective of their legality in wartime, even if many of the laws were adopted years before. In principle, it did not challenge the obligation to sell one's property because of the acquisition of a second nationality. However, even if one agrees with the EECC that every state was free to reserve the right to own property to its own nationals,[1653] that rationale does not automatically justify the *taking* of *already acquired* property merely because a property owner had acquired another nationality. It is thus unfortunate that the EECC did not differentiate between (new) acquisition and (already existing) possession of property, also in war times.

bb) Pensions of Ethiopian Civil Servants

Before separation, several contributory pension schemes had existed for civil servants in Ethiopia. After independence, Eritrea and Ethiopia seemingly cooperated and negotiated to secure the pensions for former Ethiopian state officials now living in Eritrea.[1654] During negotiations on a permanent solution, Ethiopia, under an agreed protocol, paid money to Eritrea, which then paid pensions to the former employees.[1655] Yet, when war broke

1649 ibid para. 51.
1650 ibid.
1651 Cf. ibid para. 82; *EECC Civilians Claims, Ethiopia's Claim* (n 1631) para. 121.
1652 *EECC Civilians Claims, Eritrea's Claims* (n 1632) paras. 151, 152.
1653 ibid para. 135.
1654 *Pensions (Eritrea's Claims 15, 19 & 23),* Final Award of 19 December 2005, UNRIAA XXVI 471 paras. 1-3, 11-12 (EECC).
1655 ibid paras. 13-15.

out, Ethiopia ceased payments.[1656] Before the EECC, Eritrea, besides relying on the existence of a binding international agreement,[1657] considered that withholding the payments to the fund amounted to an unlawful taking of property,[1658] and to unjust enrichment of Ethiopia,[1659] and "that its obligation to pay pensions arose pursuant to customary international law obligations regulating the succession of States"[1660]. Eritrea had argued "that those who paid into these programs acquired rights under Ethiopian law and were 'entitled to the funds accumulated by their years of hard work'."[1661] However, the EECC dismissed that argument. The purported property rights were not considered as concrete enough to be protected by international law, as there was, arguably, no individual right to payment of a pension under Ethiopian domestic law.[1662] With respect to the succession claim, the EECC was "not persuaded that customary international law applicable in situations of State succession allocates to the predecessor State primary responsibility for official pensions when unitary States divide. State practice varies."[1663] Finally, the claim based on unjust enrichment was also dismissed for essentially the same reasons.[1664] The EECC underlined that "[g]iven the doctrine's imprecise and subjective character, it must be applied cautiously".[1665] Eventually, the EECC rejected Eritrea's pension claims in total.

It is important to see that the EECC based its rejection first and foremost on considerations emanating from the laws of war, and not applicable in times of peace. Bearing in mind the violent background of Eritrea's independence, it has to be considered a significant step that the countries agreed on the importance of upholding pensions rights formerly acquired, negotiated a fund, and made the system work for years. Ethiopia repeatedly declared its commitment to the payments had it not been for the war.[1666]

1656 ibid para. 15.
1657 ibid paras. 16-17.
1658 ibid para. 18.
1659 ibid para. 19.
1660 ibid paras. 19, 40.
1661 ibid para. 35.
1662 ibid paras. 35-36. As a second argument, the EECC argued that the termination of the payment was justified by the exigencies of war and therefore not "unlawful". On property rights of the state of Eritrea, ibid paras. 37-38.
1663 ibid para. 41.
1664 ibid para. 43.
1665 ibid.
1666 ibid paras. 20, 44.

The EECC's finding of an insufficient basis of the pension claims in national law could also be seen as an affirmation of a guarantee for private claims that were unambiguously consolidated in national law - a requirement completely in line with the traditional acquired rights theory. Finally, the conclusion that there was no custom obligating *primarily* the continuing state to pay the pensions also does not necessarily militate against a rule of acquired rights. It does not force the conclusion that (potential) private rights have simply disappeared; it simply denies any steadfast customary rule with respect to the partition of debts or responsibility for private claims between the parties.

4) Interim Conclusions

In summary, Eritrea probably assumed continuity of laws and regulations in force on its territory before independence but did not feel bound by it. Especially for land rights, it felt free to enact new laws and to repudiate and abrogate former individual positions under domestic law without compensation - be they individual (customary) land rights or concessions. It seems to have insisted on freeing itself from the perceived colonial bonds and domination by not recognizing former legal positions and keeping as much leeway as possible. Ethiopia, on the other hand, in times of war, disenfranchised many of its (former) nationals by ripping them of the privileges associated with Ethiopian nationality. Yet, until the war broke out, it seemed that both states were aware of the need to negotiate for and agree on regulations protecting individual status, even after separation. Nevertheless, the legal situation in Eritrea remains obscure, due process rights are not in place and law enforcement is arbitrary. In general

> "Eritrea remains a one-man dictatorship […] with no legislature, no independent civil society organizations or media outlets, and no independent judiciary. Elections have never been held in the country since it gained independence in 1993".[1667]

1667 Human Rights Watch, 'World Report 2021: Eritrea' <https://www.hrw.org/world-report/2021/country-chapters/eritrea>.

The human rights situation in general is distressing.[1668] A new war around the border province of Tigray started in 2020, and it has still not been possible to prevent the conflict from escalating.[1669] Thus, the insights provided by the Eritrean case are limited. Besides the independence of Eritrea constituting a special case close to decolonization scenarios, which brings Eritrea's rejection of former individual rights into the realm of the clean-slate doctrine of newly independent states, a general deficit in the rule of law depicts official actions less as principled measures and more as political *ad-hoc* decisions. That deficit makes general inferences hard to sustain. Neither are the findings of the EECC of great avail to the analysis as the EECC attached much weight to its supposed jurisdiction - the laws of war - and justified many state acts under the *ius in bello* without inquiring into whether those measures were taken as measures of war or were general policies enforced during the war. Yet, its dealing with the question of pension rights of former civil servants showed a certain acknowledgement of protection of rights vested under a national legal order.

VII) The Transfer of Walvis Bay (1994)

1) General Background

Walvis Bay, a deep-sea port on the west of the Namibian coast and its surrounding territory,[1670] was subject to a turbulent colonial history before it was finally made part of Namibia's territory. Annexed by Great Britain in the 19th century, the territory constituted an enclave surrounded by the German colony of South-West Africa and later became part of the Union

1668 ibid.; Human Rights Committee, 'Concluding Observations on Eritrea in the Absence of its Initial Report' (n 1616); Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Eritrea' (n 1628).

1669 Al Jazeera, 'UN Chief Calls for Immediate End to Fighting in Ethiopia: Call Comes with Prime Minister Abiy Ahmed Reportedly on the Front Lines and Men Flocking to Join Military.' (25 November 2021) <https://www.aljazeera.com/news/2021/11/25/un-chief-calls-for-immediate-end-to-fighting-in-ethiopia>.

1670 A detailed definition of the transferred territory, which also included some outlaying islands, is given in Art. 1 of the Treaty on Walvis Bay (28 February 1994), 33 ILM 1528 (Namibia/South Africa) and Art. 1 lit. a) and b) of the Walvis Bay and Off-Shore Islands Act (24 February 1994) OG of Namibia, No. 805 1, 33(6) (1994) ILM 1557 (Namibia).

of South Africa.[1671] After the First World War, Germany had to renounce all titles to its overseas territories, and the mandate for administration over former South-West Africa was given to Great Britain and executed in its name by the Union of South Africa.[1672] When the mandate was revoked in 1966, the question of sovereignty over Walvis Bay became a matter of contention between South Africa, which considered it to be part of its territory, and the UN, which declared Walvis Bay to belong to Namibia, which itself was eligible to self-determination and independence.[1673]

Namibia gained independence from South Africa on 21 March 1990.[1674] Namibia's first constitution[1675] (NC) came into force on the day of its independence, Art. 130 NC. Even then, Art. 1 para. 4 NC defined the Namibian territory as consisting of "the whole of the territory recognised by the international community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis Bay". In the following years, South Africa and Namibia developed diplomatic relations.

1671 Albert J Hoffmann, 'Walvis Bay (2009)' in: *MPEPIL* (n 2) paras. 2-6; Graham Evans, 'Walvis Bay: South Africa, Namibia and the Question of Sovereignty' (1990), 66(3) IA 559 563.

1672 Nele Matz-Lück, 'Namibia (2009)' in: *MPEPIL* (n 2) para. 14; Hoffmann, 'Walvis Bay (2009)' (n 1670) para. 7.

1673 ibid para. 10. On the arguments for both positions John Dugard, 'Walvis Bay and International Law: Reflections on a Recent Study' (1991), 108(1) SALJ 82; Evans, 'Walvis Bay: South Africa, Namibia and the Question of Sovereignty' (n 1670), 563–566. For the UN position cf. UNGA, 'Resolution 32/9 D: Situation in Namibia Resulting from the Illegal Occupation of the Territory by South Africa' (4 November 1977) UN Doc. A/RES/32/9 D especially paras. 6-8; UNSC, 'Resolution 432: On Territorial Integrity of Namibia and Reintegration of Walvis Bay into Namibia' (27 July 1978) UN Doc. S/RES/432. Comprehensively on the status of Namibia after 1945 Matz-Lück, 'Namibia (2009)' (n 1671) paras. 5, 16-40. On the condemnation of South African presence in Namibia UNSC, 'Resolution 276: On Establishment of an Ad Hoc Subcommittee of the Council to Study Ways to Implement Council Resolutions Regarding Namibia' (30 January 1970) UN Doc. S/RES/276; *ICJ South West Africa (Advisory Opinion)* (n 363). See also Graham Evans, 'A Small State with a Powerful Neighbour: Namibia/South Africa Relations Since Independence' (1993), 31(1) The Journal of Modem African Studies 131 133 "The dispute over Walvis Bay [was], in legal terms, basically a conflict between colonial and post-colonial conceptions of the proper mode of territorial acquisition." [footnote omitted].

1674 Matz-Lück, 'Namibia (2009)' (n 1671) para. 52; Hoffmann, 'Walvis Bay (2009)' (n 1670) para. 11; D. J Devine, 'The Relationship between International Law and Municipal Law in Light of the Constitution of the Republic of Namibia' (1994), 26(2) Case W Res J Int'l L 295 297.

1675 Constitution (21 March 1990) OG of Namibia No. 2 1 (Namibia).

They agreed on a joint administration of the Walvis Bay territory from 1992 onwards.[1676] Apparently, a major concern during the negotiations on a transfer was the safeguarding of individual rights of the people living in the Walvis Bay area.[1677] The Treaty on Walvis Bay finally gave the territory to Namibia with effect from 1 March 1994.[1678] Yet, the brief instrument left "any matter relating to or arising from the incorporation/reintegration […] which may require to be regulated and any such matter which has not been settled or finalized by the date of incorporation/reintegration" to future settlement by the parties.[1679] Its provisions were implemented domestically by the Namibian "Walvis Bay and Off-Shore Islands Act" (WB Act)[1680] and the South African "Act to Provide for the Transfer to Namibia of the Territory of and Sovereignty Over Walvis Bay and Certain Islands" (WB Transfer Act),[1681] which elaborated the process in more detail.

2) Domestic Law in Walvis Bay

What is striking is the difference between Namibia's approach towards the "old" South African law in the case of the integration of Walvis Bay and its actions when it became independent from South Africa. According to Art. 2 of the WB Act, unless an exception applied, no other law than Namibian law was to be applied to Walvis Bay. Hence, the default rule did not provide for continuity of the (South African) legal system; it extended Namibia's law to the new territory. That rule largely accorded with the "moving treaty frontiers" rule taken from Art. 15 VCSST. Yet, any potential rupture in the legal environment of those living on the territory was alleviated through several circumstances.

1676 Agreement on the Joint Administration of Walvis Bay and the Off-Shore Islands (1992), 32 ILM 1154 (Namibia/South Africa); cf. Hoffmann, 'Walvis Bay (2009)' (n 1670) para. 12.
1677 ibid para. 13; see also Art. 8-10 Agreement on the Joint Administration (n 1675).
1678 Art. 2 Treaty on Walvis Bay (n 1669).
1679 Art. 4 ibid.
1680 WB Act (n 1669).
1681 Act to Provide for the Transfer to Namibia of the Territory of and Sovereignty Over Walvis Bay and Certain Islands (14 January 1994), 33 1573 (South Africa).

a) The Legacy of the South African Legal Order

First, only four years before the transfer of Walvis Bay, Namibia, when becoming independent, largely adopted the existing (South African) legal order and only adapted it to the new circumstances. According to Art. 143 NC, all international agreements "binding upon Namibia" at the time of independence remained in force for Namibia, subject to contrary decisions by the parliament.[1682] Additionally, in Art. 144,[1683] the NC adopted an "international law friendly" attitude,[1684] in principle directly incorporating general rules of international law and international agreements into the domestic legal order.[1685]

The NC dedicated a whole chapter (Chapter 20, Art. 133-143) to the question of the law in force at the time of independence and transitional provisions. For the domestic legal order, Namibia opted for continuity: Art. 140 para. 1 NC explicitly stipulated that

> "[s]ubject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court".

The stipulation included "South African legislation applicable in Namibia, and the common and customary law then applicable."[1686] Furthermore, powers vested in the official authorities of South Africa were to "be deemed

1682 Cf. Art. 63 para. 2 (d) NC (n 1674). The omission of general rules of public international law from Art. 63 para. 2 (d) may support the view that Namibia assumed to be bound by the customary law existing at the time of its inception regardless of its consent. In more detail Devine (n 1673), 300–303 who apparently assumes that a positive act of the Namibian parliament is required to succeed to international treaties concluded by South Africa. However, the wording of Art. 143 NC (n 1674) "existing international agreements […] remain in force, *unless and until* the National Assembly […] otherwise decides" [emphasis added] leads more to the conclusion that an active act of parliament is requierd for non-continuity.

1683 For more details cf. Devine (n 1673), 306–311.

1684 Cf. ibid 313–314.

1685 But see also the "savings-clause" in Art. 145 para. 2 NC (n 1674), stipulating that "[n]othing contained in this Constitution shall be construed as recognizing in any way the validity of the Administration of Namibia by the Government of the Republic of South Africa or by the Administrator-General appointed by the Government of the Republic of South Africa to administer Namibia." On the pre-independence state of the law Devine (n 1673), 298–299.

1686 ibid 297 [footnote omitted].

to vest" in the respective authorities of Namibia, Art. 140 para. 2 NC, and "[a]nything done under such laws prior to the date of Independence" by the South African authorities was to "be deemed to have been done" by Namibia, Art. 140 para. 3 NC, unless the Namibian parliament repudiated the acts.[1687] That norm was applied in 1991 by the Supreme Court of Namibia in *Minister of Defence v. Mwandinghi*.[1688] The case concerned an appeal against a judgment by the High Court of Namibia[1689] that had held that the new state of Namibia was liable to compensate the respondent for damages sustained due to delicts allegedly perpetrated by South African public officials before independence. The three sitting Supreme Court judges upheld that finding and opined that

> "[t]here can be no doubt that when the delict was committed, the respondent acquired a private right to compensation for damages against the Administration, then in control, of the country. Such private rights do not cease on a change of sovereignty […] Article 140 of the Constitution of Namibia puts the question of succession beyond any doubt. It makes it clear that the Republic of Namibia is the successor to the administration of the Republic of South Africa in Namibia."[1690]

In light of the situation of Namibia, which had just freed itself from South African occupation, that decision was remarkable. Notably, the court considered state liability claims as civil claims eligible for succession.[1691] On the other hand, it has to be underlined that the court arguably qualified the process of Namibian independence not as a change of sovereignty but as

1687 Accordingly, textual references to South African authorities are deemed to refer to the organs of the new Namibian state, Art. 140 para. 4 NC (n 1674). H. A Strydom, 'Namibian Independence and the Question of the Contractual and Delictual Liability of the Predecessor and Successor Governments' [1989] SAYbIL 111, 113–114 reported that this rule was applied to concessionary contracts as well.

1688 *Minister of Defence v. Mwandinghi* , 1992 (2) SA 355 (NmS), [1993], 25 October 1991, Appeal, ILR, 91 258 (Supreme Court of Namibia).

1689 *Mwandingi v. Minister of Defence* , 1991 (1) SA 851 (Nm), [1993], 14 December 1990, ILR, 91 341 (High Court of Namibia).

1690 *Supreme Court of Namibia Mwandinghi* (n 1687) 359.

1691 Against the background of long opposition against the idea of succession into obligations of state responsibility (see e.g. *Robert E. Brown (US v. GB),* Award of 23 November 1912, UNRIAA, VI 120 (American and British Claims Arbitration Tribunal); Reinisch and Hafner (n 2) 60; Herdegen (n 255) § 30 para. 2), this constitutes a notable finding. For more recent work on the topic of succession to state responsibility see *supra*, footnote 43.

a change of government,[1692] which would indicate state continuity and not state succession.[1693]

Analogous provisions were made for the organization of courts, procedural law, pending actions and the positions of state officials, see, e.g., Art. 138, 141 para. 1 NC. Art. 66 NC clarifies that "[b]oth the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law" unless otherwise regulated by parliament. The list of laws to be repealed contained in Art. 147 NC in combination with Schedule 8 was fairly short and exclusively included "highly political" laws. However, as continuously foreseen in the NC, the legislature after independence was free to alter the *status quo*. Art. 124 NC, in combination with Schedule 5 paras. 1-3, provided for the transfer of government assets, encompassing "movable and immovable property, whether corporeal or incorporeal and wheresoever situate[d]" including "any right or interest therein" originally belonging to South West Africa or other mentioned representative authorities to the new Namibian state "without payment of transfer duty, stamp duty or any other fee or charge". Yet, crucially, "any existing right, charge, obligation or trust on or over such property" was to be maintained and respected, Schedule 5 para. 3.

Hence, the Namibian and the South African legal systems were already fairly similar when Walvis Bay changed from one sovereignty to the other. In fact, the Namibian law that was extended to Walvis Bay under the moving treaty frontiers rule was, in certain areas, probably the same as the law in force in Walvis Bay before.

b) Continuity of Private Rights

The institution of and the subjective right of private property were recognized by Art. 98 para. 2 (b) NC and Art. 16 para. 1 NC, respectively.[1694] Art. 16 para. 2 NC governed expropriations.

1692 *Supreme Court of Namibia Mwandinghi* (n 1687) 360; see also the court's reference there to the ILC's Art. 15 para. 1 Draft Articles on State Reponsiblity that deals with attribution of liability for conduct of an insurrectional movement and the previous state to the new state ibid 360.

1693 See *supra*, Chapter II B) III).

1694 "Foreign investments shall be encouraged within Namibia", Art. 99 NC (n 1674).

Additionally, several provisions of Namibian domestic legislation, especially the WB Act, secured the continuity of rights of individuals living in Walvis Bay. For example, all South African citizens or holders of a legal and valid permanent residence permit ordinarily resident in Walvis Bay on the date of transfer were eligible for a permanent residence permit, Art. 3 para. 1 WB Act. Temporary residence permits for Walvis Bay in force on the date of transfer also remained valid under Namibian law, Art. 3 para. 9 WB Act. Civil and criminal law matters pending at the time of transfer were to be continued, Art. 4 - 6 WB Act. Court acts were to be respected and implemented in Namibia, Art. 8 para. 1 WB Act. That stipulation also held true for acts of South African state officials made before the transfer, Art. 8 para. 2 WB Act, or any "punishment, penalty or forfeiture incurred by or imposed on any person" under the "old" law, Art. 9 WB Act. In particular Art. 11 and 12 of the WB Act provided for a far-reaching upkeep of individual positions. Both articles were lengthy, overly detailed, and seemingly all-encompassing. They explained in broad and possibly partly overlapping provisions a panoply of rights or authorizations conferred under the "old" law to be valid and enforceable under the "new" law. The formalities required under Namibian law were to be approved or accorded by the Namibian authorities, Art. 12 paras. 2, 3 WB Act.[1695] Finally, according to Art. 13 WB Act, also appointments made prior to the effective date

> "of any person under any provision of any such [former] law, except a law governing the government service, […] shall […] continue to remain in force […] *provided the person concerned* […] *continues* […] the trade, profession or occupation in connection with which the appointment was made" [emphasis added].

Those provisions could be evidence of the conviction to uphold as many individual positions as possible. In a sweeping fashion, the continuity of an individual status was guaranteed as long as some minimum requirements were met, e.g., the actual, lawful acquisition of the right under the former law or, to a certain extent, the display of good faith in the stability of that position.

The South African law on implementing the Treaty of Walvis Bay, the WB Transfer Act,[1696] showed remarkably less eloquence on the question of

1695 Any person contemplated there was allowed to make use of the status or right until such authorization is issued, Art. 12 para. 4 WB Act (n 1669).

1696 WB Transfer Act (n 1680).

the fate of individual rights after the transfer. Its reticence is only logical given the circumstance that Art. 3 WB Transfer Act pronounced

> "(a) Walvis Bay shall from the date of transfer cease to be part of South Africa;
> (b) South Africa shall from that date cease to have sovereignty over Walvis Bay; and
> (c) South Africa shall from that date cease to exercise authority in Walvis Bay, except in so far as the Governments may agree otherwise."

In line with those stipulations, "[a]ny legal provision, including any Act of Parliament, in force in Walvis Bay immediately prior to the date of transfer shall, in so far as South Africa is concerned, cease to be of force in Walvis Bay as from that date", Art. 6 WB Transfer Act. Hence, South Africa acknowledged that, from that date, it was in no position to regulate domestic issues in Walvis Bay.[1697]

3) Interim Conclusions

The transfer of Walvis Bay to Namibia is commonly considered a cession of territory. Nevertheless, similar to Hong Kong and Macau, it cannot be understood without knowledge of the country's colonial history. Different to those two latter cases, the legal system in Walvis Bay was not sustained by the Namibian system; it was supplanted by it. However, while in Hong Kong and Macau independent legal systems had emerged over the years, Namibia and South Africa shared a common, oppressive, history and, in particular, a panoply of economic links and interdependencies not easy to

1697 The only provision concerning individual rights was Art. 5 WB Transfer Act concerning South African(!) citizenship. This provision did not contradict the Namibian regulations that only granted the right, not an obligation, to opt for Namibian citizenship. Art. 4 WB Transfer Act, entitled "Saving of certain rights" stipulated that "Land and immovable property situated in Walvis Bay, and any right or interest in such land or property, which on the date of transfer *vest in South Africa* shall continue so to vest until such time as the matter is resolved by the Governments in accordance with internationally recognized laws of State succession and agreements entered into by the Governments" [emphasis added]. Of course, this provision only concerns state property of South Africa and is therefore out of scope of this analysis. Yet, it is interesting that South Africa seemed to have tried to underline its claim to the persistence of its rights.

untangle.[1698] For a long time, the transfer of Walvis Bay was not considered probable.[1699] Furthermore, the friction in the legal system was only minor as Namibia had taken over large parts of the South African law shortly before its own independence. Bearing in mind the violent, colonial historical relationship between the two states and comparable cases of other states' independences (cf. the Kosovo or Eritrea above), it is striking how openly Namibia embraced continuity of a "foreign" system. Furthermore, Namibia showed utmost consideration for legal positions acquired under the former legal order.

VIII) The Transfers of Hong Kong (1997) and Macau (1999)

1) Hong Kong

a) General Background

The territory of Hong Kong, consisting of Hong Kong Island, the Kowloon Peninsula, and the so-called "New Territories", was a British crown colony until 1997.[1700] The (re-) transfer of the territory to the People's Republic of China (PRC) is often considered a case of state succession.[1701] However, as the lawfulness and measure of the British exercise of power over the area is controversial, so is the qualification of the transfer: Chinese authorities

1698 On the relationship between South Africa and Namibia Chris Saunders, 'South Africa and Namibia: Aspects of a Relationship, Historical and Contemporary' (2016), 23(3) SAJIA 347.

1699 Cf. on the relationship still in 1993 Evans, 'A Small State with a Powerful Neighbour: Namibia/South Africa Relations Since Independence' (n 1672).

1700 On the geopolitical and historical background until 1997 Malanczuk, 'Hong Kong (2010)' (n 806) paras. 1-3, 5-36. On the historical development of Hong Kong's autonomy before the transfer, especially with respect to economic and trade concerns Langer (n 810), 314–319. On the law applicable in Hong Kong upon colonization Lo, Cheng and Chui (n 803) 16–24.

1701 *Sanum Investments (PCA)* (n 401) para. 237 with reference to Mushkat (n 616), 191, 193 who, however, considers the HKSAR a "successor" of the UK and does not distinguish between state succession as a replacement of responsibility and a replacement of sovereignty. Yun-Bor Wong, *The Protection of Fundamental Rights in the Hong Kong Special Administrative Region: An Analysis of Transition* (2006) 183; arguably Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294) 432–443; unclear Dörr, 'Cession (2019)' (n 400) paras. 4, 22 "only in part a proper cession".

evaluated the treaty of Nanking ceding the territory of Hong Kong island and following treaties as well as the lease agreements with respect to the other territories to constitute "unequal treaties" not lawfully conferring sovereignty.[1702] After it became clear that the British would not be able to sustain their claim to infinite power over the territory of Hong Kong Island after the lapse of the 99-year lease agreement with China with respect to the "New Territories" in 1997, diplomatic negotiations on a regulated transfer of Hong Kong were initiated.[1703] Those discussions culminated in the 1984 Sino-British Joint Declaration,[1704] a bilateral treaty[1705] between the two states. The declaration speaks of "recovery" of the Hong Kong area and of the "resumption" of sovereignty over Hong Kong by the PRC and that the UK will "restore" Hong Kong to the PRC on 1 July 1997.[1706] That vocabulary did not speak for a real transfer of sovereignty.[1707] Yet, apart from the point that the wording might have been chosen for political and diplomatic reasons, the transfer still falls under the wide definition of succession as contemplated in Art. 2 para. 1 lit. b VCSST.[1708]

The inclusion of Hong Kong within the territory of the PRC again brought up the question of how to cope with the reconciliation of two diametrically different economic and social systems - Hong Kong, one of the most flourishing investment and financial centers of western market economies, and socialist China. The solution chosen in this case has rightly been seen as remarkable and singular: In the Joint Declaration and its annexes, the circumstances of the transfer were hammered out in some detail more than a decade before it actually took place. Under para. 3 of

1702 Cf. Malanczuk, 'Hong Kong (2010)' (n 806) paras. 7-10; Wong (n 1700) 3–19 (both contending that the cessions were legally valid); Langer (n 810), 320; Yunxin Tu, 'The Question of 2047: Constitutional Fate of "One Country, Two Systems" in Hong Kong' (2020), 21(8) German Law Journal 1481 1489–1490.

1703 Malanczuk, 'Hong Kong (2010)' (n 806) para. 31; Lo, Cheng and Chui (n 803) 24. On the history of the (re)-transfer Tu (n 1701), 1484–1490.

1704 Sino-British Joint Declaration (n 709).

1705 Malanczuk, 'Hong Kong (2010)' (n 806) para. 37; Lo, Cheng and Chui (n 803) 24; Wong (n 1700) 20–22, 28; Georg Ress, 'The Legal Status of Hong Kong after 1997: The Consequences of the Transfer of Sovereignty according to the Joint Declaration of December 19, 1984' (1986), 46 ZaöRV 647-699 648; Langer (n 810), 320, 324 with references for the opposite position.

1706 Sino-British Joint Declaration (n 709) 61, paras. 1, 2.

1707 Apparently differently Yash Ghai, 'The Basic Law of the Special Administrative Region of Macau: Some Reflections' (2000), 49(1) ICLQ 183 187 who contends that in this para. the UK would rather have insisted on its claim to sovereignty.

1708 Cf. *supra*, Chapter II B) I).

the declaration, China declared 12 policies to be applicable to Hong Kong: Hong Kong was accorded the status of a "Special Administrative Region" (HKSAR) of mainland China under Art. 31 of the Chinese constitution with its own government.[1709] That autonomous status included far-reaching autonomy rights, such as "executive, legislative and independent judicial power",[1710] but only limited autonomy with respect to "foreign and defence affairs".[1711] Under the "one country - two systems" doctrine,[1712] until 2047, the HKSAR is subject to a special legal regime and insofar not incorporated into the legal and political system of mainland China.[1713] The HKSAR "shall maintain the capitalist economic and trade systems previously practiced".[1714] Obligations deriving from the declaration were implemented domestically by the PRC through the "Hong Kong Basic Law" (HKBL),[1715] a Chinese law ranking below the Chinese constitution, and which partly replicates and partly details the provisions of the declaration.[1716]

1709 Sino-British Joint Declaration (n 709) 61, para. 3(1) (4); cf. also Art. 12 HKBL "The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government."

1710 ibid 61, para. 3(3). On the limitations of this autonomy, especially with respect to the institution of an independent judiciary Björn Ahl, 'Justitielle und legislative Auslegung des Basic Law von Hong Kong: Anmerkung zu den Urteilen des Court of Final Appeal des Sonderverwaltungsgebietes Hongkong vom 29. Januar und 3. Dezember 1999' (2000), 60 ZaöRV 511.

1711 Sino-British Joint Declaration (n 709) 61, para. 3(2); ibid 63–64 Annex I part I, ibid 64 Annex I part II; ibid 64–65 Annex I part III; ibid 68-69 Annex I part XI.

1712 This doctrine was originally invented for Taiwan, but due to the failed attempts to integrate Taiwan into China was then applied to Hong Kong and Macau, Ghai (n 1706), 183; Paulo Cardinal, 'The Judicial Guarantees of Fundamental Rights in the Macau Legal System: A Parcours Under the Focus of *Continuity* and of *Autonomy*' in Jorge C Oliveira and Paulo Cardinal (eds), *One Country, Two Systems, Three Legal Orders - Perspectives of Evolution: Essays on Macau's Autonomy After the Resumption of Sovereignty by China* (Springer 2009) footnote 28.

1713 Lo, Cheng and Chui (n 803) 367–368 even speak of a separate international personality of Hong Kong.

1714 Annex I part VI Sino-British Joint Declaration (n 709).

1715 Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (4 April 1990), 29(6) ILM 1519 (PRC). Cf. for an overview Charlotte Ku, 'Introductory Note' (1990), 29(6) ILM 1511-1513.

1716 Tu (n 1701), 1491–1492; Lo, Cheng and Chui (n 803) 91–98; *HKSAR v. Ma Wai-Kwan et al.* 29 July 1997, 1997 HKLRD 761 (High Court of the Hong Kong Special Administrative Region Court of Appeal) "The Basic Law is not only a brainchild of an international treaty, the Joint Declaration. It is also a national law of the PRC

b) The Continuity of the Hong Kong Legal Order in General

Of special interest for our topicis the declared intent of the Chinese government to leave "[t]he current social and economic systems in Hong Kong […] and […] the life-style"[1717] unchanged. Besides a guarantee for compliance to human rights treaties already implemented in Hong Kong, especially the ICCPR and the ICESCR,[1718] the domestic pre-1997 legal system was also, in principle, continued.[1719] Annex I part II to the Joint Declaration, replicated by Art. 8 HKBL,[1720] explains

> "[a]fter the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong (i.e., the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Hong Kong Special Administrative Region legislature."[1721]

What seems important, but is not obvious from a first unbiased reading of Annex I part II and Art. 8 HKBL, is what is excluded from that take-over: British laws that were not "localized" in Hong Kong, i.e. had not been enacted by Hong Kong authorities.[1722] That limitation becomes more obvious through a comparison with the Sino-Portuguese Declaration signed some years later and discussed below.

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and the constitution of the HKSAR". On possible frictions between the HKBL and the Joint Declaration, Ahl (n 1709).

1717 Sino-British Joint Declaration (n 709) 62, para. 3(5). Cf. also ibid 63 Annex I part I "Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years".

1718 Lo, Cheng and Chui (n 803) 370 speak of "over 300 multilateral treaties that were applicable to Hong Kong prior to the handover". See on the domestic implementation of international treaties *supra*, Chapter III C) II) 4) a) and for bilateral treaties, especially BITs, *supra*, Chapter III C) III) 2) a) ff).

1719 Sino-British Joint Declaration (n 709) 61, para. 3(3) "The laws currently in force in Hong Kong will remain basically unchanged".

1720 On this provision Lo, Cheng and Chui (n 803) 98, 112-113.

1721 Annex I part II Sino-British Joint Declaration (n 709) 64. Cf. also ibid Annex I part II ibid. "The laws of the Hong Kong Special Administrative Region shall be the Basic Law, and the laws previously in force in Hong Kong and laws enacted by the Hong Kong Special Administrative Region legislature as above" and Art. 18 HKBL. The laws in contravention of the Basic Law have to be declared so by the Standing Committee of the National People's Congress, Art. 160 HKBL.

1722 Lo, Cheng and Chui (n 803) 100–101.

According to Art. 160 HKBL, those laws previously in force in Hong Kong "shall be adopted as laws of the Region" and "[d]ocuments, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected".[1723] That wording has been the subject of a major constitutional decision by the Hong Kong High Court in the case of *HKSAR v. Ma Wai-Kwan et al.*[1724] The claimants had argued that, lacking a formal act of adoption, the previously valid common law had not become part of the law of the newly created HKSAR. All three judges in their opinions rejected that argument and held that the law previously in force in Hong Kong was maintained and valid as from 1 July 1997 without any further act of adoption.[1725] A reading of all relevant provisions of the Joint Declaration as well as the HKBL revealed that, by concluding the international agreement and enacting the HKBL, the previous laws were adopted. The word "shall" therefore had to be read "in the mandatory and declaratory sense", not as a future obligation. The court opined that Art. 160 HKBL must not be interpreted in isolation but in conjunction with the other provisions and in light of the general intent of the parties to the Joint Declaration and the object of the Basic Law:

> "[T]he intention of the Basic Law is clear. There is to be no change in our laws and legal system (except those which contravene the Basic Law). These are the very fabric of our society. Continuity is the key to stability. Any disruption will be disastrous. Even one moment of legal vacuum may lead to chaos. Everything relating to the laws and the legal system except those provisions which contravene the Basic Law has to continue to be in force. The existing system must already be in place on 1st July 1997. That must be the intention of the Basic Law."[1726]

Furthermore, notably, the Sino-British Joint Declaration provided for maintaining the whole judicial system except for the to be erected HKSAR

1723 See also Article 144 HKBL "Staff members previously serving in subvented organizations in Hong Kong may remain in their employment in accordance with the previous system". Cp. also Article 142 HKBL on the recognition of professions and professional qualifications.

1724 *HKSAR v. Ma Wai-Kwan* (n 1715).

1725 Arguably differently Tu (n 1701), 1496.

1726 *HKSAR v. Ma Wai-Kwan* (n 1715).

Court of Final Appeal.[1727] According to the aforementioned decision, *HKSAR v. Ma Wai-Kwan et al.*, that maintenance meant keeping in place indictments rendered before the transfer.[1728] Art. 18 HKBL set out that, in principle, national Chinese law "shall not be applied" in the HKSAR. Exceptions were listed in Annex III to the HKBL and were meant to mainly concern matters "outside the limits of the autonomy of the Region" such as "defence and foreign affairs".[1729] Only in circumstances of "a state of war or a turmoil within the Hong Kong Special Administrative Region which endangers national unity or security" could the PCR's government intervene directly.[1730]

c) Individual Rights

Continuity of the legal order included that "[r]ights and freedoms, […] [p]rivate property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law."[1731] In many cases, the Joint Declaration protected rights or legal positions *irrespective* of nationality or even residence. Annex I part XIII of the Joint Declaration stipulated that "[t]he Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and *other persons* in the

1727 Sino-British Joint Declaration (n 709) 64; cf. also Art. 81, 84, 86, 87, 91 HKBL (n 1714).

1728 *HKSAR v. Ma Wai-Kwan* (n 1715).

1729 In fact, the laws enlisted originally in Annex III often less concerned matters of defence or foreign affairs than subjects which "naturally" can only be regulated on the national, not the regional level, such as provisions on the capital, calendar, national anthem and national flag of the PRC and the nationality law of the PRC. Yet, in recent times that list was extended by adding laws such as the Law on Safeguarding National Security in the Hong Kong Special Administrative Region (30 June 2020) G.N. (E.) 72 of 2020, https://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf (PRC)" the lawfulness of which is highly controversial, see e.g. Johannes Chan, 'Five Reasons to Question the Legality of a National Security Law for Hong Kong' *verfassungsblog* (1 June 2020) <https://verfassungsblog.de/five-reasons-to-question-the-legality-of-a-national-security-law-for-hong-kong/>. These are, however, no questions of succession, but of the legality of a later reversal of decisions made at the time of the transfer.

1730 In how far this is currently the case, is a matter of intense debate, see references in ibid.

1731 Sino-British Joint Declaration (n 709) 62, para. 3(5).

Hong Kong Special Administrative Region" [emphasis added].[1732] While only permanent residents held political participation rights, i.e. rights normally reserved to citizens, Art. 26 HKBL, all residents enjoyed the panoply of rights contained in Art. 25, 27-38 HKBL.[1733] As elaborated on in Annex I part IV, pension rights of civil servants were also to be paid "irrespective of their nationality or place of residence".[1734] Interestingly, Art. 40 HKBL dealt with the "lawful traditional rights and interests of the indigenous inhabitants of the "New Territories", which "shall be protected". Hence, many rights, especially civil and social rights of private persons, were guaranteed irrespective of nationality or even the status as a Hong Kong resident.[1735]

The Joint Declaration explicitly, and elaborately, mentioned the continued protection of the right of private property:

> "Rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to the real value of the property concerned, freely convertible and paid without undue delay) shall continue to be protected by law".[1736]

That guarantee was implemented by Art. 6 and 105 HKBL. The latter explicitly extended protection to the "ownership of enterprises and the investments from outside the Region". Yet, surprisingly against that background, Art. 7 HKBL prescribed that all "land and natural resources" within the HKSAR were to be property of the state, and Hong Kong was entitled to grant leases and collect revenues. It foresaw no exceptions to the rule, especially not for the Anglican church, the only private landowner in Hong

1732 Art. 4 HKBL (n 1714) repeats the guarantee. Cf. also Art. 41 HKBL "Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter."

1733 In Hong Kong equal implementation of these rights is in principle guaranteed by the implementation of the ICCPR through the Bill of Rights Ordinance. For the different situation in Macau see *infra*.

1734 Sino-British Joint Declaration (n 709) 65; cf. Article 93, 100, 102 HKBL. This seeming generosity had its reasons in the liberal approach to the takeover of public employees, including foreigners, cf. ibid 65; Joint Declaration goal 4.

1735 On the differences between Macau and Hong Kong in this respect Wang (n 811).

1736 Annex I part VI Sino-British Joint Declaration (n 709). The verbatim reference to the Hull-compensation-standard is striking; cf. also ibid 62, para. 3(5) 5.

Kong.[1737] Para. 6 of the Declaration and its Annex III were dedicated to land leases,[1738] the topic that had been one of the issues originally prompting[1739] the discourse over the fate of Hong Kong after 1997. Para. 1 of Annex III basically provided that

> "[a]ll leases of land granted or decided upon before the entry into force of the Joint Declaration and those granted thereafter in accordance with paragraph 2 or 3 of this annex, and which extend beyond 30 June 1997, and all rights in relation to such leases shall continue to be recognised and protected under the law of the Hong Kong Special Administrative Region."

Paragraphs 2 to 3 of the Annex concerned leases by the British Hong Kong government to be decided after the entry into force of the Joint Declaration. If a lease had expired before 30 June 1997, it could be renewed and should, in principle, be subject to a rent, para. 2, sentences 1-3.[1740] New leases granted before 30 June 1997 were also subject to a rent, para. 3. In no case was such a lease to extend beyond 30 June 2047.[1741] If a lease expired after the date of re-transfer, the law of the HKSAR was to regulate them, para. 2 sentence 4.

As no general (public) pension scheme was implemented in Hong Kong in 1997, pertaining acquired rights issues did not become apparent. The already existing social welfare system was by and large upheld and only reformed in the wake of introducing the general Mandatory Provident

1737 Ghai (n 1706), 188; Paul Fifoot, 'One Country, Two Systems - Mark II: From Hong Kong to Macao' (1994), 12(1) International Relations 25 34. But see also Art. 141 HKBL which determines that "religious organizations shall, in accordance with law, enjoy the rights to acquire, use, dispose of and inherit property and the right to receive financial assistance. Their previous property rights and interests shall be maintained and protected." On the different approach in Macau see *infra*.

1738 Cf. also Artt. 120-123 HKBL.

1739 Malanczuk, 'Hong Kong (2010)' (n 806) para. 33; Tu (n 1701), 1489.

1740 For exceptions cf. Sino-British Joint Declaration (n 709) Annex III para. 2, Art. 123 HKBL.

1741 With this provision the PRC secured its leeway with respect to the territory under state lease.

Fund Schemes Authority in 2000.[1742] The issue was not separately dealt with in the Joint Declaration or the Basic Law.[1743]

2) Macau

a) General Background

Since the 16th century, Macau had been a Portuguese settlement on Chinese soil, therefore even preceding the British presence in Hong Kong. Over the centuries, the relationship of factual power between the PRC and Portugal with respect to the territory shifted and remained largely unsettled.[1744] Analogous to the Hong Kong case, the re-transfer of the territory consisting of the Macau peninsula and the islands of Taipa and Coloane was agreed on and its circumstances settled in a bilateral international agreement, the Joint Declaration on the Question of Macau.[1745] That transfer as well is often discussed under the heading of state succession.[1746] Yet (contrary to

1742 On the Hong Kong pensions and welfare systems Wai K YU, 'Pension Reforms in Urban China and Hong Kong' (2007), 27(2) Ageing and Society 249; Sam W-K Yu, 'Pension reforms in Hong Kong: Using Residual and Collaborative Strategies to Deal with the Government's Financial Responsibility in Providing Retirement Protection' (2008), 20(4) Journal of Aging & Social Policy 493; Nelson Chow and Kee-Lee Chou, 'Sustainable Pensions and Retirement Schemes in Hong Kong' (2005), 10(2) Pensions 137. The pension arrangements for state officials were rather generous, see Annex I part IV Sino-British Joint Declaration (n 709) 65; cf. Article 93, 100, 102 HKBL (n 1714). This is also remarkable as the HKSAR showed a very liberal approach to the takeover of public employees, including foreigners, cf. Sino-British Joint Declaration (n 709) 65 goal 4. Merely the highest official ranks in the public service of the newly built HKSAR could not be held by foreigners; cf. Art. 44, 55, 61, 67, 71, 90, 101 HKBL.

1743 But cf. Art. 36 HKBL "Hong Kong residents shall have the right to social welfare in accordance with law. The welfare benefits and retirement security of the labour force shall be protected by law."

1744 On the history of the Portuguese presence in Macau F. G Pereira, 'Towards 1999: The Political Status of Macau in the Nineteenth and Twentieth Centuries' in Rolf D Cremer (ed), *Macau: City of Commerce and Culture* (2nd ed. API Press 1991) 261; Arnoldo Gonçalvès, 'Les Implications Juridico-Constitutionnelles du Transfert de la Souveraineté de Macao à la République Populaire de Chine' (1993), 45(4) RIDC 817 818–821; Fifoot (n 1736), 25–28; Ghai (n 1706), 185–187; Dieter Kugelmann, 'Macau (2009)' in: *MPEPIL* (n 2) paras. 2-5; Cardinal, 'The Judicial Guarantees of Fundamental Rights in the Macau Legal System' (n 1711) 224–226.

1745 Sino-Portuguese Joint Declaration (n 709) 229, para. 1.

1746 *Sanum Investments (PCA)* (n 401) para. 237; Kugelmann, 'Macau (2009)' (n 1743) para. 13, but under the assumption that no transfer of sovereignty took place.

the Hong Kong case), at least at the time of negotiations about the re-transfer, both parties agreed that Portugal did not possess sovereignty over the territory.[1747] In the Sino-Portuguese Joint Declaration both[1748] countries declare that China "will resume the exercise of sovereignty over Macau with effect from 20 December 1999".[1749] Thus, if succession is understood as a change of sovereignty over a territory,[1750] Macau would not qualify as a case of state succession. It could better be described as a negotiated, consensual solution of a particular remaining from colonial history. Nevertheless, the situation still fits under the wide definition advanced by Art. 2 para. 1 lit. b) VCSST.

The transfer of Macau took place only shortly after the Chinese recovery of Hong Kong and the whole process was closely modelled on that example.[1751] Under explicit reference to the "one country, two systems principle", Macau was also granted the status of a "special administrative region" (MSAR) under Art. 31 of the Chinese constitution and guaranteed far-reaching autonomy rights.[1752] The PRC, again, declared 12 principles as applicable to the territory, principles guaranteed for 50 years.[1753] The PRC introduced a national law, the "Basic Law of the Macau Special Administrative Region of the People's Republic of China" (MBL),[1754] with a drafting process similar to that of the HKBL[1755] implementing the aforesaid goals into the domestic legal order.[1756] Therefore, literature often deals with the

1747 "Chinese territory under Portuguese administration", Pereira, 'Towards 1999: The Political Status of Macau in the Nineteenth and Twentieth Centuries' (n 1743) 273–275; Kugelmann, 'Macau (2009)' (n 1743) para. 7; Ghai (n 1706), 185, 187; Fifoot (n 1736), 25.

1748 In the Sino-British Joint Declaration (n 709) only China had declared that "to recover the Hong Kong area […] is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997."

1749 Sino-Portuguese Joint Declaration (n 709) 229, para. 1.

1750 *Supra*, Chapter II B) IV).

1751 Ghai (n 1706), 183-184, 187; Cardinal, 'The Judicial Guarantees of Fundamental Rights in the Macau Legal System' (n 1711) footnote 28; cf. Fifoot (n 1736), 31.

1752 Sino-Portuguese Joint Declaration (n 709) para. 2 no. 1; ibid Annex I part I.

1753 ibid para. 2 no. 12; ibid Annex I Part I.

1754 Basic Law of the Macau Special Administrative Region of the People's Republic of China (31 March 1993) http://bo.io.gov.mo/bo/i/1999/leibasica/index.asp [in Portuguese]; English version available at https://www.refworld.org/docid/3ae6b53a0.html (PRC).

1755 Tu (n 1701), 1491.

1756 Sino-Portuguese Joint Declaration (n 709) para. 1 no. 12.

cases of Hong Kong and Macau together and highlights their similarities. Yet, it seems important not to neglect that, in each case, negotiations were conducted independently and did not lead to exactly the same outcomes. Both bilateral agreements account for the specificities and distinctive historical facts of the former colonies.[1757] In some respects, the differences are particularly evident in relation to the question of the maintenance of the domestic legal system. The following, therefore, concentrates on the discrepancies of both cases with relevance to the topic of acquired rights and does not reiterate in detail all of the basically analogous provisions.

b) The Continuity of the Macau Legal Order and Individual Rights

With respect to the continuity of the legal order, the Sino-Portuguese Joint Declaration also provides that

> "[t]he current social and economic systems in Macau will remain unchanged, as shall the existing way of life. *The laws in force will remain basically unchanged*. The Macau Special Administrative Region will, in accordance with the law, ensure all the rights and freedoms of the inhabitants and other individuals in Macau."[1758]

While Portugal, at the time of negotiations, had been a party to the ICCPR and ICESCR, it extended, with reservations,[1759] the protection of both covenants to Macau only after the conclusion of the Joint Declaration.[1760] Accordingly, contrary to the Sino-British Declaration, no explicit reference to the two covenants can be found in the Sino-Portuguese Declaration.

1757 For a general overview of the similarities and differences in the legal treatment of both cases see Ghai (n 1706); Fifoot (n 1736).

1758 Sino-Portuguese Joint Declaration (n 709) para. 2 no. 4 [emphasis added]. In Annex I part V, these rights are again enumerated, *inter alia* "the right to own private property, including business undertakings, rights relating to the transfer and inheritance of property and compensation for lawful expropriation".

1759 The reservations concerned in particular the right to self-determination, universal suffrage and immigration policy, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en#6; cf. also Wang (n 811), 568–569.

1760 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en#6, cf. also Ghai (n 1706), 189; Fifoot (n 1736), 52. This had repercussions for the later MBL (n 1753) and its implementation provisions, see Wang (n 811), 568.

Nevertheless, and insofar in parallel to the Hong Kong example, Annex I part VIII of the declaration provides that "[i]nternational agreements to which the People's Republic of China is not a party but which are implemented in Macau may continue to be implemented".[1761] Art. 40 MBL then makes explicit reference to ICCPR and ICESCR by stipulating, *inter alia*, that

> "[t]he provisions of International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Macao shall remain in force and shall be implemented through the laws of the Macao Special Administrative Region."

While, in principle, Macau follows the Portuguese tradition of a monist system, which directly implements international law,[1762] the provision is interpreted to - exceptionally - require explicit statutory implementation ("transformation") of those conventions to become domestically binding.[1763]

Art. 25 to 39, 41 MBL also guaranteed several individual rights.[1764] Even if Art. 43 MBL provided that "[p]ersons in the Macao Special Administrative Region other than Macao residents shall, in accordance with law, enjoy the rights and freedoms of Macao residents prescribed in this Chapter", in practice, the local implementation of basic rights of foreigners ("non-residents") varied significantly.[1765] The difference arose because local administration interpreted Art. 43 MBL as granting rights to non-residents only if they were explicitly mentioned in the provision.[1766] Persons of Portuguese descent were subject to special protection,[1767] but there was no explicit provision protecting the interests of native inhabitants, as was the case in Hong Kong.

1761 Also Art. 138 MBL (n 1753).
1762 Wang (n 811), 565 with a comparison to Hong Kong.
1763 ibid 566 on the historical background ibid 568, 571.
1764 Even some more than in Hong Kong, cf. Ghai (n 1706), 189. Cf. for a short comparison also Cardinal, 'The Judicial Guarantees of Fundamental Rights in the Macau Legal System' (n 1711) 258. But on the lacunae of that catalogue of rights ibid 253–257.
1765 In detail on the reasons Wang (n 811).
1766 ibid 562, 576.
1767 Sino-Portuguese Joint Declaration (n 709) para. 2 no. 6, Art. 42 MBL (n 1753); see Ghai (n 1706), 194. On the protection of cultural rights cf. Art. 125 MBL.

With respect to which parts of *domestic* law would survive the transfer, the Sino-Portuguese Joint Declaration, in principle, also opted for continuity,[1768] but a slight deviation from the Hong Kong model can be detected:

> "[T]he laws, decree-laws, administrative regulations *and other provisions previously in force* in Macau shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Macau Special Administrative Region legislature."[1769]

The Sino-*British* Declaration had only maintained "the common law, rules of equity, ordinances, subordinate legislation and customary law" - hence, "localized" laws.[1770] In comparison, the clause in the Sino-*Portuguese* Declaration is broader. The difference can be explained by the circumstance that, in Macau, there were few "local laws" at the time the Sino-Portuguese Declaration was concluded and thus, with only a few exceptions, Portuguese civil law was applied - many of the legislative acts had not even been translated into Chinese.[1771] Hence, while for Hong Kong it was possible to insist on severing the links to the UK's legal order, the continuity of the Macau legal order could only be protected by guaranteeing the survival of (some) Portuguese laws.[1772] Article 145 MBL was an analogous provision to Art. 160 HKBL, setting out that, in principle,

> "the laws previously in force in Macao shall be adopted as laws of the Region [...] [d]ocuments, certificates and contracts valid under the laws

1768 Cf. Cardinal, 'The Judicial Guarantees of Fundamental Rights in the Macau Legal System' (n 1711) 231–233. For Chinese laws (exceptionally) applicable to Macau see Annex X to the MBL (n 1753).

1769 Sino-Portuguese Joint Declaration (n 709) Annex I part III [emphasis added]. Cf. in this respect also the wording of Art. 8 MBL (to which Art. 18 MBL referred): "The laws, decrees, administrative regulations and other normative acts previously in force in Macao shall be maintained, except for any that contravenes this Law, or subject to any amendment by the legislature or other relevant organs of the Macao Special Administrative Region in accordance with legal procedures."

1770 Ghai (n 1706), 193 "Acts of the UK Parliament and Orders in Council were excluded"; Jorge C Oliveira and others, 'An Outline of the Macau Legal System' (1993), 23(3) HKLJ 358 374.

1771 Ghai (n 1706), 193; R. Afonso and F. G Pereira, 'The Constitution and Legal System' in: *Cremer Macau* (n 1743) 283 295–296. On the language question still in 1993 Oliveira and others (n 1769), 385–389; cf. Fifoot (n 1736), 32.

1772 However, apparently the Chinese side later insisted on prior consultations and later "approval" of the Portuguese laws, see Oliveira and others (n 1769), 390–391; Afonso and Pereira, 'The Constitution and Legal System' (n 1770) 297.

previously in force in Macao, and the rights and obligations provided for in such documents, certificates or contracts shall continue to be valid and be recognized and protected".[1773]

Again, already concluded land leases were individually mentioned and protected in the declaration and regulated separately in an annex.[1774] Contrary to Hong Kong, in Macau more land was in the hand of private persons. That difference is acknowledged by Art. 7 MBL, which, while also granting the state property to all "land and natural resources", explicitly called for respect of private titles to land recognized before the MSAR was established.[1775] Art. 6 and 103 MBL protected the right to own private property in a broad manner.[1776]

3) Interim Conclusions

In sum, the understanding in the cases of Hong Kong and Macau is not only that these two territories were subject to a special regime but that they, with certain exceptions, continued the preceding legal systems.

1773 Interestingly, contrary to the Hong Kong provision, Art. 145 MBL (n 1753) went on to say that "The contracts signed by the Portuguese Macao Government whose terms of validity extend beyond 19 December 1999 shall continue to be valid except those which a body authorized by the Central People's Government publicly declares to be inconsistent with the provisions about transitional arrangements contained in the Sino- Portuguese Joint Declaration and which need to be re-examined by the Government of the Macao Special Administrative Region" thereby introducing some form of escape clause. On the reasons Ghai (n 1706), 190–191; Fifoot (n 1736), 56–57.

1774 Sino-Portuguese Joint Declaration (n 709) para. 5, Annex I, part XIV, Art. 120 MBL (n 1753). More details were contained in Annex II part II of the Declaration which in large parts mirrored the respective provisions in the Sino-British Joint Declaration (n 709).

1775 Ghai (n 1706), 188.

1776 Cf. Article 103 MBL (n 1753) "The Macao Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property. Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay. The ownership of enterprises and the investments from outside the Region shall be protected by Law."

With respect to international treaties, the widely endorsed provision of Art. 15 VCSST, the "moving treaty frontiers" rule, was not followed:[1777] International covenants implemented in Hong Kong and Macau continued to have effect while international treaties of mainland China were not automatically extended. Admittedly, it is not beyond doubt whether the relatively meticulous regulation of the transfer in the declarations has been chosen in order to deviate from the otherwise automatic consequence of the taking over of the Chinese legal order or whether one or both states felt legally obligated to uphold parts of the legal framework. In that respect, it is instructive to remember that, in one of its reports to the Human Rights Committee, the UK explicitly mentioned the guarantee for continued application of the ICCPR in the Sino-British Declaration.[1778] The mention lends support to the opinion that the UK felt obliged to assure the (at least intermediate) application of the covenant to the residents of Hong Kong.

Beyond that, the general maxim in Hong Kong and Macau was to leave the domestic legal order untouched and hence to provide for legal continuity as far as possible. The private legal order has, by and large, been upheld. Respect for titles to property and land leases were explicitly accounted for in the declarations. Formerly acquired rights and contracts of private individuals were upheld. An exception exists in the case of Hong Kong with respect to property of land, which was solely attributed to the state.

When the cases of Hong Kong and Macau are referred to as state practice with respect to a principle of acquired rights, it is important to take into account their particularities and the caveats with regard to their categorization as proper succession scenarios. Nevertheless, the precedential effect of these relatively recent incidents of a transfer of territory should not be underestimated: The joint declarations were the final outcome of a politically sensitive and diplomatically protracted but nevertheless consensual bargaining process. Compared to other cases of state succession in which the route to be taken had to be worked out within weeks or months, such as Germany, or was only agreed on after succession had already taken place, such as Eritrea or South Sudan, the Sino-British Declaration was negotiated

1777 Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 339. Differently, but not convincingly, Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294) 449.

1778 UK, 'Fourth Periodic Report: Supplementary Report on the Depedent Territories: Hong Kong' (7 August 1995) Un Doc. CCPR/C/95/Add.5 paras. 372-374.

over about two years,[1779] the Sino-Portuguese one (in large parts replicating it) over roughly one year,[1780] more than a decade before the actual transfer. Furthermore, both are the product of an agreement between a capitalist, western market economy and one of the politically strongest and largest socialist countries in the world. Therefore, the solutions could serve as a blueprint for other countries no matter what political or economical preferences they abide by. China agreed for a period of several decades to grant far-reaching rights to individuals, not on the basis of nationality, reciprocity, or its own policy but on the basis of "inheritance" or "continuity". The persistence of many rights, except of highly political positions such as the right to stand for the highest political offices or to vote, was not made dependent on a specific nationality (neither the Chinese, nor the British nor the Portuguese one).

Of course, the agreement found in the joint declarations was a temporary one. It was clear from the first day of their entry into force that the guarantees for Hong Kong and Macau as autonomous regions, and with it the upholding of so many individual rights under a continuous legal system, were only given for 50 years. Once those 50 years have elapsed, the fate of the "one country two systems" doctrine is unclear. Therefore, the possible change of rights can be seen as delayed, not debarred. Yet, the theory of acquired rights never purported to guarantee the eternal upholding of individual rights but only that the instant change of sovereignty over a territory would not automatically lead to a loss of rights. The new state is as free as the old one to change the law. Yet, through the internalization of the provisions of the joint declarations, a later amendment may well be subject to limits under Chinese constitutional law.[1781]

IX) The Independence of South Sudan (2011)

1) General Background

Even as a colony, the northern and southern part of Sudan were socially and culturally separated by the occupying powers and hence developed

1779 On the phases of the process Tu (n 1701), 1490.
1780 Cf. Fifoot (n 1736), 31; Ghai (n 1706), 186.
1781 Cf. Tu (n 1701), 1524–1525.

disparately.[1782] After the Sudan, inhabited by a panoply of ethnic communities,[1783] became independent of British colonial rule in 1956, bloody civil wars for more autonomy erupted in the south and ravaged the country for decades.[1784] In 2005, the "Comprehensive Peace Agreement" (CPA)[1785] between the Sudanese government and the warring civil fraction of the Sudan People's Liberation Movement was agreed on and its implementation secured by a UN mission.[1786] The CPA, consisting of several agreements, not only contained a cease-fire agreement but also provided for an interim period of six years after which a referendum about the future of the south was to be organized. In fact, in January 2011, an independence referendum was held under international supervision in South Sudan, in which more

1782 Markus Böckenförde, 'Sudan (2010)' in: *MPEPIL* (n 2) para. 3; Remember Miamingi, 'Constitution Making and the Challenges of State Building in South Sudan' in Amir H Idris (ed), *South Sudan: Post-Independence Dilemmas* (Routledge Taylor & Francis Group 2018) 92 94–95; Clayton Hazvinei Vhumbunu and Joseph Rukema Rudigi, 'Sustainability and Implications of the Sudan-South Sudan Secession' (2019), 6(3) Journal of African Foreign Affairs 23 25; Sterio (n 392) 114; Ali S Fadlalla and Mohamed A Babiker, 'In Search of Constitution and Constitutionalism in Sudan: The Quest For Legitimacy and the Protection of Rights' in Lutz Oette and Mohamed A Babiker (eds), *Constitution-Making and Human Rights in the Sudans* (Routledge 2019) 41 45.

1783 Böckenförde, 'Sudan (2010)' (n 1781) para. 1; also, with respect to citizenship issues, Munzoul AM Assal, 'Citizenship, Statelessness and Human Rights Protection in Sudan's Constitutions and Post South Sudan Secession Challenges' in: *Oette/Babiker Constitution-Making and Human Rights in the Sudans* (n 1781) 118 122–123.

1784 For more information Géraldine Giraudeau, 'La Naissance du Soudan du Sud: La Paix Impossible?' (2012), 58 AFDI 61 62–63; Petrus de Kock, 'Southern Sudan's Secession From the North' in: *Pavković/Radan Secession Research Companion* (n 392); Sterio (n 392) 114–115.

1785 Comprehensive Peace Agreement (9 January 2005) https://peacemaker.un.org/node/1369 (Republic of the Sudan/The Sudan People's Liberation Movement (The Sudan People's Liberation Army)). See on the status as a binding international treaty Scott P Sheeran, 'International Law, Peace Agreements and Self-Determination: The Case of the Sudan' (2011), 60(2) ICLQ 423.

1786 ibid 425–427; Böckenförde, 'Sudan (2010)' (n 1781) para. 11; Miamingi, 'Constitution Making and the Challenges of State Building in South Sudan' (n 1781) 97. On the international involvement in the interim process Matthew LeRiche and Matthew Arnold, *South Sudan: From Revolution to Independence* (OUP 2013) 135–138. On the general political background of the peace process Øystein H Rolandsen and M. W Daly, *A History of South Sudan: From Slavery to Independence* (CUP 2016) 133–150.

than 98% of the voters opted for independence.[1787] Accordingly, the state of South Sudan became independent on 9 July 2011. It was admitted to the UN on 14 July 2011.[1788] The emergence of South Sudan is considered a case of separation (or secession).[1789]

The first constitution of the new state after formal independence was the "Transitional Constitution of the Republic of South Sudan"[1790], which entered into force on 9 July 2011, providing for a four-year transitional period until the enactment of a permanent constitution. Yet, additionally, the signing of the CPA six years earlier was a significant step not only for the relations between the two countries but also for the statehood of South Sudan, because it explicitly acknowledged the south's right to self-determination and eventually the consequence of separation. While, at that time, the goal of the interim period was still to convince the Southerners of the advantages of unity and South Sudan formally had not become an independent state, one of the consequences of the acknowledgment was the enactment of the "Interim Constitution of South Sudan"[1791] establishing state institutions such as a government, a legislature, and a judiciary as early as 2005.[1792] The 2005 Interim Constitution was similar to the 2011 Transi-

1787 LeRiche and Arnold (n 1785) 131/132. Official results reprinted in Nadia Sarwar, 'Breakup of Sudan: Challenges for North and South' (2011), 31(1-2) Strategic Studies 224 227–228.

1788 UNGA, 'Resolution 65/308: Admission of the Republic of South Sudan to Membership in the United Nations' (14 July 2011) UN Doc. A/RES/65/308.

1789 Grimmeiß (n 392) 19; Arnauld *Völkerrecht* (n 255) para. 104; Giraudeau (n 1783), 63/64 "sécessions plus 'négociées' que 'déclarées'" [footnote omitted]; Kock, 'Southern Sudan's Secession From the North' (n 1783); Sterio (n 392) 113; cf. Jure Vidmar, 'South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States' (2012), 47(3) Tex Int'l LJ 541; see Hazvinei Vhumbunu and Rukema Rudigi (n 1781), 27–29.

1790 For more information on the instrument, especially its genesis and the provisions for a permanent constitution Daniel Gruss and Katharina Diehl, 'A New Constitution for South Sudan' (2010-2011), 16 Yrbk Islam Mid East L 69-90. Apparently, there are several, slightly different documents accessible online. This work will make reference to the version Transitional Constitution (2011) https://www.refworld.org/docid/5d3034b97.html (South Sudan).

1791 Interim National Constitution (6 July 2005) https://www.refworld.org/docid/4ba74c4a2.html (South Sudan).

1792 On the special character also Gabriel M Apach and Garang Geng, 'Update: An Overview of the Legal System of South Sudan' (September 2018) <https://www.nyulawglobal.org/globalex/South_Sudan1.html>. But cf. on the opposite evaluation by the public, considering 2011 as the decisive date of independence LeRiche and Arnold (n 1785) 142.

tional Constitution, as the latter was developed from the template of the first and is often considered a mere amendment to it.[1793] Even Art. 199 para. 1 lit a), one of the "transitional provisions" of the 2011 Constitution, spoke of "the amended Interim Constitution of Southern Sudan, 2005 [...] which shall thereafter be known as the Transitional Constitution of the Republic of South Sudan, 2011". It is therefore prudent to inspect both instruments and the relevant statutory domestic law of South Sudan, adopted after the CPA.

Additionally, after separation, several unresolved problems between predecessor and successor state necessitated negotiations that led to nine bilateral agreements being signed on 27 September 2012.[1794] The most important amongst them with respect to the question of private rights are the "Framework Agreement on the Status of Nationals of the Other State and Related Matters"[1795] (Nationals' Status Agreement) and the "Framework Agreement to Facilitate Payment of Post-Service Benefits"[1796] (Pensions Agreement). But some provisions of the other agreements are also of relevance to the topic and deserve further analysis.

1793 Apach and Geng (n 1791); cf. Miamingi, 'Constitution Making and the Challenges of State Building in South Sudan' (n 1781) 94, 95, 97-99; LeRiche and Arnold (n 1785) 153; apparently of different opinion Paul Mertenskoetter and Dong S Luak, 'An Overview of the Legal System of South Sudan' (November/December 2012) <https://www.nyulawglobal.org/globalex/South_Sudan.html> "the Interim Constitution was substituted with the Transitional Constitution of the Republic of South Sudan of 2011".

1794 The full text of all agreements can be retrieved online at https://sites.tufts.edu/reinventingpeace/2012/09/27/sudan-and-south-sudan-full-text-of-agreements/ or https://peacemaker.un.org/. An overview of the content of all nine agreements is provided on the website of the embassy of the Republic of Sudan in Oslo at http://www.sudanoslo.no/the-nine-agreements-between-s-ii.html.

1795 Framework Agreement on the Status of Nationals of the Other State and Related Matters (27 September 2012) https://sites.tufts.edu/reinventingpeace/files/2012/09/Nationals-Agreement-2709120001.pdf (South Sudan/Sudan).

1796 Framework Agreement to Facilitate Payment of Post-Service Benefits (27 September 2012) https://sites.tufts.edu/reinventingpeace/files/2012/09/Agreement-on-Post-Service-Benefits-SudanSouth-S0001.pdf (South Sudan/Sudan).

2) The Continuity of the Legal Order in General

Neither constitution contained an explicit provision on how to deal with *international treaties* of the former Sudan.[1797] South Sudan's actual practice after independence was more in line with non-succession: South Sudan *acceded* to some of Sudan's international treaties.[1798] There is no information indicating that South Sudan succeeded to any bilateral investment treaty of Sudan.[1799]

There were, however, provisions on the continuity of the former *domestic* legal order. In so far, the 2005 Constitution was even more telling than the later 2011 one, underlining the former's significance. Its Art. 208 para. 3 stipulated that "[a]ll current laws shall remain in force and all judicial and civil servants shall continue to perform their functions, unless new actions are taken in accordance with the provisions of this Constitution", therefore accepting continuity of the domestic legal order. A further notable feature of the 2005 Interim Constitution was that, in Art. 208 paras. 6 and 7, it provided for its own continuity *after* the foreseen referendum. Irrespective of the outcome of the referendum, the 2005 Constitution was basically supposed to stay in force and only the institutional set-up was open to change. While it seems obvious that a constitution cannot bind the *pouvoir constituant* and the people of an independent South Sudan were free to adopt a new constitutional basis of their community, those provisions paid witness to a clear commitment to continuity of the domestic legal order after separation. Art. 198 of the 2011 Transitional Constitution (entitled "Continuity of Laws and Institutions") in fact replicated Art. 208 para. 3 of the 2005 Constitution when stipulating that "[a]ll current Laws of Southern Sudan shall remain in force and all current institutions shall continue to perform their functions and duties, unless new actions are taken in

1797 There is merely a provision incorporating international human rights obligations of South Sudan directly into the domestic constitution, Art. 31 para. 3 of the Interim Constitution 2005 (South Sudan) (n 1790) and Art. 9 para. 3 of the Transitional Constitution South Sudan (n 1789). On the question whether South Sudan applies a monist or a dualist approach to international law but with ambigious result Ruben SP Valfredo, 'Domesticating Treaties in the Legal System of South Sudan - A Monist or Dualist Approach?' (2020), 28(3) AJICL 378.

1798 For the CAT (n 516) and the CRC (n 574) this happened only in 2015, i.e. years after independence. For more information, especially on human rights treaties, see *supra*, Chapter III C) II) 2) d).

1799 The Investment Policy Hub of UNCTAD only lists two BITs for South Sudan, which both were concluded *after* independence, https://investmentpolicy.unctad.org/international-investment-agreements/countries/196/south-sudan.

accordance with the provisions of this Constitution." In that way, even after a separation, continuity of the domestic legal order was (again) chosen as the default rule.

Moreover, customary, non-written law had played a major role in the south of Sudan before independence. The 2005 (Art. 5 lit. c) and the 2011 (Art. 5 lit. b) constitutions listed as "sources of legislation", besides others, "customs and traditions of the people", thus also upholding traditional customary rights not encapsulated in a written provision. Customary courts, adjudicating alongside statutory courts, were consciously acknowledged in the Southern Sudanese legal system, also after independence.[1800] However, what was not taken over from the Sudanese system was the reliance on Islamic Sharia law. The 2005 Interim Constitution of South Sudan did not mention that source. The 2005 Interim Constitution of the Sudan,[1801] which at the time was still applicable in South Sudan, consciously differentiated between north and south and only for the former area declared Sharia law applicable.

3) Private Rights

a) Property Rights in General

Legislation on property matters was in the competence of South Sudan even before formal independence in 2011, cf. Art. 57 para. 2 in combination with Schedule B Nr. 9 of the 2005 Constitution ("civil and criminal laws and judicial institutions, lands"). The upholding of the "laws of Southern Sudan" therefore should, formally, have left the civil property regime untouched. Furthermore, both constitutions contained an almost identical provision protecting the private right to own or acquire property "regulated by law" and not to be expropriated except by law, in the public interest, and against compensation; confiscations were only allowed by court order, Art. 28 of the 2011 Constitution and Art. 32 of the 2005 Constitution. No-

1800 Apach and Geng (n 1791); International Commission of Jurists, 'South Sudan: Country Profile' (June 2014) 2 <http://www.icj.org/cijlcountryprofiles/south-sudan/>. See also Art. 167 para. 1 of the 2011 Constitution "Legislation of the states shall provide for the role of Traditional Authority as an institution at local government level on matters affecting local communities"

1801 Interim National Constitution (2005) https://www.refworld.org/pdfid/4ba749762.pdf (Sudan).

tably, while the 2005 Constitution had only protected property of "citizens", the 2011 Constitution protected property of all "persons".[1802] Apart from that point, both guarantees had the same scope, and, therefore, the protected property after independence should have been the same as before. Yet, in general, caution is advisable when relying on provisions of the "Bill of Rights" in the South Sudanese Constitution (2011). Art. 44 ("Saving") maintained explicitly that "[u]nless this Constitution otherwise provides or a duly enacted law guarantees, the rights and liberties described and the provisions contained in this Chapter are not by themselves enforceable in a court of law" but were mere guiding principles for state officials. It is therefore open to serious doubt whether people in South Sudan enjoyed a genuine right of property under the constitution.

b) Land Rights

Land ownership proved to be a pivotal issue in the process of South Sudan's state-building. Its importance was due to the historical link between power politics and land administration, especially colonial policies, and the encroachment on land rights of South Sudanese rural communities by the Khartoum government, which became one of the main issues of the civil wars.[1803] Additionally, many people in South Sudan were heavily dependent on land ownership to fulfill their most basic needs such as food and accommodation.[1804] Land reform therefore became one of the main political goals after 2005.[1805] 180 para. 1 of the 2005 Constitution provided for a concurrent competence of the government in Southern Sudan for the "regulation of land tenure, usage and exercise of rights thereon". In 2009, South Sudan

1802 Art. 43 para. 1 of the Intermin National Constitution of Sudan (2005) only protected property rights of citizens.

1803 Peter H Justin and Han van Dijk, 'Land Reform and Conflict in South Sudan: Evidence from Yei River County' (2017), 52(2) Africa Spectrum 3 8–9; World Bank, 'Land Governance in South Sudan: Policies for Peace and Development' (May 2014) Report No. 86958-SS 13, paras. 1-3, 18, para. 22. Cf. David K Deng, 'South Sudan Country Report: Findings of the Land Governance Assessment Framework (Draft)' (January 2014) 11 <http://hdl.handle.net/10986/28520>.

1804 ibid 7.

1805 In more detail Justin and van Dijk (n 1802), 9–11; *World Bank Land Governance in South Sudan* (n 1802) 18-19, paras. 23-26.

enacted the "Land Act",[1806] still in force after independence.[1807] Its named purpose, Art. 3, was to "regulate land tenure and protect rights in land in Southern Sudan". The 2011 Constitution in Art. 169 para. 1 laid out the basic rule that all "land in South Sudan is owned by the people of South Sudan". But according to Art. 170 para. 6, private title to land could, in principle, only be acquired through registration as leasehold tenure or investment land acquired under lease from the government or community, meaning, in practice, that the land was in state possession.[1808] Since that stipulation deviated from that of the former legislation, especially Art. 7 para. 2 "Land Act", which knew freehold rights of private persons, the change lead to frictions in practice.[1809]

As a further, less theoretical consequence of the Sudanese supremacy not recognizing South Sudan "unregistered" land rights,[1810] the three South Sudanese laws paid tribute to already existing customary or "traditional" land rights. In Art. 180 para. 2 of the 2005 Constitution, the government was also held to respect customary land rights. That idea was taken up by Art. 170 para. 7 of the 2011 Constitution and Art. 8 para. 4 of the Land Act. Art. 170 para. 8 of the 2011 Constitution required "[a]ll levels of government" to "institute a process to progressively develop and amend the relevant laws to incorporate customary rights and practices, and local heritage".[1811] The content of Art. 170 para. 9 of the 2011 Constitution was based on Art. 180 para. 5 of the 2005 Constitution:

> "Customary seasonal access rights to land shall be respected, provided that these access rights shall be regulated by the respective states taking

1806 Land Act (2009) https://www.refworld.org/docid/5a841e7a4.html (South Sudan).

1807 Noel J K Ajo, 'Land Ownership and Conflict of Laws in South Sudan' <https://landportal.org/node/13043>.

1808 ibid. "people in power also carefully crafted the Transitional Constitution. It gave the People the right to own the land by one hand and took that right away by the other. It explains that land belongs to the people yet one can only own a lease from the government. The reality is that the government owns the land and all of us today hold leasehold titles over our plots." Therefore, also critical, Justin and van Dijk (n 1802), 21.

1809 Ajo (n 1806). Cp. also *Deng South Sudan Country Report* (n 1802) 12 "Although the Land Act recognizes freehold as a valid form of ownership, there is currently no land held in freehold anywhere in South Sudan". Furthermore, Art. 14 of the Land Act denied "freehold rights" to foreigners, except for investment purposes, Art. 61.

1810 *World Bank Land Governance in South Sudan* (n 1802) 18, paras. 22-23.

1811 But the provision - strikingly - omitted "international trends and practices" which had been included in the former Art. 180 para. 3 in 2005.

into account the need to protect the environment, agricultural production, community peace and harmony, and without unduly interfering with or degrading the primary ownership interest in the land, in accordance with customary law".

Of special importance was that acknowledgment of unregistered rights for traditional communities or tribes in South Sudan. In fact, the accessibility of land rights in South Sudan is, for many, still linked to their belonging to a certain ethnic or tribal community.[1812] Land "continues to be understood in many African countries in terms of social relations rather than as 'property'".[1813] Accordingly, besides public and private land, the 2011 Constitution also knew so-called "community land",[1814] Art. 170 para. 2, which is understood as "all lands traditionally and historically held or used by local communities or their members", para. 5.[1815] Furthermore, "[c]ommunities and persons enjoying rights in land shall be consulted in decisions that may affect their rights in lands and resources", para. 10, and they "shall be entitled to prompt and equitable compensation on just terms arising from acquisition or development of land in their areas in the public interest", para. 11.[1816] While that legislation at first glance seems generous, a comparison with the previous 2005 Constitution reveals that the rights of communities in this respect were in fact curtailed. In the earlier constitution's Art. 180 para. 6, communities and persons enjoying rights in land should not only be consulted but "their views duly taken into account in decisions to develop subterranean natural resources in the area in which they have rights" and, crucially, "they shall share in the benefits of that development" - a phrase that was deleted in 2011.[1817]

1812 Justin and van Dijk (n 1802), 6.

1813 ibid 7 [reference omitted].

1814 On the problems of distinguishing between those different forms ibid 7–8.

1815 With this, the Transitional Constitution South Sudan (n 1789) supposedly party accomplished the task contained in Art. 180 para. 4 of the Interim Constitution 2005 (South Sudan) (n 1790) that "All lands traditionally and historically held or used by local communities, or their members shall be defined, held, managed and protected by law in Southern Sudan." Cf. also Art. 6 paras. 4-7 (n 1805).

1816 Cf. in this respect also Art. 47 of the Petroleum Act (2012) https://s3.amazonaws.com/rgi-documents/e9bdc9a21b51187808eb4a1156e791748c874ba1.pdf (South Sudan).

1817 Furthermore, Art. 183 para. 4 of the Interim Constitution 2005 (South Sudan) (n 1790) maintained that "Any petroleum development in Southern Sudan shall be conducted in a manner that will ensure that: [...] (c) it recognizes and protects rights in land, including customary and traditional land rights; (d) the communi-

In general, an assessment of the continued protection of property rights in practice is hampered mainly for three reasons. First, the law regulating land tenure in South Sudan was not only a mixture of different laws and regulations, both written and customary, from different times, but those laws had also not been made conform and often even contained contradictory provisions.[1818] Second, in South Sudan, a disparity existed between formal law and its actual application.[1819] Much of the law, even the constitution, was not enforced in the whole territory of South Sudan and its contents remained undelivered.[1820] Third, one of the main problems of property protection was the completely underdeveloped system of land registration, leaving large parts of the territory undocumented.[1821] Even if theoretically being committed to "traditional" rights, much of the customary possession of land or premises by individuals and communities, especially in rural areas, remained formally unrecognized,[1822] the notion of "community" not sufficiently defined[1823] and therefore the "taking" of the land or property remained uncompensated.[1824] Apart from those three stumbling blocks, poor administrative practice, ranging from ignorance of the law to corrupt behavior,[1825] a lack of financial resources and skilled personnel, bad administrative organization,[1826] and missing coordinated action led to arbitrary and unpredictable decisions negatively affecting legal security.[1827] Those issues, in turn, exacerbated the housing situation with thousands of homeless or displaced persons. The task of accommodating the housing

ties in whose areas development of subterranean natural resources occurs have the right to participate, through their respective states, in the negotiation of contracts for the development of those resources".

1818 *World Bank Land Governance in South Sudan* (n 1802) xi, para. 6; *Deng South Sudan Country Report* (n 1802) 1.

1819 *World Bank Land Governance in South Sudan* (n 1802) xi, para. 6.

1820 ibid 21, para. 35.

1821 ibid 35, para. 97.

1822 ibid vii, viii, 19-21, paras. 31-33.

1823 ibid 21-22, 34, paras. 39-40, 92-93; *Deng South Sudan Country Report* (n 1802) 4–5.

1824 *World Bank Land Governance in South Sudan* (n 1802) 23-24, paras. 47-48; *Deng South Sudan Country Report* (n 1802) 2.

1825 *World Bank Land Governance in South Sudan* (n 1802) 38-40, paras. 110-125.

1826 ibid 27, paras. 62-63.

1827 On the transparency and fairness of expropriation procedures ibid 36-37, paras. 104-109.

needs of millions[1828] of internally or externally displaced persons after years of war placed a heavy burden on the new country.

In sum, it can arguably be assumed that formal independence in 2011 did not change much in the way of formal property rights, i.e. already registered rights to land, as it did not involve a real change of system. Notably, the 2009 Land Act in Art. 78-83 already contained provisions providing for restitution of property to persons dispelled by the civil war. However, the new country's devastating economic, social, and political situation thwarted actual implementation.

c) Ownership of Natural Resources

When South Sudan became independent, about 75% of the former Sudan's oil resources, its single most important source of revenue, were located in the territory of another state, South Sudan.[1829] Simultaneously, South Sudan was dependent on the North's infrastructure for the transportation and processing of its crude oil. Furthermore, the 2005 CPA, and with it the "Agreement on Wealth Sharing"[1830] providing for a 50/50 share of oil revenue for both states, expired,[1831] and new solutions had to be found. Neither the Agreement on Wealth Sharing[1832] nor the 2005 South Sudanese Constitution[1833] had conclusively settled the topic of ownership or sovereignty over those natural resources. In that respect, important changes were included in the 2011 Constitution. The new provision in Art. 170 para. 4 stipulated that

> "[r]egardless of the classification of the land in question, rights over all subterranean and other natural resources throughout South Sudan,

1828 *Deng South Sudan Country Report* (n 1802) 7, 1 speaks of about four million displaced people.

1829 IMF Middle East and Central Asia Dept. (Chen, Qiaoe), 'Sudan: Selected Issues: Sudan's Oil Sector: History, Policies, and Outlook' (2020), 20(73) IMF Staff Country Reports 28 28 (also in general on the oil industry in both states).

1830 Agreement on Wealth Sharing During the Pre-Interim and Interim Period (Chapter III to the CPA) (7 January 2004) https://peacemaker.un.org/somalia-frameworkwealthsharing2004 (Sudan/The Sudan People's Liberation Movement (The Sudan People's Liberation Army)).

1831 Art. 5 para. 6 ibid. Cf. also Sarwar (n 1786), 232.

1832 Especially Art. 2 para. 1.

1833 Interim Constitution 2005 (South Sudan) (n 1790).

> including petroleum and gas resources and solid minerals, shall belong to the National Government and shall be regulated by law".

It seems that, through that provision in 2011, ownership of all named natural resources was arguably officially transferred to the state and potential pertaining community or private rights were abolished. Even if the stipulations under the heading "Guiding Principles for Petroleum and Gas Development and Management", especially Art. 172 para. 1, spoke of "[o]wnership of petroleum and gas […] vested in the people of South Sudan and […] managed by the National Government on behalf of and for the benefit of the people", it can again be presumed that those resources came under state ownership. In its Art. 7 para. 1, the national South Sudanese "Petroleum Act" from 2012[1834] replicated that fiduciary idea, but in Art. 8 para. 1 ("ownership of Petroleum") used clear language when stipulating

> "[t]he entire property right in and control over petroleum existing in its natural state in the subsoil of the territory of South Sudan is hereby vested in the Government, and shall be developed and managed by the Government, in each case on behalf of and for the benefit of the people of South Sudan."

Art. 175 of the Transitional Constitution urged the establishment of a "national petroleum and gas corporation which shall participate in the […] activities of the petroleum and gas sectors on behalf of the National Government." The stipulation was put into practice by Art. 13 of the Petroleum Act, with which the "Nile Petroleum Corporation" (NILEPET), a South Sudanese state-owned oil company, was established. The sharing and processing of oil became a major bone of contention between predecessor and successor state after 2011, culminating in a complete shut-down of oil production by South Sudan.[1835] The impasse could only be solved in 2012 through the "Agreement Concerning Oil and Related Economic Matters" (Oil Agreement)[1836]. The solution rested on the general proposition that "[e]ach State shall have the permanent sovereignty over its natural resources located in or underneath its territory, including petroleum resources", Art. 2 para. 1 and the application of the territorial principle, Art. 2

1834 Petroleum Act (n 1815).

1835 Rolandsen and Daly (n 1785) 152–153.

1836 Agreement Concerning Oil and Related Economic Matters (27 September 2012) https://sites.tufts.edu/reinventingpeace/files/2012/09/Oil-Agreement-between-SudanSouth-Sudan0001.pdf (South Sudan/Sudan).

para. 3.[1837] The rights of the "Sudan National Petroleum Corporation" (SUDAPET) to the oil sources in South Sudan remained an unresolved issue, and the quarrel led to the first ever arbitration proceedings against the new state.[1838] Unfortunately, the details of the proceedings, especially the award, have remained under closure.[1839]

With respect to private individual rights to South Sudanese oil resources emanating from concession agreements, the "Agreement on Wealth Sharing" in 2004 originally stipulated that "contracts signed before the date of signature of the comprehensive Peace Agreement" should "not be subject to renegotiation", Art. 4 paras. 2 and 4. Instead, when damages and/or violations of rights of third persons had been entailed by such contracts, the government was responsible for remedial measures, e.g., to pay damages, Art. 4 paras. 3 and 5. However, after July 2011, South Sudan changed its attitude. In the 2012 "Petroleum Act",[1840] it enacted a clean slate approach with respect to "old" contracts, thereby repudiating any obligation to be bound by contracts entered into by the Sudanese Republic. It reserved a whole chapter (Chapter XXI) to the topic, one that basically consisted of only one article, Art. 100 on "Transitional Provisions". Essentially, Art. 100 para. 1 unambiguously confirmed that "[t]he Republic shall not assume any obligations or responsibility under or in connection with prior contracts related to petroleum activities, and is not a successor to such contracts." Thus, all such contracts could be put under review or audit, potential concession blocks could be re-organized, the South Sudanese government was not to be responsible for debts or loan agreements formerly entered into, and contracts potentially upheld would have to be approved by the South Sudanese National Assembly, Art. 100 paras. 2-7. In practice, the new state of South Sudan concluded "transitional agreements" with companies

1837 Yet, Art. 14.1 of the Oil Agreement has to acknowledge that "the parties at the time of the signature of this Agreement disagree and reserve their positions with regard to the consequences of the secession […] on Sudapet's participating interests in exploration and production sharing agreements with contract areas located in the RSS, they shall discuss the matter within a period of two (2) months from the signature of this Agreement".

1838 *Sudapet Company Limited v. Republic of South Sudan,* ICSID Case No. ARB/12/26, Award of 30 September 2016.

1839 For the scarce information available see https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/12/26.

1840 Petroleum Act (n 1815).

in possession of oil concessions by Sudan on its territory,[1841] and repeatedly reserved its right to re-negotiate or even cancel concessions granted by the Karthoum government without paying compensation.[1842]

d) The Status of Nationals

Art. 7 para. 2 of the Sudanese 2005 Constitution and Art. 48 para. 1 of the 2005 South Sudan Constitution were based on the *ius sanguinis* principle, granting *Sudanese* citizenship to "[e]very person born to a Sudanese mother or father".[1843] Both constitutions underlined that "[c]itizenship is the basis of equal rights and duties", Art. 48 para. 2 South Sudanese and 7 para. 1 of the Sudanese Constitution. When South Sudan became independent, its population had risen to almost 10 million people,[1844] who came under the *de facto* sovereignty of a new state. In Art. 45 para. 1, the 2011 South Sudan Constitution introduced the South Sudanese nationality, which was granted to "[e]very person born to a South Sudanese mother or father" and reserved the detailed regulation to statutory law.

Since numerous rights were associated with citizen status,[1845] it was obvious that the re-regulation of nationality in both states could lead to

1841 ONGC Videsh Ltd. 'Annual Report 2012-2013' (2012) 142, para. 43.2 <https://www.ongcvidesh.com/wp-content/uploads/2019/05/OVL_Annual_Report_2012-13.pdf>; Christina Forster, 'Malaysia's Petronas Signs Transition Agreement for South Sudan blocks' *S&P Global Platts* (16 January 2012) <https://www.spglobal.com/platts/en/market-insights/latest-news/oil/011612-malaysias-petronas-signs-transition-agreement-for-south-sudan-blocks>.

1842 Cf. Amitav Ranjan, 'Sudan Wants to Redraw ONGC Videsh Oil Contracts' *The Indian Express* (11 October 2011) <https://indianexpress.com/article/news-archive/web/sudan-wants-to-redraw-ongc-videsh-oil-contracts/>; Energy Voice, 'South Sudan to Split Oil Concession as Lawmakers Question Award' (12 September 2014) <https://www.energyvoice.com/oilandgas/64995/south-sudan-split-oil-concession-lawmakers-question-award/>. At least some of the international companies assumed that without such agreement they would not have been able to continue their work on South Sudanese territory, e.g. *ONGC Videsh Annual Report 2012-2013* (n 1840) 142, para. 43.2.

1843 Additionally, Art. 9 para. 3 of the Interim Constitution 2005 (South Sudan) (n 1790) defined all those eligible to vote in the independence referendum and hence contained an early conception of South Sudanese citizenship.

1844 For nos. see https://data.worldbank.org/country/SS.

1845 E.g. while the Transitional Constitution South Sudan (n 1789) guaranteed property rights to every "person", the Interim Constitution Sudan (2005) (n 1800) only protected property rights of "citizens".

frictions or legal gaps and therefore to a loss of rights. The Nationals' Status Agreement[1846] concluded in 2012 between Sudan and South Sudan attempted to alleviate such frictions. Even in its preamble, it set out the general goal of guaranteeing that "Sudanese and South Sudanese people continue to interact with each other and enjoy the freedom to reside, move, acquire, and dispose of property, and undertake economic activities within the territories of the two states". The central provision, Art. 4 para. 1, provided for four basic freedoms each *national* of the two states should enjoy in the respective other state: freedom of residence, of movement, to undertake economic activity, and to acquire and dispose of property.[1847] While those provisions may seem a matter of course, such requirement can become too high a threshold, even an unsurmountable impediment, to the enjoyment of basic rights in a country such as Sudan or South Sudan, where statelessness constitutes a major problem, not least due to the succession scenario.[1848] In the wake of independence, the Sudan, arguably in contravention of its own constitution,[1849] amended its previous laws and declared in Art. 10 para. 2 of its new Nationality Law[1850] that "Sudanese nationality shall *automatically* be revoked if the person has acquired, de jure *or de facto*, the nationality of South Sudan" [emphasis added][1851]. As this stripping of Sudanese nationality happened automatically, and hence irrespective of an actual conferral of South Sudanese citizenship, many

1846 Nationals' Status Agreement (n 1794).

1847 Beyond that, Art. 4 para. 2 of the Nationals' Status Agreement guarantees these freedoms once "exercised" also in case of amendment or termination of the agreement. This constitutes a remarkable expression of states binding themselves beyond the scope of the treaty.

1848 According to the UNHCR still in 2021 about 90% of the population are not in possession of "essential documentation", UNHCR, 'I BELONG: Collective Action Key to Solving Statelessness in South Sudan' (2021) <https://www.unhcr.org/afr/news/press/2021/11/619f992b4/i-belong-collective-action-key-to-solving-statelessness-in-south-sudan.html>; see also UNHCR, 'A Study of Statelessness in South Sudan' (Juba, South Sudan 2017) 2 <https://www.refworld.org/docid/5b1112d54.html>.

1849 As the *ius sanguinis* principle was declared "inalienable" in Art. 7 para. 2 Interim Constitution Sudan (2005) (n 1800).

1850 Nationality Act (2004 (as amended 2011)) http://citizenshiprightsafrica.org/wp-content/uploads/2016/01/Sudan_Nationality_Law_2011_EN.pdf (Sudan).

1851 According to the amended Art. 10 para. 3 Sudan Nationality Act this was even the case when the father of the person had its Sudan nationality revoked because of para. 2. Mike Sanderson, 'The Post-Secession Nationality Regimes in Sudan and South Sudan' (2013), 27(3) JIANL 204 221–222 also argues that this provisions unjustifiably discriminated against Southern people as Sudan's constitution in general provided for the possibility of dual citizenship.

people living in Sudan became, at least for an interim period, stateless and therefore in many respects disenfranchised.[1852] The relative swiftness of the process bereaved most people of the possibility to orderly migrate to their new place of nationality.[1853]

The situation was exacerbated by three factors. First, the rather generous regulation in the new South Sudanese nationality law[1854] and the automaticity of the loss of Sudanese nationality left many people without any choice but to migrate to the South even if they had much stronger ties ("genuine links") with the Sudan than with South Sudan.[1855] Second, the liberal, broad approach of the South Sudanese legislation, legal loopholes, and poorly defined requirements such as "indigenous ethnic community" gave ample discretion to Sudanese authorities on when they could assume South Sudanese nationality without the guarantee of due process.[1856] Third, discriminatory and slow administrative procedures and a general lack of birth certification or registration rendered it almost impossible for many people, especially from nomadic or trans-boundary tribes as well as displaced and economically poor people, to apply for South Sudanese citizenship.[1857] Hence, the regulation in the Nationals' Status Agreement offered relief to people already having formally acquired South Sudanese citizenship or Sudanese nationals not in danger of losing it because not having a link to the Southern territory. The many who - for several reasons - were not as lucky lost many of their formerly enjoyed rights as Sudanese citizens through the combined effect of new nationality legislation in both states.

A completely different approach was chosen with respect to pension claims of state officials, for whom the re-arrangement of nationality laws also had ramifications. After independence, several members of the civil service on both sides had to migrate. The "Framework Agreement to Facil-

1852 ibid 205-206, 208, 228; cf. UNHCR, 'A Study of Statelessness in South Sudan' (n 1847) 35–36.

1853 Sanderson (n 1850), 205–207.

1854 Nationality Act (2011) http://citizenshiprightsafrica.org/wp-content/uploads/2016/01/South_Sudan_Act_2011.pdf (South Sudan) and Nationality Regulations (2011) http://citizenshiprightsafrica.org/wp-content/uploads/2016/01/South_Sudan_Regulations_2011.pdf (South Sudan). On the different bases of South Sudanese citizenship in more detail Sanderson (n 1850), 208–214.

1855 ibid 208, 228.

1856 ibid 205, 208, 213; UNHCR, 'A Study of Statelessness in South Sudan' (n 1847) 16–17.

1857 ibid 19–34; for nomadic tribes Sanderson (n 1850), 220.

itate Payment of Post-Service Benefits"[1858] acknowledged in Art. 2 para. 1 and para. 2 the duty of the two states to "pay Post-Service Benefits […] including pensions and gratuities and other payments due to [their own] eligible and vested current and former Public Servants […] including Public Servants who have become citizens of [the other state and who reside there] or [in] any other country […]" in accordance with their national law. The preamble explicitly used the term "vested rights" and recognized that the agreement was required to protect civil servants' "livelihoods and wellbeing". Hence, with respect to that segment of society, both states acted in a way much more compliant with the idea of acquired rights. Payment of post-service benefits was linked only to former employment, nationality was no eligibility requirement, and a change of nationality was not considered as a ground for exclusion.

e) Other Issues

The "Agreement on Border Issues" (Border Agreement)[1859] and the "Agreement on a Framework for Cooperation on Central Banking Issues" (Banking Agreement)[1860] contained some provisions of minor relevance for acquired rights. Similar to the constitutional provisions, the Border Agreement aimed to safeguard the traditional privileges of ethnic tribes after border delimitation. Art. 14 para. 1 required the parties to the treaty

> "to regulate, protect and promote the livelihoods of border communities without prejudice to the rights of the host communities and in particular those of the nomadic and pastoral communities especially their seasonal customary right to cross, with their livestock, the international boundary between the Parties for access to pasture and water."

In Art. 3 para. 2, the Banking Agreement guaranteed continued operation to commercial banks headquartered in the respective other state. Furthermore "[t]he claims of commercial banks and other financial institutions

1858 Pensions Agreement (n 1795).

1859 Agreement on Border Issues (27 September 2012) https://sites.tufts.edu/reinventingpeace/files/2012/09/Agreement-on-Border-Issues-2709120001.pdf (South Sudan/Sudan).

1860 Agreement on a Framework for Cooperation on Central Banking Issues (27 September 2012) https://sites.tufts.edu/reinventingpeace/files/2012/09/Agreement-on-Banking-2709120001.pdf (South Sudan/Sudan).

against citizens or legal entities of the other State shall be pursued through established, legal and judicial processes of each State", Art. 3 para. 4. In the "The Agreement on Certain Economic Matters" (Economic Agreement),[1861] both states agreed on partitioning external assets and debts. All mutual claims were to be forgone, Art. 5 para. 1 subpara.1, and subpara. 3. With respect to oil-related claims, an analogous provision was contained in Art. 12 para. 1 and 12 para. 2 of the Oil Agreement.[1862] Yet, importantly, both agreements secured that private claims were not touched upon by the decision: The Economic Agreement foresaw in Art. 5 para. 1 subpara. 3 (and the Oil Agreement contained an analogous provision in Art. 12 para. 3) that

> "the provisions […] shall not serve as a bar to any private claimants. The Parties agree to safeguard the rights of private claimants and to ensure that such claimants that [sic] they have the right of access to the courts, administrative tribunals and agencies of each State for the purpose of realizing the protection of their rights."

Furthermore, both treaties even purported to supporting prospective private claims (Art. 5 para. 1 subpara. 4 Economic Agreement and 12 para. 4 Oil Agreement). According to the still prevalent opinion in international legal scholarship, both states would have been free to waive claims of their nationals under international law or at least not to internationally espouse such private claims.[1863] That exemption - notwithstanding serious doubts as to the practical value of such claims in national courts - therefore has to be seen as a considered decision for the states not to avail themselves of the opportunity. On the other hand, such claims naturally were of more concern for the state of Sudan, which had concluded prior contracts or granted concessions, and were subject to definition by national legislation.

4) Interim Conclusions

All in all, the domestic order of the state of South Sudan also showed a remarkable commitment to continuity. While South Sudan favored a clean-

1861 Agreement on Certain Economic Matters (27 September 2012) https://sites.tufts.edu/reinventingpeace/files/2012/09/Agreement-on-Certain-Economic-Matters-2709120001.pdf (South Sudan/Sudan).
1862 Oil Agreement (n 1835).
1863 See *supra*, Chapter III B) I) 1).

slate approach with respect to treaties concluded by its predecessor,[1864] it, in a general and broad manner, took on the former domestic legal order. Of course, that continuity was rendered more natural by the semi-autonomous status of South Sudan after 2005. But its significance is substantial since South Sudan emerged from a violent process of separation. Importantly, Sharia law was never supposed to be part of the South Sudanese legal order. Conversely, non-religious, traditional non-written laws were formally acknowledged. Therefore, written and unwritten domestic rights of people living in South Sudan *prima facie* seemed to be broadly acknowledged and protected, even after independence. Besides those general continuity stipulations, the interplay of specific provisions in the Interim and Transitional Constitution, bilateral treaties with the Sudan, and domestic statutory law paid attention to securing particular individual rights despite separation.

However, protection of property found its limits when it came to implementation, where, in particular, poor administrative practice and a lack of sufficient property registration played a role. Additionally, protection of individuals' rights was considered secondary when it came to topics perceived as being of vital interest to the national interest of the new state of South Sudan. That back seat concerns, especially, natural resources and land, where South Sudan claimed far-reaching ownership rights irrespective of potential pre-existing possessions. The attitude was also reflected in the decision to cancel existing concession rights.

Apparently, both countries anticipated a potential loss of rights from a change of nationality after independence and concluded the "Nationality Agreement" to buffer the problems induced by the renunciation of Sudanese citizenship. Yet, due to the serious statelessness problems on the ground in both countries, that attempt can only be described as a drop in the ocean. While the difficulties encountered due to a restrictive and overly hasty renunciation of nationality by the Sudan primarily concerned people located in the northern territories, the decision led to a serious disenfranchisement of thousands of people.

The mixture of different, sometimes unwritten, sometimes even contradictory, sources of law made their correct application difficult, and there

1864 Also Apach and Geng (n 1791) although without any conclusive evidence for this contention and later talking about South Sudan's alleged "succession" to human rights treaties. Genest (n 953), albeit on basis of a dubious comparison to the case of Yugoslavia.

was a huge gap between law and its practical enforcement by the courts.[1865] In general, minority rights were reported not to be genuinely implemented and their enforcement was weak.[1866]

> "Sudanese constitutions have been used by subsequent regimes as ideological instruments and as a tool of social control […] Sudan has had a number of constitutions but has experienced neither democratic processes of constitution-making nor respect for constitutions in force. This lack of respect for successive constitutions in Sudan reflects a broader disregard for fundamental constitutional principles and the rule of law."[1867]

Still, much has remained in dispute since the independence of South Sudan, especially the distribution of and cooperation on large oil resources in South Sudan and border delimitation. Despite its wealth in natural resources, South Sudan remains one of the least developed countries with a starving population, a lack of infrastructure, changing governments, corruption, and ongoing inter-ethnic rivalries, which have grown into new civil wars leading to permanent insecurity and the inability to fulfil the population's basic needs.[1868] Egregious crimes have again been committed in recent civil wars since 2011, and the human rights' situation remains

1865 *International Commission of Jurists South Sudan* (n 1799) 2.

1866 See Noha I Abdelgabar, Mohamed A Babiker and Lutz Oette, 'Constitutional Dimensions of Minority Rights and the Rights of Peoples in the Sudans' in: *Oette/Babiker Constitution-Making and Human Rights in the Sudans* (n 1781) 139.

1867 Fadlalla and Babiker, 'In Search of Constitution and Constitutionalism in Sudan' (n 1781) 42. Cf. also, critical on the process of constitution making in South Sudan, Gruss and Diehl (n 1789), 90.

1868 In more detail Giraudeau (n 1783); James P McGovern and John Prendergast, 'South Sudan: The Road to a Living Hell, Paved with Peace Deals' *Just Security* (13 June 2022) <https://www.justsecurity.org/81867/south-sudan-the-road-to-a-living-hell-paved-with-peace-deals/?utm_source=rss&utm_medium=rss&utm_campaign=south-sudan-the-road-to-a-living-hell-paved-with-peace-deals>.

alarming.[1869] Some have announced that the youngest member of the world community of states already "failed".[1870]

X) The British Termination of its EU Membership (2020)

1) General Background

The United Kingdom joined the European Communities, the predecessor of the EU, in 1973, but some of the British population retained serious reservations regarding integration into the supra-national organization.[1871] Over the years, dissatisfaction with its EU membership grew as a consequence of the required domestic application of EU policies and rules, especially those on immigration, human rights, and the social security system. In June 2016, the majority of participants in a public referendum voted in favor of leaving the organization. In March 2017, the British government notified the Council of the EU of its intention to withdraw from the Treaty on European Union (TEU)[1872], thereby triggering the process under Art. 50 para. 2 TEU.[1873] After lengthy negotiations with the EU, domestic quarrels in British parliament, and several extensions of the withdrawal period, the UK finally left the EU on 31 January 2020.[1874] The (last-minute) Withdrawal

1869 Human Rights Council, 'Statement of the Chairperson Yasmin Sooka and Members of the Commission on Human Rights in South Sudan' <https://www.ohchr.org/en/statements/2019/09/statement-chairperson-and-members-commission-human-rights-south-sudan-42nd-human>; Commission on Human Rights in South Sudan, 'Ten Years After Gaining Independence, Civilians in South Sudan Still Longing for Sustainable Peace, National Cohesion, and Accountability – UN Experts Note' (9 July 2021) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=27292&LangID=E>; McGovern and Prendergast (n 1867).

1870 Miamingi, 'Constitution Making and the Challenges of State Building in South Sudan' (n 1781) 106; Giraudeau (n 1783), 79; McGovern and Prendergast (n 1867).

1871 Joris Larik, 'Brexit, the EU-UK Withdrawal Agreement, and Global Treaty (Re-)Negotiations' (2020), 114(3) AJIL 443 445–446; Thomas Oppermann, Claus D Classen and Martin Nettesheim, *Europarecht: Ein Studienbuch* (9th ed. C.H. Beck 2021) § 3 para. 20.

1872 Treaty on European Union (26 October 2012) OJ C 326 13 (2012).

1873 UK, 'Letter from the Prime Minister of the United Kingdom to the President of the European Council' (29 March 2017) European Council Doc. No. XT 20001/17, Annex I <data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf>.

1874 For an overview of the Brexit process see https://www.consilium.europa.eu/en/policies/eu-uk-after-referendum/.

Agreement[1875] (WA) accordingly entered into force on that date.[1876] It is estimated that about 3.7 million EU citizens lived in the UK at the time of the withdrawal,[1877] and that there were about one million Britons living in another EU member state.[1878]

The "taking-back" of sovereignty put into question the existence of (and was in fact intended to terminate) a range of rights conferred by the EU legal order, which ceased to apply to the UK and its citizens.[1879] In the only similar situation, the territory of Greenland (as a part of the sovereign state of Denmark, which is still an EU member state) leaving the EU in 1985,[1880] the European Commission had issued an opinion in which it drew attention to the fact that

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1875 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (24 January 2020) OJ L 29/7 (2020). Even if the UK concluded the agreement with the EU *and* the EAEC, in the following, it will only be referred to the treaty partners of the EU and the UK as the provisions relevant for the present analysis were solely negotiated between those two partners.

1876 It provided for a transition period until 31 December 2020, see Art. 126-132, during which, in principle, EU law continued to apply in and to the UK. Many of the mentioned deadlines refer to the end of this transition period.

1877 UK Office for National Statistics, 'Latest Population Estimates for the UK by Country of Birth and Nationality, Covering the Period From 2004 to the Year Ending June 2021' (25 November 2021). Statistical Bulletin 5–6 <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/ukpopulationbycountryofbirthandnationality/yearendingjune2021>; cf. also Chris Morris and Anthony Reuben, 'Brexit: How Many More EU Nationals in UK Than Previously Thought?' *BBC News* (29 June 2021) <https://www.bbc.com/news/56846637>.

1878 Georgina Sturge, 'House of Commons Briefing Paper: Migration Statistics' (27 April 2021) No. CBP06077 26, 30-31 <https://commonslibrary.parliament.uk/research-briefings/sn06077/>.

1879 Cf. *Andy Wightman and Others v Secretary of State for Exiting the European Union,* C-621/18, 10 December 2018, Reference For a Preliminary Ruling para. 64 (CJEU) „any withdrawal of a Member State from the European Union is liable to have a considerable impact on the rights of all Union citizens, including, inter alia, their right to free movement, as regards both nationals of the Member State concerned and nationals of other Member States".

1880 Greenland left the EU in 1985 and was listed as an "overseas territory". However, Greenland by then was and still is not a sovereign state, but part of the Kingdom of Denmark but has acquired far-reaching autonomy status. Denmark in 2009 even recognized the Greenlanders as an own people and to a certain extent accorded Greenland the right to conduct its foreign relations on its own, cf. Act on Greenland Self-Government (12 June 2009) Act. No. 473, 12; English translation available at https://wwwex.ilo.org/dyn/natlex2/r/natlex/fe/home (Denmark).

> "[i]f Greenland ceased to be a member and withdrew from the territory of the Community, the mutual rights and obligations at present assumed by the Community and by Denmark in its capacity as Greenland's representative internationally and at Community level would *automatically terminate*."[1881]

Therefore, under the heading of "retention of vested rights" the Commission urged that

> "[p]rovision should be made for appropriate measures to protect companies and persons *who have exercised* the right of establishment as well as Community workers employed in Greenland. The extremely small number of persons affected and the case-law of the Court of Justice that has already been established in favour of the retention of pension rights acquired by workers during periods of employment in a territory which has subsequently ceased to belong to the Community give no reason to suppose that there will be any major difficulties in this area, *even if the future status of Greenland were to rule out the principle of free movement*. It would, however, be *preferable* to retain the substance of the Community rules, at least in respect of Community workers employed in Greenland at the time of withdrawal."[1882]

Two lessons can be drawn from that short excerpt. First, the Commission was of the opinion that mutual rights and obligations of Greenland and the EU would terminate *automatically*. Indeed, that automatic termination was the reason the Commission proposed provisions "for appropriate measures to protect companies and persons". Second, rights should not necessarily be secured for all persons but for those "who have exercised the right of establishment" or "[c]ommunity workers employed in Greenland at the time of withdrawal". Because few people were affected, however, there seems to have been no meaningful discussion of the issue at the time.

1881 Commission of the European Communities, 'Opinion on the Status of Greenland 1/83: Commission Communication Presented to the Council on 2 February 1983' [1983] Bulletin of the European Communities Supplement 1/83, Annex I 21 [emphasis added].

1882 ibid. [emphasis added].

That changed for Brexit. The treatment of individuals' rights as a "bargaining chip"[1883] in the negotiations leading to a withdrawal agreement became a major bone of contention. Indeed, a further point why dealing with this case may proof fruitful for this analysis is that, despite the rather exceptional circumstances, or probably exactly because of them, the doctrine of acquired rights was routinely invoked and became a catch word in the discussions. Originally used as an argument by proponents of the "Leave" campaign, it soon was made clear by the "Remainers" that the doctrine of "acquired rights" could not be resorted to as a panacea for all potential unwelcomed drawbacks of Brexit.[1884] Especially in the phase after the notification of withdrawal, facing the (not unwarranted) fear of a "no-deal" Brexit, i.e. the collapse of negotiations on a withdrawal agreement, a vivid scholarly debate had emerged about the persistence of EU-granted rights as "acquired rights" in case of Brexit.[1885] Both houses of the British parliament dealt with the question under the explicit heading of "acquired rights".[1886]

1883 Paolo Sandro, 'Like a Bargaining Chip: Enduring the Unsettled Status of EU Nationals Living in the UK' *verfassungsblog* (13 July 2016) <http://verfassungsblog.de/post-brexit-status-of-eu-nationals-living-in-the-uk-sandro/>.

1884 See on the one side The Daily Telegraph (London), 'Immigration: Let's Take Back Control: Outside the Shackles of the EU, Says Business for Britain, this Country Could Attract the Skilled Workers it Needs From Across the Globe Without the Uncontrolled Pressures of Free Movement' (26 June 2015), and on the other Lisa O'Carroll, 'Would Europeans Be Free to Stay in the UK After Brexit?: The Leave Campaign Insists EU Nationals Already in Britain Would Be Able to Stay – But Immigration Lawyers Say It's Not So Simple' *The Guardian* (22 June 2016) <https://www.theguardian.com/uk-news/2016/jun/22/will-europeans-be-free-to-stay-in-the-uk-after-brexit>.

1885 E.g. Waibel, 'Brexit and Acquired Rights' (n 8), 444; *Fernández/López Garrido Brexit and Acquired Rights* (n 427); Sionaidh Douglas-Scott, 'What Happens to 'Acquired Rights' in the Event of a Brexit?' *UKCLA Blog* (16 May 2016) <https://ukconstitutionallaw.org/2016/05/16/sionaidh-douglas-scott-what-happens-to-acquired-rights-in-the-event-of-a-brexit/> and the references cited in the following.

1886 House of Lords (European Union Committee), '10th Report of Session 2016–17: Brexit: Acquired Rights' (14 December 2016) HL Paper 82 <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/82/8202.htm>; UK House of Commons, 'Research Paper 13/42: Leaving the EU' (1 July 2013) 14–16 <https://commonslibrary.parliament.uk/research-briefings/rp13-42/>; cf. also Vaughne Miller, 'Brexit and European Citizenship' (6 July 2018). House of Commons Briefing Paper 8365 14–15 <https://commonslibrary.parliament.uk/research-briefings/cbp-8365/>.

That debate is significant, as even if it seems to be accepted that a successor state could also take over only specific sovereign rights and obligations over a territory,[1887] Brexit would not fall under the literal definition of state succession as it was not two *states* between which responsibility was transferred.[1888] But even if not constituting a state, the EU is more than an international organization,[1889] i.e. an "organization established by a treaty or other instrument governed by international law and possessing its own international legal personality"[1890]. In fact, it represents the most eminent example of a "supra-national"[1891] organization. In its seminal judgment *Van Gend en Loos*, the CJEU stated that

> "the EEC Treaty [...] is more than an agreement which merely creates mutual obligations between the contracting states. [...] This view is confirmed by the [...] establishment of institutions *endowed with sovereign rights*, *the exercise of which affects Member States and also their citizens*. [...] the Community constitutes a new legal order of international law for the benefit of which *the states have limited their sovereign rights*, albeit within limited fields, *and the subjects of which comprise* not only Member States but also *their nationals*. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also *intended to confer upon them rights which become part of their legal heritage*."[1892]

1887 Delbrück and Wolfrum (n 266) 159, para. 2.b).

1888 Larik (n 1870), 443; Richard J F Gordon and Rowena Moffatt, 'Brexit: The Immediate Legal Consequences' (2016) 66 <https://consoc.org.uk/publications/brexit-immediate-legal-consequences/>. Comparing the process to other cases of succession Larik (n 1870), 443 who positions Brexit in between succession and withdrawal from an international organisations ibid 443–444.

1889 Oppermann, Classen and Nettesheim (n 1870) 25, § 4 para. 21.

1890 Art. 2(a) ILC, 'Draft Articles on the Responsibility of International Organizations with Commentaries' (2011), 2011(II(2)) YbILC 46 40, para. 87. Since the foundation of the European Union by the Treaty of Lisbon in 2009, the organization's status is explicitly provided for in Art. 47 TEU (n 1871).

1891 Term used (even if not only for the EU) by Kirsten Schmalenbach, 'International Organizations or Institutions, General Aspects (2014)' in: *MPEPIL* (n 2) paras. 16-19; see also *Maastricht,* 2 BvR 2134/92, 12 October 1993, BVerfGE 89 155 (German Federal Constitutional Court [BVerfG]) and *Lissabon,* 2 BvE 2/08, 30 June 2009, BVerfGE 123 267 (German Federal Constitutional Court [BVerfG]) "association of states" ("Staatenverbund").

1892 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Tariefcommissie,* C.26-62, 5 February 1963, Reference For a Preliminary Ruling, Slg 1963 1 12 (CJEU) [emphasis added].

Only one year later, the court underlined and extended that finding in its decision in the case of *Costa/ENEL*:

> "The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty *carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.*"[1893]

The withdrawal of a state from an organization that has been conferred sovereign rights and the power to issue laws and decisions directly binding within the member states, however, was a situation the drafters of the Vienna Conventions apparently did not conceive of.[1894] The exit of the UK from the supra-national EU (Brexit) currently constitutes a unique process. But Brexit involved a change in sovereignty comparable to succession scenarios entailing a comparable issue - whether a state, the UK, can be bound to accept the decisions of *another* sovereign authority, the EU, once that former state has regained the competence for a matter. The issue is different from the case of a treaty withdrawal, where states are supposed to be bound by their *own* former decisions. It is that difference that should be better accounted for than is currently the case when Brexit is discussed from the sole perspective of treaty withdrawal, as it often is.[1895] On the other hand, the UK consciously acceded to the EU, thereby deliberately conferring sovereign rights. That deliberate choice suggests a certain bindingness of

1893 *Flaminio Costa v E.N.E.L.* C-6-64, 15 July 1964, Reference For a Preliminary Ruling, Slg 1964 1251 594 (CJEU) [emphasis added].

1894 The VCSST declares its rules to be applicable to "any treaty which is the constituent instrument of an international organization" or "any treaty adopted within an international organization", but is "without prejudice to the rules concerning acquisition of membership, cf. Art. 4 VCSST. It defines an international organization simply as an "intergovernmental organization", cf. Art. 2 para. 1 lit. n VCSST.

1895 See also Larik (n 1870), 444 positioning Brexit between leaving an international organization and succession; Patricia Mindus, *European Citizenship after Brexit: Freedom of Movement and Rights of Residence* (Springer 2017) 62–63 drawing an analogy to succession; also Victor Ferreres Comella, 'Does Brexit Normalize Secession?' (2018), 53(2) Tex Int'l LJ 139 141 speaking of secession, without, however, further substantiating this proposition. Gordon and Moffatt (n 1887) 66 reject the application of succession rules as "the ultimate locus of sovereignty remains with the Member States", but concede that "the principles underlying the doctrines of non-retrospectivity and concerns of fairness in protecting existing interests are clearly of relevance to the Brexit situation."

obligations deriving from this supra-national order even after Brexit. The case of Brexit therefore can best be described as a case *sui generis*.

Additionally, the rights imperiled in the process of Brexit were not domestic rights *per se*, i.e. rights enacted by a state as part of its domestic legal order; they were rights conferred upon individuals by the EU "supra-national" legal order. They therefore showed a certain resemblance to individual rights granted by international treaties.[1896] On the other hand, at least from the CJEU's perspective,[1897] EU rights - different to other international rights - are directly enforceable and applicable in every member state and hence are part of the national legal orders without the need for any further incorporation. The UK paid tribute to that particularity through the 1972 "European Communities Act" (ECA),[1898] and it was explicitly acknowledged by the UK Supreme Court in its seminal *Miller* judgment.[1899] In that judgment, the Supreme Court upheld the lower court's conclusion that withdrawal from the TEU required parliamentary approval and did not fall under the "royal prerogative"[1900] exactly because such withdrawal would have led to the abrogation of individual rights under UK *domestic* law.[1901] Even if the UK constitutional system provided for a dualist approach to international law, the ECA had the effect not only of implementing EU law but also of making it directly applicable as domestic law as long as the

1896 On the question of the UK's obligations under EU-only or so called "mixed" international agreements after Brexit see Manuel Kellerbauer, 'Art. 50 TEU' in Thomas Liefländer, Manuel Kellerbauer and Eugenia Dumitriu-Segnana (eds), *The UK-EU Withdrawal Agreement: A Commentary* (OUP 2021) paras. 1.45-1.46; Jed Odermatt, 'BREXIT and International Law: Disentangling Legal Orders' (2017), 31 Emory Int'l LRev 1051; Ramses A Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and its Member States' (2018), 55(Special Issue) CML Rev 101; Thomas Voland, 'Auswirkungen des Brexits auf die völker-vertraglichen Beziehungen des Vereinigten Königreichs und der EU' (2019), 79(1) ZaöRV 1.

1897 *CJEU Costa/E.N.E.L* (n 1892) 593 "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States"; *CJEU van Gend en Loos* (n 1891) 12 "rights which become part of their legal heritage".

1898 European Communities Act UK Public General Acts 1972 c. 68 (UK).

1899 *R (on the Application of Miller and Another) (Respondents) v Secretary of State for Exiting the European Union (Appellant),* UKSC 2016/0196, 24 January 2017, [2017] UKSC 5, https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf (UK Supreme Court).

1900 Cf. on the prerogative and its relationship to the theory of dualism ibid paras. 55-56.

1901 ibid paras. 82, 83, 86, 101.

UK remained part of the EU and the act was not repealed by parliament.[1902] Rights conferred by the EU legal order, at least in the UK, therefore took a middle place between purely domestic and purely international individual rights, making this case even more special.

2) Persistence of Individual Rights Derived from EU Law

a) Theoretical Approaches

Soon after the referendum, it became clear, or at least the majority opinion in the legal discourse considered,[1903] that after Brexit, EU law as such would cease to apply and therefore could not protect UK citizens from losing their rights, especially from losing their EU citizenship.[1904] Art. 50 TEU did not confer any specific legal obligations pertaining to individual rights on the

1902 ibid paras. 55, 60-67.

1903 Against, arguing for continuity of EU citizenship Clemens M Rieder, 'The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship: Between Disintegration and Integration' (2013), 37(1) Fordham Int'l LJ 147 172; arguably also Volker Roeben and others, 'Revisiting Union Citizenship From a Fundamental Rights Perspective in the Time of Brexit' (2018), 5 EHRLR 450 458, 466-468.

1904 Phoebus L Athanassiou and Stéphanie Laulhé Shaelou, 'EU Citizenship and Its Relevance for EU Exit and Secession' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 731 740–747, 749-750; Gillian More, 'From Union Citizen to Third-Country National: Brexit, the UK Withdrawal Agreement, No-Deal Preparations and Britons Living in the European Union' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship under Stress* (Brill, Nijhoff 2020) 457 457, 461-462; Gordon and Moffatt (n 1887) 67; Nicolas Bernard, 'Union Citizens' Rights Against Their Own Member State after Brexit' (2020), 27(3) MJECL 302 314; Sionaidh Douglas-Scott, 'Written Evidence Before the European Union Committee of the UK House of Lords' (4 September 2016) AQR0001 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-acquired-rights/written/37921.html>; *Miller Brexit and European Citizenship* (n 1885) 15–16 (with references to the opposite opinion at 16-20); Robert Frau, *Das Brexit-Abkommen und Europarecht* (Nomos 2020) 88; Steve Peers, 'The End - or a New Beginning?: The EU/UK Withdrawal Agreement' (2020), 39 YEL 122 143, 152-154; *Fernández/López Garrido Brexit and Acquired Rights* (n 427) 49; Ignacio Forcada Barona, 'Brexit and European Citizenship: Welcome Back to International Law' (2020), 24 SYbIL 210 212; also on the various initiatives to alleviate the loss Mindus (n 1894) 72–73.

withdrawing state.[1905] Furthermore, the CJEU, sitting as a full court in *Andy Wightman and Others v Secretary of State for Exiting the European Union*, maintained that

> "since citizenship of the Union is intended to be the fundamental status of nationals of the Member States […] any withdrawal of a Member State from the European Union is liable to have a considerable impact on the rights of all Union citizens, including, inter alia, their right to free movement, as regards both nationals of the Member State concerned and nationals of other Member States."[1906]

As a consequence, attention turned from (supra-national) EU law to international law and its capacity to secure individual rights in that situation. As could have been expected with respect to a topic having always been "replete of controversy" and being discussed in the middle of political upheaval, the issue was approached in different ways, partly overlapping, partly contradicting each other. Even if the EU and UK were successful in concluding a withdrawal agreement also covering that field, several good reasons remain for giving a short overview of the ideas advanced beforehand and analyzing them for their cogency and practicability. First, the WA did not comprehensively cover all issues related to individual rights potentially falling under the doctrine of acquired rights. Second, it seems important to analyze the international legal situation outside the agreement to grasp the potential evolution of general international law binding on the EU or the UK apart from the WA. While the rules agreed in a treaty may reflect the legal obligations of states or international organizations, that congruency should not lightly be assumed. Moreover, such an analysis may provide tools to categorize, interpret, and evaluate the WA. Additionally, it is likely that the drafters of the WA were influenced by the legal discourse and theories advanced before.

On the one side of the spectrum, in the Brexit case, academics drew a sober picture of the extent to which the doctrine of acquired rights protected individuals.[1907] Referring back to authorities such as *Lalive* and

1905 Piet Eeckhout and Eleni Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading' (2017), 54(3) CML Rev 695 706, 718; Kellerbauer, 'Art. 50 TEU' (n 1895) para. 1.08; cf. also *CJEU Wightman* (n 1878) para. 50.

1906 ibid para. 64.

1907 E.g. Sionaidh Douglas-Scott and Vaughan Lowe, who were invited to give oral and written evidence before the UK House of Lords European Union Committee, see following quotes.

O'Connell and consequently to their definitions from the 1950s to 1970s, the proponents of that argument maintained that the doctrine would only protect a small portion of domestic property rights and therefore would not be applicable to most rights protected by the EU legal order.[1908] Art. 70 para. 1 lit. b) VCLT, in line with the argumentation in this book, was discarded as only protecting rights of the states party to the treaty.[1909] Salvation could, at the most, be found in the UK's still existing obligations under the ECHR.

At the opposite end of the spectrum, authors argued that all rights conferred under the EU order would survive Brexit. One line of that argument, often with (superficial) reference to similar discussions on withdrawal from human rights treaties, contended that Union citizenship, as a package of rights conferred by EU law, could not be taken away at discretion after Brexit as Union citizenship constituted a "fundamental status" or even a

1908 Lowe, 'Written Evidence Before the European Union Committee of the UK House of Lords' (n 47) paras. 5-11. A more comprehensive list is contained in Vaughan Lowe, 'Supplementary Written Evidence Before the European Union Committee of the UK House of Lords' (28 September 2016) AQR0003 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-acquired-rights/written/39768.html>. Extensively referring to Lalive, Douglas-Scott, 'Written Evidence Before the European Union Committee of the UK House of Lords' (n 1903). Primarily talking about the traditional rights mentioned by O'Connell, Douglas-Scott, 'What Happens to 'Acquired Rights' in the Event of a Brexit?' (n 1884). Similar, covering more precedents, but less stringent and less persuasive *Fernández/López Garrido Brexit and Acquired Rights* (n 427) 11, 19, 21, 40, 44, 57, 59, 60 who deny almost all relevance of the doctrine of acquired rights under international law. See also Forcada Barona (n 1903), 231 "Obviously, the international law doctrine of acquired rights, only by the absurdity of wanting to be applied to a political decision of a democratic character that affects millions of people, did not have much used as a limit to the loss of citizenship rights associated with Brexit, and was soon discarded by almost all commentators" [footnote omitted].

1909 Lowe, 'Written Evidence Before the European Union Committee of the UK House of Lords' (n 47) paras. 24-27; Douglas-Scott, 'Written Evidence Before the European Union Committee of the UK House of Lords' (n 1903); Douglas-Scott, 'What Happens to 'Acquired Rights' in the Event of a Brexit?' (n 1884); *Miller Brexit and European Citizenship* (n 1885) 14; Gordon and Moffatt (n 1887) 66; Waibel, 'Brexit and Acquired Rights' (n 8), 443; *Fernández/López Garrido Brexit and Acquired Rights* (n 427) 31, 58 "Anything else is groundless speculation about a sentence taken out of context"; Mindus (n 1894) 62. In detail on the discussion with respect to Art. 70 VCLT see *supra*, Chapter III C) II) 2) f).

"fundamental right".[1910] The argument was built on the assumption that securing Union citizenship meant securing the rights associated with it. However, since that argument cannot convincingly provide a basis for a right to Union citizenship outside the EU treaties,[1911] it collapses as soon as one has to admit that there is no absolute international right to a specific nationality and UK citizens would not become stateless through the loss of EU citizenship. Even if such a right did exist, it is not sufficiently proven that EU citizenship would in fact be "unreasonable", i.e. did not have a legitimate aim, was disproportionate, or otherwise "inappropriate, unjust, illegitimate or unpredictable",[1912] especially in light of the deliberate inclusion by all EU member states of Art. 50 in its present form into the TEU via the treaty of Lisbon[1913]. It is thus important to distinguish between Union citizenship and its pertaining rights:[1914]

> "The debate about associate or continuing EU citizenship is a distraction. It's not the label that matters. Rather, the core issue is protecting people whose rights are withdrawn while they are exercising them or who are discriminated against on grounds of their nationality as a result of the withdrawal process."[1915]

Arguments advocating the upholding of rights are often supported by relying on Art. 70 para. 1 lit. b) of the VCLT.[1916] Individual rights acquired

1910 E.g. William T Worster, 'Brexit and the International Law Prohibitions on the Loss of EU Citizenship' (2018), 15(2) IOLR 341; Roeben and others (n 1902); Minnerop and Roeben (n 429), 486.

1911 Arguments based on the EU Rights Charter (n 577), e.g. brought forward by Roeben and others (n 1902), 460–463, can be discarded because the Charter will not be applicable in the UK after Brexit and the ECHR does not know an unqualified right to a nationality. The argument in Minnerop and Roeben (n 429), 486 is also based on "higher-ranking principles of EU-law" that are not applicable to the UK after Brexit.

1912 See for this standard and pertaining case law Worster (n 1909), 346, 361-362; cf. also Roeben and others (n 1902), 459–460.

1913 Art. 1 para. 58 of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community (17 December 2007) OJ C 306 1 (2007).

1914 Gordon and Moffatt (n 1887) 50–51.

1915 More, 'From Union Citizen to Third-Country National' (n 1903) 479.

1916 Peers (n 1903), 134; Roeben and others (n 1902), 470–471. Sympathizing with this approach Stijn Smismans, 'EU Citizens' Rights Post Brexit: Why Direct Effect Beyond the EU is Not Enough' (2018), 14(3) EuConst 443 447/448 and footnote 9; similar Peers (n 1903), 134 "while the VCLT provisions concerning retention of rights in the event of termination of a treaty, or the ban on reprisals in the event

under *international* treaties are assumed to be protected by the provision. That opinion bypasses the ILC's commentary that Art. 70 para. 1 lit. b) VCLT is only concerned with states' rights and not "vested rights of individuals"[1917] by arguing that what is at stake are not "vested rights" in the traditional sense. Rights derived from international law could nevertheless exist besides states' rights.[1918] However, that approach is, again, too general when postulating that - the much more nuanced - Art. 70 para. 1 lit. b) VCLT prohibits "any retroactive effect"[1919] without even distinguishing between executed or executory rights.[1920] In essence, what proponents of that reading of Art. 70 para. 1 lit. b) VCLT attempt to do is to convert a treaty rule into a customary rule without showing sufficient state practice.

In his article named "Brexit and Acquired Rights",[1921] *Waibel* advocates a strain of argument that asserts to take a possible evolution of the doctrine of acquired rights into account. He explicitly refers to the theories of *O'Connell*, *Lalive*, and *Kaeckenbeeck*, which understand acquired rights as a factual situation that has to be recognized.[1922] He acknowledges that "the scope of acquired rights protection under customary international law evolves over time."[1923] Therefore, he argues that "public" rights nowadays may be encompassed by the doctrine, too,[1924] and that succession is a scenario so close to Brexit that its rules may be applied analogously.[1925] Apart from the fact that the public-private distinction had already been abandoned by some "classic" authors,[1926] unfortunately, *Waibel* (in his admittedly short

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that a treaty of a 'humanitarian character' is terminated for a material breach, arguably do not literally cover those covered by the citizens' rights rules, it could be argued that in conjunction with the EU law principle of legitimate expectations, such rights cannot be removed." [footnotes omitted].

1917 See in more detail *supra*, Chapter III C) II) 2) f) aa).

1918 Minnerop and Roeben (n 429), 479–480.

1919 ibid 475.

1920 See the general statements at ibid 477, 485, 487, 489 or the unclear reference to "situations that commenced" at ibid 481.

1921 Waibel, 'Brexit and Acquired Rights' (n 8).

1922 ibid 442.

1923 ibid 444.

1924 ibid.

1925 ibid 442 "If private rights are protected in the more disruptive scenario of state succession where sovereignty changes hand and new states emerge or old states disappear, acquired rights should be protected even more so in the less disruptive scenario of a state withdrawing from the European Union"; similar Mindus (n 1894) 62–63.

1926 See *supra*, Chapter I C).

piece) does not explain whether, why, or how that evolution might have come about. Additionally, he, somehow contradictory, clings closely to the traditional definitions of acquired rights, e.g., *Lalive*'s exclusion of "rights of a public or political character" from protection.[1927] *Waibel* is not completely clear on how acquired rights are determined and how any requirements might interact. At times, he relies on the distinction between "liquidated" and "unliquidated" claims.[1928] Simultaneously, he qualifies "[t]he economic freedoms under the EU treaties and the permanent right to live and reside in the host member country following five years of residency" as acquired rights because of their "considerable monetary value"[1929] without inquiring why that requirement is (still?) relevant at all. His choice of rights purported to survive the change thus seems random.

What all these mentioned approaches have in common is that they confine the doctrine of acquired rights to its traditional, "old" enunciation and do not sufficiently ponder a possible evolution or the reasons for its former definition.[1930] However, in the following, as in the whole of this analysis, in order not to foreclose the possibility of a further evolution of the definition, the term "acquired rights" will be used in a broad sense, meaning all individual rights acquired in the domestic legal order of a state and eligible for protection in a case of a change in sovereignty. Consequently, it is proposed that the whole discussion on the protection of essential rights granted by the EU legal order in the Brexit process is concerned with acquired rights.[1931] The proposal entails that, to grasp the complete picture of such a rule, all arguments purporting to a survival of individual EU rights after Brexit should be taken into account, no matter whether they come from other areas of international law or involve the term "acquired rights". What should therefore also be considered are arguments relying on existing *duties of the EU and the EU27* under EU and international law

1927 Waibel, 'Brexit and Acquired Rights' (n 8), 443–444.

1928 ibid 444.

1929 ibid.

1930 Minnerop and Roeben (n 429) even explicitly discard the doctrine of acquired rights only to in turn advocate a protection of all individual EU-citizens' rights after Brexit. A similar unduly narrow stance is taken by *Fernández/López Garrido Brexit and Acquired Rights* (n 427) 55 "We agree with that recommendation, which implies accepting the status quo at the time of the UK's formal withdrawal with regard to the citizens who enjoy today, and will enjoy up to the date of the UK's withdrawal, European citizenship rights in the UK and in the EU (the British). In other words, as if they were 'acquired rights', even if they are not."

1931 Such understanding is shared by Bernard (n 1903); Mindus (n 1894).

related to securing basic individual rights during the negotiations of the WA.[1932] Those duties include constitutional principles and values of the EU itself such as legal security, the rule of law, and basic human rights. What makes the approach particularly interesting is that it advocates an international obligation to secure rights of individuals *against their own home state*. That approach brings such rights close to human rights even if the rationale of the duty supposedly lies in objective principles of the EU legal order.

As mentioned, many of these arguments can, be brushed aside *for the UK* if one agrees that the EU law itself, and therefore its particularities and rules, will not apply in the country after Brexit and as long as no external, customary rule transposing the rights or obligations is proven. In turn, the ECHR has been routinely mentioned by many authors as a "fall-back" position when it comes to the rights of EU citizens against the post-Brexit UK.[1933] Especially the ECtHR's jurisprudence on Art. 8 ECHR, the right to family life, is used as an argument for a persistence of residence and/or working rights once acquired.[1934] Tellingly, the ECtHR's decision in *Kurić*, already analyzed with respect to the situation of Slovenian independence,[1935] was often presented in the Brexit discourse as evidence that civil status cannot be taken away without reasonable grounds.[1936] Yet, it has to be underlined that even the ECHR is not directly applicable in the UK but only through the (domestic) Human Rights Act. The UK can repeal the Human Rights Act at its will at any time and UK judges are domestically not obliged to follow the jurisprudence of the ECtHR nor allowed to declare invalid a parliamentary law if they find it to be in violation of the ECHR.[1937]

1932 E.g. Bernard (n 1903), 323; on the EU's duties while negotiating the agreement Kellerbauer, 'Art. 50 TEU' (n 1895) para. 1.34.

1933 Mindus (n 1894) 104; Gordon and Moffatt (n 1887) 62–64; Vaughan Lowe, 'Oral Evidence', *Examination of Witnesses, Public Record of Oral Evidence Before the Justice Sub-Committee* (2016) „the international law doctrine of acquired rights is pretty well eclipsed by the protection given by the European Convention on Human Rights, for example. There is no obvious reason why anyone would try to rely on the acquired rights doctrine, rather than rely on the European Convention". More cautious Douglas-Scott, 'Written Evidence Before the European Union Committee of the UK House of Lords' (n 1903).

1934 Eeckhout and Frantziou (n 1904), 719–723.

1935 *ECtHR Kurić and Others* (n 1364).

1936 Bernard (n 1903), 313, 314/315; Mindus (n 1894) 68–69.

1937 See information provided by the UK Supreme Court at https://www.supremecourt.uk/about/the-supreme-court-and-europe.html.

Hence, also the ECHR, faced by a - potential - domestic unwillingness to afford protection to the mentioned rights, would not be a steadfast guarantee for EU or British citizens.[1938] Against that background, it seems of special significance that *Gordon and Moffat* indicate that the principles of legal security and legitimate expectations are also well entrenched in British administrative law and could potentially offer an avenue for individual redress after Brexit.[1939] Crucially, as a common denominator, almost all theories advocating for the upholding of EU rights refer to the protection of legitimate expectations or legal security as recurrent points, either as an independent or as an additional argument from the international or national plane.[1940]

After this brief overview, the following shows whether and in how far the UK and the EU in their negotiations and in the final WA text have followed up on the ideas. The solution in the WA constitutes not only the fruits of political bargaining but also a reflection on these different thoughts.

1938 Also Eeckhout and Frantziou (n 1904), 725/726. Tellingly, the UK government intended to 'update' or even substitute the Human Rights Act see BBC News, 'Human Rights Act: UK Government Unveils Reform Proposals' (14 December 2021) <https://www.bbc.com/news/uk-59646684>; see Milanović (n 819); Steph Spyro, 'Sunak to Resurrect Bill of Rights to Foil EU law and Deport Migrants Quickly' *Daily Express* (6 November 2022) <https://www.express.co.uk/news/politics/1693033/rishi-sunak-immigration-british-bill-of-rights>.

1939 Gordon and Moffatt (n 1887) 62–64.

1940 Peers (n 1903), 134; Eeckhout and Frantziou (n 1904), 726; Roeben and others (n 1902), 459 "Such removal does away with the basis for all the citizens' rights that the Treaty and the case-law provide, to reside, to vote, and not to be expelled or extradited. The individual finds himself or herself cut off from much of the EU legal order, and *a legal vacuum replaces the certainty this citizenship seeks to establish*. As such, removing Union citizenship is more than a change in status; it interferes with the *promise of protection* inherent in the concept of citizenship" [emphasis added]; similarly Worster (n 1909), 361 "looking at UK nationals resident or with long standing ties to EU member states, these individuals may have investments, homes, and lives that are rendered unstable and unpredictable". Gordon and Moffatt (n 1887) 58–61 explain that also British administrative law knows the principle of vested rights and legitimate expectations.

b) Individual Rights under the EU-UK Withdrawal Agreement

aa) The General Conception of the Agreement

In Art. 126, the WA provided for a "transition period" until 31 December 2020 during which, subject to a sophisticated list of exceptions in Art. 127 WA, most of the Union law should still be applicable in the UK. To a large extent, the transition period prolonged the membership of the UK after formal withdrawal. As the interim period has now ended, its pertaining legal situation is not covered by the following analysis.[1941] However, the end of the transition period is the still relevant ("cut-off") date for determining certain facts in the post-withdrawal situation.

The WA explicitly names rules or rights meant to still exist after Brexit. That explicit inclusion strongly suggests that, unless otherwise indicated, with the exit of the UK from the EU treaty, EU law will cease to apply in the UK and the CEJU will no longer have jurisdiction over the UK or its nationals. Both parties, in principle, assumed the termination of all mutual rights and obligations *not* mentioned in the WA, including the rights of EU citizens in the UK or UK citizens in the EU under the EU treaties.[1942] Hence, EU citizenship was not to be granted to British citizens after 31 December 2020 (unless they held the nationality of another EU member state as well).[1943]

1941 For a detailed account see Peers (n 1903), 146–152. On individual rights during this period European Parliamentary Research Service (Cîrlig, Carmen-Cristina), 'EU and UK Citizens' Rights After Brexit: An Overview' (06/2020) 4 <https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2020)651975>.

1942 Whether the mentioning of the relevant rights in the WA is declaratory or constitutive for their continuity is a question open to debate.

1943 In support of this supposition, "Union Citizen" is defined in Art. 2 lit. (c) of the WA as "any person holding the nationality of a Member State" referring to a list of members states in that the UK is not included, Art. 2 lit. (b) WA. Additionally, there is a separate definition for "United Kingdom national" in Art. 2 lit. (d) of the WA.

bb) The Rights Protected

Before and during the WA negotiations, the former UK Prime Minister[1944] and several EU institutions[1945] insisted on the protection of British and EU citizens' rights as a cornerstone of the Brexit process.[1946] The protection of "citizen's rights" indeed took a prominent place in the final WA. Its preamble's suggestion

> "that it is necessary to provide *reciprocal* protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have *exercised* free movement rights before a date set in this Agreement, and to ensure that their rights under this Agreement are *enforceable* and based on the principle of non-discrimination; recognising also that rights deriving from periods of social security insurance should be protected" [emphasis added]

is a first-class summary of the following provisions on citizens' rights. In fact, its position in Part II of the agreement, the very first part after the general provisions and definitions, underlines the special status dedicated to the topic. Art. 10 WA delimits the "personal scope" of that part and therefore defines the persons and rights that ought to be protected. According to Art. 10 para. 1, the following provisions should apply to

1944 UK, 'Prime Minister's Open letter to EU Citizens in the UK' (19 October 2017) <https://www.gov.uk/government/news/pms-open-letter-to-eu-citizens-in-the-uk.>.

1945 European Commission, 'Letters by Chief Negotiator Barnier to UK Secretary of State Barclay from 25 March and 18 June 2019' (2019) <https://www.gov.uk/government/publications/costa-amendment-letter-to-the-eu-institutions>; European Parliament, 'Resolution on the Framework of the Future EU-UK Relationship' (14 March 2018) 2018/2573(RSP) lit.) L, para. 52; European Parliament, 'Resolution on Implementing and Monitoring the Provisions on Citizens' Rights in the Withdrawal Agreement' (15 January 2020) 2020/2505(RSP).

1946 Basic rights were not the focus of the negotiations. Since the WA does not mention the EU Rights Charter (n 577) it ceased to apply to the UK; therefore critical Frau (n 1903) 58, 64. Yet, this omission is logical as the Charter according to its Art. 51 addressed "institutions and bodies of the Union […] and […] Member States only when they are implementing Union law." Since EU law does not apply anymore to the UK, the Charter is not applicable. An example of the Charter's application in the interim period is provided by *CG v The Department for Communities in Northern Ireland,* C-709/20, 15 July 2021, Reference For a Preliminary Ruling paras. 88-89 (CJEU [GC]).

> "(a) Union citizens *who exercised their right to reside* in the United Kingdom in accordance with Union law before the end of the transition period *and continue* to reside there thereafter;
> (b) United Kingdom nationals *who exercised their right to reside* in a Member State in accordance with Union law before the end of the transition period *and continue* to reside there thereafter;
> (c) Union citizens who *exercised their right as frontier workers* in the United Kingdom in accordance with Union law before the end of the transition period *and continue* to do so thereafter;
> (d) United Kingdom nationals *who exercised their right as frontier workers* in one or more Member States in accordance with Union law before the end of the transition period and *continue to* do so thereafter" [emphasis added].

According to Art. 9 lit. b) of the WA, "'frontier workers' means Union citizens or United Kingdom nationals who pursue an economic activity in accordance with Article 45 or 49 Treaty on the Functioning of the European Union (TFEU) in one or more States in which they do not reside". Persons eligible to protection of their "citizen's" rights after Brexit are thus EU or UK citizens either residing or working in an EU member state or the UK, respectively, at the time of withdrawal. Under specific conditions, their family members and partners with a "durable relationship" were also included, Art. 10 para. 1 lit. (e) and para. 4.[1947] All those individuals were also protected from discrimination in the future on grounds of nationality, Art. 12 WA. However, crucially, to have these rights secured, the right must have been *made use of*, i.e. the right to reside or work must have been "exercised" *and continue* to be exercised. The persistence of rights was therefore predicated upon the distinction between rights already exercised and mere "potential" rights people may have been entitled to but that had never been used. That distinction arose from a conscious decision not to protect all rights but to "provide *reciprocal* protection for Union and UK citizens, to enable the effective exercise of rights derived from Union law and *based on*

1947 In general on both categories Michal Meduna, 'Part Two. Citizens' Rights: Title I. General Provisions' in: *Liefländer/Kellerbauer et al. UK-EU Withdrawal Agreement* (n 1895) paras. 3.14-3.22. On the reduced scope of family members Michael Dougan, 'So long, Farewell, Auf Wiedersehen, Goodbye: The UK'S Withdrawal Package' (2020), 57(3) CML Rev 631 671. Cut-off-date for the existence of such relationships is always the end of the transition period, cf. *Citizens' Rights After Brexit* (n 1940) 6.

past life choices, where those citizens have *exercised* free movement rights by the specified date."[1948] Once a right ceases to be exercised, it will come to an end as well.

After setting that course, the WA proceeds to enlist the particular rights to be secured and preconditions for their protection. Art. 13 WA is concerned with "residence rights", which are secured "under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU"[1949] and several provisions of the "Citizens' Rights Directive" 2004/38/EC[1950]. The introduction of further limitations is explicitly forbidden, and the respective state has no discretion in applying these principles unless in favor of the person concerned, Art. 13 para. 4 WA. Persons residing in a state in accordance with these provisions were to "have the right to leave the host State and the right to enter it", again pursuant to Directive 2004/38/EC, Art. 14 para. 1 WA. As before, under EU law (especially Directive 2004/38/EC), after five years of legal residence in a country, a person acquired the right to permanent residence and "[p]eriods of legal residence or work in accordance with Union law before and after the end of the transition period shall be included in the calculation of the qualifying period necessary for acquisition of the right of permanent residence", Art. 15 para. 1 WA. Finally "[o]nce acquired, the right of permanent residence shall be lost only through absence from the host State for a period exceeding 5 consecutive years", para. 3. Individuals who did not complete the five years before the end of the transition period were to "have the right to acquire the right to reside permanently under the conditions set out in Article 15 of this Agreement once they have completed the necessary periods of residence", Art. 16. Similarly, Art. 24 para. 1 preserves the rights of workers in accordance with the limitations already contained in EU law such as Art. 45 paras. 3 and 4 TFEU. Also self-employed persons

1948 European Commission, 'Joint Report From the Negotiators of the European Union and the United Kingdom Government on Progress During Phase 1 of Negotiations Under Article 50 TEU on the United Kingdom's Orderly Withdrawal From the European Union' (8 December 2017) TF50 (2017) 19 para. 6 <https://commission.europa.eu/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1_en>. On the evolution of the phrase More, 'From Union Citizen to Third-Country National' (n 1903) 462–463.

1949 Special provisions for family members are contained in Art. 13 paras. 2 and 3 WA (n 1874).

1950 Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States (29 April 2004) OJ L 158, 77 (EC).

retain their rights under Art. 49 and 55 TFEU, Art. 25 WA. Moreover, the WA secured already recognized professional qualifications, Art. 27, and EU law was to be applied to ongoing recognition procedures, Art. 28. What is more, all those rights, once acquired, were protected for the holder's lifetime "unless they cease[d] to meet the conditions set out in those Titles", Art. 39.

Rights with a link to property protection had a special status. In Title III of Part Two on Citizens' Rights, on the Coordination of Social Security Systems, Art. 30 - 31 WA stipulate that entitlements under social security schemes for persons involved in cross-border activities at the time of the withdrawal were to be kept, in some cases even for third-party nationals or stateless persons.[1951] In contradistinction, Art. 32 did not provide for the continued application of the respective provisions but secured that aggregated times paid into social security systems were still recognized after Brexit and could be exported to national systems.[1952] Again, those rights could even be claimed by third-party-nationals, Art. 33 WA.[1953] Hence, the rights were, in essence, protected in the same way as before the withdrawal.[1954] Intellectual property rights *already recognized* ("registered or granted") under EU law survived the withdrawal, and the UK "without any re-examination" had to grant a "comparable registered and enforceable" right under its own law, Art. 54 WA. Thus, those rights were "de-personalized", i.e. de-coupled from the nationality of their holder. They were not included into the life-long protection scheme of Art. 39 WA,[1955] which is only natural as intellectual property, "a defined set of the intangible products of creative activity [...] usually referred to by the form of 'right' granted to the holder",[1956] is regularly protected only for a certain amount of time.

1951 Daniel Denman, 'Title III: Coordination of Social Systems' in: *Liefländer/Kellerbauer et al. UK-EU Withdrawal Agreement* (n 1895) paras. 3.119-3.130.

1952 ibid paras. 3.131-3.140.

1953 ibid para. 3.142.

1954 For more information on the very detailed but rather generous rules with respect to social security entitlements Herwig Verschueren, 'The Complex Social Security Provisions of the Brexit Withdrawal Agreement, to be Implemented for Decades' (2021), 23(1) EJSS 7; in general *Citizens' Rights After Brexit* (n 1940) 7/8; Catherine Barnard and Emilija Leinarte, 'Citizens' Rights' in Federico Fabbrini (ed), *The Law & Politics of Brexit: Volume II: The Withdrawal Agreement* (OUP 2020) 107 116.

1955 For social security rights Marie Simonsen, 'Title IV: Other Provisions' in: *Liefländer/Kellerbauer et al. UK-EU Withdrawal Agreement* (n 1895) para. 3.147.

1956 Frederick M Abbott, 'Intellectual Property, International Protection (2022)' in: *MPEPIL* (n 2) paras. 2-3.

Finally, the WA provided that the CJEU should "continue to have jurisdiction in any proceedings brought by or against the United Kingdom before the end of the transition period", Art. 86 para. 1 WA. The same held true for administrative procedures concerning "compliance with Union law by the United Kingdom, or by natural or legal persons residing or established in the United Kingdom" initiated before the end of the transition period, Art. 92 para. 1 lit (a) WA. Because individuals only have limited capability to bring actions before the CJEU on their own,[1957] that provision is only marginally relevant for them.

In addition, the two Protocols on Northern Ireland and Gibraltar explicitly emphasized the protection of acquired rights, although less concretely. Art. 2 para. 1 of the North Ireland Protocol required the UK to "ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union".[1958] Art. 1 para. 1 of the Protocol on Gibraltar stipulated in even vaguer language that "[t]he Kingdom of Spain [...] and the United Kingdom in respect of Gibraltar shall closely cooperate with a view to preparing and underpinning the effective implementation of Part Two of the Withdrawal Agreement on citizens' rights, which fully applies, inter alia, to frontier workers residing in Gibraltar or in Spain".

cc) What is Lost?

However, under the regime of the WA, rights or positions have been "lost" after Brexit - essentially most rights that are not explicitly safeguarded in the text of the WA.[1959] First, as already mentioned, UK nationals (as long as they did not hold a second nationality of another EU member state) were

1957 *Cf.* Art. 263 Abs. 4 and Art. 268 TFEU; *see* Oppermann, Classen and Nettesheim (n 1870) § 13 paras. 10, 56-67; Anthony Arnull, 'Judicial Review in the European Union' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015).

1958 For more information Dagmar Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' in Federico Fabbrini (ed), *The Law & Politics of Brexit: Volume III* (OUP 2021) 49 61–62.

1959 *Citizens' Rights After Brexit* (n 1940); Smismans (n 1915), 443. Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' (n 1957) 55 describes the protection of individual rights as "fractional".

not to enjoy the status of EU citizens anymore. Hence, associated rights such as the right to vote or stand for EU elections or municipal elections in another member state,[1960] or diplomatic protection, Art. 20 para. 2 TFEU, were to be foregone, except under special (bilateral) agreement.[1961]

In a case before the CJEU, *EP v. Préfet du Gers and Institut National de la Statistique and des Études Économiques*[1962], involving the loss of election rights by a UK national living in France for more than 15 years at the time but not having acquired French citizenship, the referring French court asked the CJEU several poignant questions. First of all whether the loss of union citizenship and the loss of voting rights by UK nationals having made use of their freedom to move and reside in another EU member state was a necessary consequence of the withdrawal according to Art. 50 TEU or whether the WA secured such rights. And if such rights were not secured, whether the WA was considered to be invalid because of lack of legal protection that would violate basic principles of the EU legal order. Such argumentation is based on the claim mentioned above, that it was upon the EU to secure rights of UK citizens against the state of their nationality. Advocate General *Collins* had outrightly denied UK nationals any persisting right to vote in another member state under EU law after Brexit:[1963] He opened by underlining that it was an explicit choice of the EU member states to make Union citizenship dependent on being a national

1960 The UK guaranteed voting rights to all persons who held and continued to hold lawful immigration status by the end of the interim period. For all other persons the UK granted these rights on the basis of reciprocal agreement which had been concluded e.g. with Spain, Portugal, Luxembourg and Poland, see UK Government, 'Policy Paper: Local Voting Rights for EU Citizens Living in the UK" (17 June 2021) <https://www.gov.uk/government/publications/local-voting-rights-for-eu-citizens-living-in-the-uk/local-voting-rights-for-eu-citizens-living-in-the-uk>. There are several EU Members States who accord permanently resident non-nationals the active and sometimes even passive right to vote in local elections, see for an overview *Citizens' Rights After Brexit* (n 1940) 16–17.

1961 Dougan (n 1946), 673. The right to petition the European Parliament or to raise complaints before the European Ombudsman are not dependent on EU citizenship, but all persons resident or having their registered office in a member state are entitled, Art. 227, 228 TFEU, cf. More, 'From Union Citizen to Third-Country National' (n 1903) 471/472.

1962 *EP v. Préfet du Gers and Institut National de la Statistique et des Études Économiques (INSEE),* C-673/20, 9 June 2022, Reference For a Preliminary Ruling (CJEU).

1963 *Préfet du Gers and Institut National de la Statistique and des Études Économiques - Opinion,* C-673/20, 24 February 2022 (Advocate General Collins); see also CJEU, *Press Release No 39/22: Advocate General's Opinion in Case C-673/20* (2022).

of a member state and not to give the EU competence in this respect.[1964] It was the sovereign choice of the UK to leave the EU and consequently to bereave its nationals of Union citizenship and associated voting rights.[1965] In his view, there was no duty upon the EU to negotiate in favor of British citizens:

> "Since the United Kingdom's sovereign choice to leave the European Union amounts to a rejection of the principles underlying the European Union, and the Withdrawal Agreement is an agreement between the European Union and the United Kingdom to facilitate the latter's orderly withdrawal from the former, the European Union was in no position to insist that the United Kingdom fully adhere to any of the European Union's founding principles. *Nor could the European Union secure rights that, in any event, it was not bound to assert on behalf of persons who are nationals of a State that has left the European Union and who are therefore no longer Union citizens*."[1966]

Since the goal of securing voting rights abroad for UK nationals was not pursued by the UK government,[1967] *Collins* is very clear who the claimant should complain to:

> "She can address any issue that she may have concerning her status or rights as a British national to the United Kingdom authorities. […] These observations apply equally to [her] attempts to rely upon legitimate expectations against the European Union and/or the French authorities. Any breach of legitimate expectations that [she] may wish to ventilate concerning her status as a Union citizen is to be addressed to the United Kingdom, which has withdrawn from the European Union, and not to either the French authorities or to the European Union."[1968]

Finally, since UK citizens, as third-country nationals, were not comparable to EU citizens, *Collins* did not consider that there was discrimination on the grounds of nationality.[1969] What is remarkable is that *Collins* maintained that the loss of "political" rights of UK nationals associated with EU citizen-

1964 *Opinion AG Collins* (n 1962) paras. 22, 75.
1965 ibid paras. 28, 42, 70.
1966 ibid para. 75 [emphasis added].
1967 ibid para. 73.
1968 ibid paras. 43-44.
1969 ibid para. 51.

ship was a direct consequence of withdrawal and that there were no strings attached on the UK under EU law to cut back such rights. Furthermore, he explicitly rejected any kind of "fiduciary" duty of the EU to protect the position of UK nationals under EU law. Hence, he espoused a traditional view of European law as a type of international law in which an individual's fate is dependent solely on his or her home state, at least with respect to such "political" rights as voting rights. The CJEU in its recent judgment from 9 June 2022[1970] aligned with his view and held that

> "nationals of that State who exercised their right to reside in a Member State before the end of the transition period, no longer enjoy the status of citizen of the Union, nor, more specifically, by virtue of Article 20(2)(b) TFEU and Article 22 TFEU, the right to vote and to stand as a candidate in municipal elections in their Member State of residence"[1971].

That finding was considered "the automatic result" of the UK's sovereign decision to withdraw from the EU treaties.[1972] It underlined that the purpose of the WA was "to ensure *mutual* protection for citizens of the Union and for United Kingdom nationals who exercised their respective rights of free movement before the end of the transition period."[1973] It was not the obligation of the EU to secure such rights[1974] as "the EU institutions enjoy broad discretion in policy decisions in the conduct of external relations […]. In the exercise of their prerogatives in that area, those institutions may enter into international agreements based, inter alia, on the principle of *reciprocity* and *mutual* advantages."[1975] Besides insisting that that the mentioned rights would not persist after Brexit as they were intrinsically coupled to EU citizenship, the court also clarified that the EU was under no fiduciary duty to act in favor of UK nationals.

Additionally, mere "inactive" rights granted by the EU legal order but not exercised by a person were not to be kept. All EU or British citizens

1970 *CJEU Préfet du Gers (n 1961).*
1971 ibid para. 83.
1972 ibid para. 62. The CJEU distinguished this case explicitly from "specific situations falling within the scope of EU law, where a Member State had withdrawn its nationality from individual persons" and in which there was an "obligation to carry out an individual examination of the proportionality of the consequences of the loss of Union citizenship concerned".
1973 ibid para. 72 [emphasis added].
1974 ibid para. 98.
1975 ibid para. 99 [emphasis added].

who had not taken residence or worked as frontier workers by the end of the transition period could not avail themselves of the generous provisions under the WA (nor could their relatives and partners) but were to be subject to British domestic immigration regulations (EU citizens) or be treated as nationals of a third state (UK citizens). That stipulation entailed that British nationals lawfully residing in another EU member state would lose their right to move across Europe in countries other than their country of residence or country of work.[1976] Additionally, the "right to return" after five years of absence from the country of residence was not secured during the negotiations, cf. Art. 15 para. 3 WA.[1977] Furthermore, the WA did not cover persons offering trans-national services while residing and working in the same country, i.e. situations in which only the service crossed the border.[1978] As summarized by *More*,

> "[t]he principal rights not protected by the Agreement for Britons in the UK are their EU rights to earn a living through employment or self-employment in another Member State, provide cross-border services ('market citizenship rights') and move freely across EU borders."[1979]

Furthermore, after 31 December 2020, criminal conduct by persons residing or working in the UK were to no longer be judged according to European rules but according to national legislation, Art. 20 para. 2 of the WA. Applicants for resident status were potentially to have to undergo thorough security checks, which could lead to acquired rights of residence or movement being restricted or to deportation measures - a serious drawback of withdrawal.[1980] Additionally, CJEU case law providing for several family reunification rights was no longer to be applicable to UK nationals.[1981]

1976 *Citizens' Rights After Brexit* (n 1940) 5, 7; Barnard and Leinarte, 'Citizens' Rights' (n 1953) 115; Dougan (n 1946), 673–674 "golden cage".

1977 Cf. Smismans (n 1915), 447 and Peers (n 1903), 159 who argue that before Brexit such right to return could have been held under free movement rights; cp. also Dougan (n 1946), 669–670.

1978 More, 'From Union Citizen to Third-Country National' (n 1903) 470; Meduna, 'Part Two. Citizens' Rights' (n 1946) para. 3.43; Marie Simonsen, 'Chapters 2 and 3: Rights of Workers and Self-Employed Persons, and Professional Qualifications' in: *Liefländer/Kellerbauer et al. UK-EU Withdrawal Agreement* (n 1895) para. 3.91.

1979 More, 'From Union Citizen to Third-Country National' (n 1903) 467 (also on earlier drafts of the agreement).

1980 Barnard and Leinarte, 'Citizens' Rights' (n 1953) 115, 116; cf. Dougan (n 1946), 671.

1981 *Citizens' Rights After Brexit* (n 1940) 6; Smismans (n 1915), 443; Dougan (n 1946), 672–673; More, 'From Union Citizen to Third-Country National' (n 1903) 469.

dd) The Actual Implementation

As mentioned, one of the main problems with rights emanating from international law is their fragile status under national law. Each state can decide on how it wants to incorporate its international duties into its national corpus of law. An additional serious disadvantage of domestic non-implementation lies in the fact that it regularly leads to individuals lacking any administrative or judicial redress in case of a violation of their rights. The UK adheres to a dualist approach, finding international law only applicable domestically once incorporated by national legislation.[1982] In 2018, it in fact repealed its domestic legislation implementing EU law, the ECA, as of exit day.[1983] Even if simultaneously incorporating almost all EU law in force and directly applicable at the time of the withdrawal into its national legal order, and thus plainly upholding existing rights derived from EU law, that course of action naturally left the UK free to change the law at any time by a simple act of parliament.[1984]

Beyond that, the interpretation of certain rules implementing the WA can vary considerably. As the WA provided for life-long protection of rights, their effective domestic enforcement in the UK became an issue and was explicitly dealt with in the WA. The "general provision" Art. 4 stipulates that

> "(1) The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.
> Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
> (2) The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative

But see for the UK's domestic decision to maintain these rights Bernard (n 1903), 324 and More, 'From Union Citizen to Third-Country National' (n 1903) 469.

1982 Peers (n 1903), 135; *UK Supreme Court Miller* (n 1898) para. 55. On the background and evolution of this thesis Roger Masterman, 'Reasserting/Reappraising Dualism' *UK Const L Blog* (7 December 2021) <https://ukconstitutionallaw.org/2021/12/07/roger-masterman-reasserting-reappraising-dualism/>.

1983 European Union (Withdrawal) Act 2018, UK Public General Acts 2018 c. 16. However, the effect of the ECA was "saved" by the European Union (Withdrawal Agreement) Act 2020, UK Public General Acts 2020 c. 1, for the time of the transition period, i.e. until the end of 2020.

1984 Also Eeckhout and Frantziou (n 1904), 725/726.

authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.
(3) The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.
(4) The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.
(5) In the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period."

This acknowledgment of the limits of force of international obligations is remarkable. The provision recognizes not only the need for domestic implementation to make the WA enforceable by individuals but also the utility of pertinent interpretative rules. Nevertheless, Art. 4 WA only begs the question as, naturally, the provision is also not directly applicable in the UK, but, like the other WA contents, was formally implemented by statutory law[1985]. Moreover, Art. 4 para. 2 WA is somewhat vague, leaving much discretion for implementation, which can lead to a reduced effectiveness of rights.[1986]

After Brexit, the European Commission was empowered to monitor the implementation of the WA in the Union member states but no longer in the UK. Therefore, the WA provides for several exceptional "new" enforcement or monitoring measures with respect to the rights under Part II. For example, while the CEJU's jurisdiction (for new applications) in principle ended with the withdrawal from the TEU, this was different when it came to "citizens' rights" under Part II of the WA. Art. 158 para. 1 of the WA allows UK courts to request a preliminary ruling from the CJEU when "a question is raised concerning the interpretation of Part Two of this Agreement" and the case "commenced at first instance within 8 years from the end of

1985 Section 5 of the European Union (Withdrawal Agreement) Act (2020) UK Public General Acts 2020 c. 1 (UK).

1986 Critical on the implementation the WA provisions therefore Smismans (n 1915), 457–465; fearing non-implementation Peers (n 1903), 144.

the transition period".[1987] Yet, arguably, UK courts are not obliged to refer their cases to the CJEU.[1988] Furthermore, Art. 164 WA established a "Joint Committee" (JC), consisting of EU and UK representatives in charge of monitoring the implementation and application of the WA. Within the JC, a "Committee on Citizens' Rights" has been established, Art. 165 para. 1 lit. a) WA. While the JC can, Art. 166 paras. 1, 2, issue binding decisions to the EU and the UK, decisions that are of the same force as those of the WA itself, the action, can, para. 3, only take place following the mutual consent of EU and UK. That requirement of mutual consent represents a limiting factor when it comes to condemning possible failures in implementing the WA.

Finally, Art. 159 para. 1 WA established an "independent authority". The body was charged with monitoring the implementation and application of Part Two of the WA *within* the UK. It could - like the European Commission - conduct inquiries and receive complaints from Union citizens and their families and bring legal actions before UK courts. The independent monitoring authority (IMA) was to report "on the implementation and application of Part Two in the Union and in the United Kingdom, respectively" to the special committee of the JC, Art. 159 para. 2. Yet, concerns about the IMA's effectivity and independence were raised, as it was dependent on the funding and personnel provided by the UK and could be abolished by the JC after eight years, Art. 159 para. 3.[1989] In sum, the WA did not provide for any capability of individuals to bring claims and therefore to control the correct application of Part II of the WA before a supra- or international court or institution after the interim period.[1990] Effective enforcement of citizens' rights under the WA is hence limited.[1991]

1987 Restrictions are in place for cases concerning Art. 18 and 19 WA.

1988 Barnard and Leinarte, 'Citizens' Rights' (n 1953) 123; Verschueren (n 1953), 19; Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' (n 1957) 60.

1989 Barnard and Leinarte, 'Citizens' Rights' (n 1953) 108, 127–129; Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' (n 1957) 60; European Parliament, 'Resolution on Implementing and Monitoring the Provisions on Citizens' Rights in the Withdrawal Agreement' (n 1944) para. 12.

1990 Note that the information leaflet of the European Commission, 'Enforcement of Individual Rights of United Kingdom Nationals Under Part Two of the Withdrawal Agreement' <https://commission.europa.eu/system/files/2021-08/enforcement_of_individual_rights_under_the_withdrawal_agreement_en.pdf> does not mention any judicial avenue apart from UK courts.

1991 Also Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' (n 1957) 60.

In fact, several complaints have been made about the UK's treatment of EU citizens after Brexit.[1992] Most of the critique related to implementing the WA has been directed against the UK's so-called "EU settlement scheme" (EUSS). Art. 18 WA left EU states and the UK a free choice on whether to implement a declaratory or constitutive registration system for persons eligible under the WA.[1993] The UK implemented the former, requiring EU citizens to apply for "settled" or "pre-settled" status, originally a domestic immigration status, if they wanted to stay and enjoy their previous rights in the country.[1994] Even before its start, serious concerns were uttered that the EUSS would be implemented in a discriminatory manner and in a way that would eventually lead to many people losing their residence rights in the UK, thereby not adhering to the spirit of the WA.[1995] In December 2022, the IMA, in fact, sucessfully challenged the legality of the particular implementation of the EUSS under the WA.[1996] The major bone

1992 Daniel Boffey, 'EU to Ask UK to Respect Citizens' Rights After Mistreatment Scandals' *The Guardian* (19 May 2021) <https://www.theguardian.com/world/2021/may/19/eu-to-ask-uk-to-respect-citizens-rights-after-mistreatment-scandals>. In fact, already during the transition period in 2020, the European Commission had opened infringement proceedings against the UK for failure to comply with provisions of the
WA and sent a letter of formal notice to the UK, European Commission, 'Commission Opens Infringement Proceedings Against the United Kingdom For Failure to Comply With EU Rules on Free Movement' (2020) <https://ec.europa.eu/commission/presscorner/detail/en/inf_20_859>; Laurenz Gehrke, 'EU Takes Legal Action Against UK on Free Movement: Brussels Gives Britain Four Months to Comply With Rules' *Politico* (14 May 2020) <https://www.politico.eu/article/eu-takes-action-against-uk-on-free-movement/>; C. J McKinney, 'European Commission Accuses UK Government of Violating EU Citizens' Rights' (14 May 2020) <https://www.freemovement.org.uk/european-commission-accuses-uk-government-of-violating-eu-citizens-rights/>.

1993 Meduna, 'Part Two. Citizens' Rights' (n 1946) para. 3.62 describes Art. 18 as „the single biggest departure from Union law on free movement of citizens" in the WA. For an overview of the relevant regulations in the EU member states see *Citizens' Rights After Brexit* (n 1940) 10–14.

1994 ibid 8–10.

1995 Smismans (n 1915), 449–451, Frau (n 1903) 75. Concerned about the problems with respect to vulnerable people Barnard and Leinarte, 'Citizens' Rights' (n 1953) 110–112; *Citizens' Rights After Brexit* (n 1940) 9–10 and European Parliament, 'Resolution on Implementing and Monitoring the Provisions on Citizens' Rights in the Withdrawal Agreement' (n 1944) paras. 8-11. On implementation cf. also More, 'From Union Citizen to Third-Country National' (n 1903) 467–468.

1996 IMA, 'Judicial Review Claim Issued by IMA' (14 December 2021) <https://ima-citizensrights.org.uk/news_events/judicial-review-claim-issued-by-ima/>; *The In-*

of contention was that the Secretary of State required those qualifying EU and EEA EFTA citizens who successfully applied for pre-settled status to make a second application. If they failed to do so they were considered unlawful residents and were "exposed to serious consequences affecting their right to live, work and access social security support" in the UK.[1997] While a comprehensive discussion of the question would go beyond the scope of this chapter, the introduction of such further formal requirements for the acquisition of rights secured under the WA is a prime example of the mentioned "implementation gap". Already in light of the ECtHR case law in *Kurić*,[1998] such practice seemed assailable.

3) Interim Conclusions - Theory Tested Against the Facts

The Brexit process is a peculiar, complicated, multi-layered scenario influenced by obligations under EU law, human rights law, and general international law as well as - and by no means least - by political considerations. Even if not constituting a proper succession scenario, the process of withdrawal of the UK from the EU is a unique and, for the purposes of our analysis, tremendously significant case - not only because the Brexit is the most recent example of a change of sovereign rights with respect to a certain territory but also because the change has led to a remarkable loss of deeply entrenched and forceful individual rights hammered out over decades by national and EU courts. Those rights were not only protected on the international plane but purported to be directly applicable within the member states. The notion of acquired rights featured prominently in the debate. Probably, it was not despite but exactly because of these extraordinary, "new", circumstances that the doctrine of acquired rights was re-discovered.

The WA means that an international instrument exists in which both parties articulated their opinions with respect to the consequences of a withdrawal. It represents a considered, long-negotiated agreement between the EU as a supra-national organization, one of the most important and

dependent Monitoring Authority for the Citizen's Rights Agreements v. Secretary of State for the Home Department (The European Commission and The3Million Limited intervening), Case No: CO/4193/2021, Judgment of 21 December 2022, [2022] EWHC 3274 (Admin) (UK High Court of Justice).

1997 ibid. paras. 9-12, 74-75.

1998 *ECtHR Kurić and Others* (n 1364).

powerful international economic and political players, and the UK as one of its most important and economically as well as politically strongest members. Both parties possess highly developed administrative and judicial systems. Of course, caution is warranted: The WA is the result of a political bargaining process, not a statement of the law - it can therefore not be taken as a plain evidence of *opinio iuris sive necessitatis*. However, the conclusion of the WA can be seen as an act of state practice that can contribute to the evolution of an already existing or the emergence of a new rule of law. Additionally, the provisions with respect to citizens' rights were not particularly disputed between the parties. In fact, Part II of the Agreement was drafted at an early stage in the process and apparently has not been subject to major revisions since March 2018.[1999] The enormous importance attached to individual rights in the agreement is striking, all the more so as the rights secured under the WA can, by no means, be seen as customary rights. They are special rights applicable in principle only to EU citizens and therefore only within the treaty regime of the TEU.

The scheme of securement of rights shows a remarkable resemblance to the traditional acquired rights doctrine. If the starting point was from a "fundamental rights" or "human rights perspective", positioning the individual center stage, then rights acquired under the EU legal order would have been given an "untouchable" status. That status would have meant securing the pure "right" to free movement, to residence or work within a state to every person eligible for it before. That position is not what the WA espouses - its default option is the loss of individual rights after Brexit. Even a highly integrated and sophisticated "supra-national" legal order such as that of the EU does not transcend its own boundaries. Rights once conferred can be taken away. On the other hand, starting from a pure inter-state perspective, it would have been possible to do away with all of the individual rights formerly conferred by the EU order as long as that removal was done formally correct. As mentioned, Art. 50 TEU explicitly provides for the possibility of leaving the Union and consciously does not

1999 Cf. Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (19 March 2018) https://www.gov.uk/government/publications/draft-withdrawal-agreement-19-march-2018.

attach any material prerequisites to a withdrawal.[2000] Yet, such complete negation of all individual rights was also not the solution chosen in the WA.

The WA opted for a middle way. It protected rights that had been "exercised", i.e. made use of. That path comes close to the differentiation chosen in Art. 70 para. 1 lit. b) VCLT between "executed" and "executory" rights. The distinction protects not mere theoretical entitlements but factual "existing" situations - reminiscent of what *O'Connell* proposed more than 60 years ago. The purpose, or at least the result, of the distinction is a far-reaching upholding not of the *legal* situation but of the *factual status quo* created through the use of the right. Additionally, from a personal perspective, what is protected are situations in which a legitimate expectation in the rights' persistence emerges. The WA drafters explicitly meant to protect "life-choices" of persons, i.e. situations in which an individual has a legitimate interest in the persistence of the situation, such as when he or she chose to permanently reside in an EU country.

Several authors have detected the protection of legitimate expectations as one of the bases of the WA.[2001] Therefore, the right to free movement was not protected after Brexit as it was not predicated upon the expectation of being able to exercise it on a continuous basis. That legitimization might also be the reason why the possibility to offer trans-boundary services was not secured. In such cases, it is the legal environment and not the factual one that changes. However, the belief in the persistence of a good market situation or mere chances of success are not protected. Finally, to have given EU citizenship to British nationals as third-country nationals would have meant to fundamentally change the citizenship's basis and content. Essentially, it would have meant giving more to British citizens than they had before Brexit, when they could lose EU citizenship by loss of nationality. That right is not what the theory of acquired rights asks for.

2000 Eeckhout and Frantziou (n 1904), 706, 718; Kellerbauer, 'Art. 50 TEU' (n 1895) para. 1.08; cf. *CJEU Wightman* (n 1878) para. 50.

2001 Cf. Forcada Barona (n 1903), 234; Eeckhout and Frantziou (n 1904), 726–727; Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' (n 1957) 49; Smismans (n 1915), 447/448; Mindus (n 1894) 106; against *Fernández/López Garrido Brexit and Acquired Rights* (n 427) 45 stating (without further explanation) that acquired rights would be "stronger". Cp. Burri T, 'Why leaving the EU would be complicated for the UK' *Euractiv* (17 June 2016) https://www.euractiv.com/section/uk-europe/opinion/why-leaving-the-eu-would-be-complicated-for-the-uk/ referring to the "structural guarantee" of Union law that can only be changed by the consent of all EU members.

On the other hand, what becomes clear is that the WA's content extends considerably beyond the scope of the traditional doctrine of acquired rights. First of all, it protects more than "property rights" or "pecuniary rights". It protects a panoply of rights the value of which is not completely measurable in money but which have a deeply moral value, such as rights to residence. As property legislation is still within the competence of the member states, EU law does not have as much to say on the issue. However, intellectual property rights and cross-border pension rights, i.e. rights with a special link to property, are secured under the WA, even without any specific nationality requirement. Furthermore, the WA is particularly generous in that it accords life-long protection to most of the rights upheld (Art. 39). Arguably, that protection would not have been required by the original doctrine of acquired rights, which does not protect the rights in a stronger fashion than before the change in sovereignty.[2002] It is thus questionable whether a "transmission period" comparable to that foreseen by Art. 126 WA would not have sufficed under general international law.[2003]

A further extraordinary feature of the WA constitutes the recognition of its limited influence on the UK national sphere. It therefore openly purports to accord effective and actionable rights to individuals,[2004] and

2002 Therefore overstretching the doctrine of acquired rights e.g. Forcada Barona (n 1903), 240 with a quote to Jean-Claude Piris, 'Should the UK Withdraw From the EU: Legal Aspects and Effects of Possible Options' [2015] Foundation Robert Schuman - Policy Paper, 10 "I would not think that one could build a new legal theory, according to which 'acquired rights' would remain valid for millions of individuals […] who, despite having lost their EU citizenship, would nevertheless keep its advantages for ever".

2003 Before the conclusion of the WA the European Commission initiated a process of so called "Brexit-Preparedness" with all the remaining 27 EU member states in order to prepare for a no-deal scenario. When these member states were asked for their domestic regulation of residence rights for former EU nationals, the picture varied across all countries, but only very few of them intended to grant indefinite residence rights to UK nationals without a new application under national law, European Commission, 'Citizens' rights: EU27 Member States Measures on Residence Rights of Legally Residing UK Nationals and Social Security Entitlements Related to the UK in Case of No Deal' <https://wayback.archive-it.org/11980/20201223032410/https://ec.europa.eu/info/brexit/brexit-preparedness/citizens-rights_en>. That reaction is notable and can be representative evidence of state practice.

2004 In comparison, Art 5 para. 1 of the following Trade and Cooperation Agreement (30 April 2021) OJ L 149/10 (2021) explicitly maintains that "nothing in this Agreement […] shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international

contains explicit requirements for the UK to implement the agreement and in particular its provisions on citizens' rights. Amongst them is the establishment of an independent authority to monitor implementation accessible by individuals - a quite extraordinary feature for an international treaty not protecting human rights.

Apart from those considerable innovations, the WA shows features of a traditional agreement under international law. First, it is largely based on the principle of reciprocity.[2005] The introduction of that basis was also due to the mode of negotiations leading to the WA. While the EU negotiated in favor of the EU citizens in the UK, the UK tried to secure the position of its citizens in the EU.[2006] However, UK citizens are not equally protected and, in fact, lost more rights than the remaining EU citizens.[2007] Thus, second, nationality still played a non-negligible role in the process, the exception being the treatment of persons in social security schemes.[2008] Hence, the WA, and the negotiating parties in general, despite their highfalutin statements, did not completely depart from a state-centric point of view. Furthermore, it has yet to be determined how effective the enforcement of the WA through the IMA or British courts will be. Apart from those avenues, individuals' opportunities for direct redress are limited.

C) Conclusions

What becomes clear from the foregoing overview is that a country can tackle the issue of individual rights acquired under a predecessor's domestic legal order in a myriad of ways, and while there are similarities, no state has yet acted in exactly the same way as others. The story of state succession since 1990 has brought up a panoply of regulations and views on the topic,

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law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties." According to para. 2 "A Party shall not provide for a right of action under its law against the other Party on the ground that the other Party has acted in breach of this Agreement or any supplementing agreement."

2005 Cf. More, 'From Union Citizen to Third-Country National' (n 1903) 463; Forcada Barona (n 1903), 233, 240. Already suggesting a solution on basis of reciprocity before the WA Piris (n 2001), 10.

2006 More, 'From Union Citizen to Third-Country National' (n 1903) 480; Bernard (n 1903), 319, 323.

2007 More, 'From Union Citizen to Third-Country National' (n 1903) 480–481; Bernard (n 1903).

2008 ibid 311–312.

necessitated by the different situations and political backgrounds. While some of the changes were introduced by an amicable and friendly exchange of views, often accompanied by an international agreement setting out the basic consensus points, others were the result of hostilities and violent and disruptive. Regardless of such differences, however, it seems fair to say that, in all cases, the shift in sovereignty constituted an eminent momentum for the self-perception of the respective states. No state succession came out of the "nowhere". In an international system in which state continuity was and is one of the cornerstones and guarantors of stability and peace, such shifts rarely take place unless crucial change seems to be the best or only option. Hence, the legal act of succession has always been preceded by profound political changes within a state. It therefore necessarily entailed the questioning of the foregoing legal order and almost intrinsically asked for new solutions to old problems. It is the profoundness of those changes going to the roots of the identity of the respective state that, in relevant legal proceedings, has caused constitutional and international courts to accord broad discretion to a new state in ordering its new inner system, even if, in some cases, the re-ordering involved abrogating positions held under a former legal order.

On the other hand, benches or whole courts were regularly split on these issues.[2009] The international community was often divided on how to assess the situation, too. In many cases, legal classification of a factual situation has taken time, often with extensive debate, and sometimes finally made only years after the events or is still controversial. Different perceptions of the facts exist and often the affected state authorities neither acted nor pronounced their stance on the issue unambiguously. Additionally, the categories of succession are not well-defined, the whole field not conventionally regulated. Regularly, it can be doubted whether the definition of a certain situation was made according to objective criteria or because an attempt was being made to achieve certain political ends. Added to the wide variety of solutions chosen, this lack of definition makes it difficult to present an obvious *leitmotif* in the collected practice. Apparent similarities have to be

2009 See *ECtHR [GC] Jahn and others* (n 1069) para. 117 overturning the previous judgment *ECtHR Jahn and Others* (n 1211). *ECtHR Savickis and Others* (n 1277) overturning with a ten to seven vote its own former case-law in *ECtHR Andrejeva* (n 1279); *ECtHR [GC] Blečić v. Croatia* (n 1398) (six to eleven votes split bench); *ECtHR Ališić* (n 1466) and *ECtHR Ališić - Dissenting Opinion Nußberger* (n 1477). See also on disputes between different courts of the same state the "Slovak Pension Cases" before the Czech courts, *supra*, section B) V) 3).

approached cautiously; striking differences should not be overemphasized. Nevertheless, common points or general paths can be discerned. Similarities might become more significant or credible when the disparity in the states surveyed in this book, in terms of geographical locations, social and political systems, ethnic compositions, economic strengths etc., is taken into account.

I) Practice with Regard to the Domestic Legal Order in General

As early as 1965, *Zemanek* had

> "submitted that no evidence as to a rule of international law continuing the law in force independently of the will of the new sovereign has come to light. Quite the contrary is the case. The quasi-uniform practice of providing for continuance in legislation tends to support the contention that the law must be reenacted to continue."[2010]

From the cases analyzed in this book, such a conclusion can also be seconded today. Almost all states covered included explicit provisions in either their new constitution or their respective laws, some concluded international treaties explicitly regulating their attitudes towards a predecessor's law. The regulation was even performed in cases of continuity, i.e. where the permanence of the legal system would have been a matter of course. Eritrea is the only state for which no explicit provision dealing with the fate of the former legal order on its territory could be detected. Furthermore, all states explicitly legislating in favor of the persistence of a predecessor's domestic legal order had some reservations about the continuity, generally the law had to conform to any new constitution, sometimes even to a whole new domestic legal order. While those caveats are clear evidence that states did not consider themselves to be bound by former law *against* their will, they do not conclusively answer the question whether approval by the new sovereign was declaratory or constitutive for the persistence of domestic

2010 Zemanek (n 38), 281; cf. also Crawford *Brownlie's Principles of Public International Law* (n 3) 429; Epping, '§7. Der Staat als die „Normalperson" des Völkerrechts' (n 2) 197/198, para. 240.

law, i.e. what would have happened when no explicit attitude had been adopted or until a decision had been made.[2011]

However, at least for the purposes of our analysis, the dispute is of no relevance. Even if the domestic private order was *not* continued automatically, the discontinuation would not mean that a state did not have to respect the rights acquired, or, perhaps better phrased as, the factual situation established through the exercise of rights, under the former legal order. Contrarily, even an assumption of the permanence of the domestic legal order would not mean that states were not at freedom to curtail or abrogate rights acquired under that legal order.[2012] Additionally, as alluded to, all investigated states in fact continued the domestic legal order, even Eritrea. But if a state at least continues to accept and enforce private rights, tacit approval can also be assumed.

In the period under analysis, at least one of each of the types of succession explained in Chapter II can be discerned. A complete picture of one uniform practice of succession to *international* treaties does not materialize, either in cases of merger or absorption (lowering the number of states worldwide), e.g., Yemen and Germany, or in cases of separation (increasing the number of states worldwide), e.g., Montenegro, Eritrea, Sudan, and Kosovo, or for dismemberments (also increasing the number of states worldwide), e.g., the SU, the SFRY, and the CSFR.

But apparently, when it came to the question of the *domestic* legal order, the practices in cases of separation or dismemberment were considerably more uniform. Basically, all states under analysis developing from the dismemberment of another state, especially in the cases of the SU, the SFRY, and the CSFR, opted for continuity of the domestic legal order. As explained, since many of the successor states had been conveyed jurisdiction with respect to some areas of domestic law even before independence, or dismemberment had taken place amicably, that option seems rather obvious. However, even states that became independent during those "waves"

2011 For continuity (but based on philosophical, instead of legal, considerations) O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 124, 127, 131; for cessions Strupp (n 2) 85, 86; against "automatic" continuity Zemanek (n 38), 278, 281; apparently of the opinion that the very fact of adoption of laws speaks against the continuity of the national legal order Rosenne (n 44), 268 and 279.

2012 This is why O'Connell, although assuming the permanence of the domestic legal order, still argues for a doctrine of acquired rights, i.e. the duty to compensate for expropriations.

of succession and generally adhered to a theory of discontinuity, such as the Baltic states or Georgia, in large parts voluntarily continued the domestic legal order, albeit while (re)adapting their own constitutions and several politically sensitive laws. With respect to separation, South Sudan deliberately transferred domestic law of the Sudan from which it separated into its national legal order. The examples of the Kosovo and Eritrea are both special. In Kosovo, through the interim administration of UNMIK on its territory, the legal order dating from before Serbian control was restituted. In Eritrea, discontinuity was more of a political choice, but the official attitude was neither clear nor stringent, and in many respects, the country still seemed to have at least assumed continuity of the old law until it abrogated it. Continuity of the domestic legal order was not always a conscious choice; it was often a mere *consuetudo* or an actual necessity, as a complete overhaul of the national legal system in a short time would have been logistically unfeasible.

While new states generally just continued with the known domestic legal order, "unified" states had to tackle the question of which of the several domestic legal orders to keep or how to reconcile them. In its merger, Yemen's general policy was to opt for far-reaching continuity in the respective parts of its unified country. It paralleled that decision for its international obligations. While that continuation theoretically protected all rights acquired under the respective legal order, it became clear that, in the long run, the solution was not viable for a unified state in which citizens moved freely. Contrarily, in Germany, a case of accession or absorption, one domestic system was considered prevalent over the other and, in fact, superseded it in most aspects. Again, the same approach was adopted with respect to international treaties. Here, the question of whether and how to protect formerly acquired rights was virulent from the beginning.

As previously explained,[2013] in this list of cases, cessions, i.e. voluntary transfers of territory, hold a special status as there is no change to the personality of both states involved. The examples here, Hong Kong, Macau, and Walvis Bay, have shown that, for the permanence of domestic law, similar problems to those arising through unification exist - the question remains how to reconcile two, sometimes very disparate, legal systems. The receiving states, China and Namibia, solved the problem differently. In the cases of Hong Kong and Macau, far-reaching continuity of the "old" law for a 50-year transition period was chosen, leading to a (temporary) split of the

2013 *Supra*, Chapter II C) III).

legal system within one country. That continuity is even more remarkable as, for both Hong Kong and Macau, it was not clear whether China had ever actually lost sovereignty over the territories. Whatever the current situation, it is more than probable that, at the end of the transmission period, both territories will legally become assimilated into the rest of China. In comparison, Walvis Bay from the moment of transfer was completely absorbed into the territory of Namibia, and the law in force was supplanted by Namibian law. Hence, in the long run, in all cases of cession under discussion, the domestic legal system of the receiving state will be applied.

In sum, continuity of the domestic legal order was widespread practice. Importantly, even states completely repudiating (mostly for political reasons) a continuation of the *international* relations of their predecessor (e.g., the Baltic states) or those applying a pick-and-choose approach with respect to multilateral conventions (e.g., Eritrea or South Sudan) did not follow their lines with the same verve and stringency when it came to former *domestic* law, normally still choosing a general transition of the domestic law with specific (although important) exceptions. The analysis here has shown that, most of the analyzed states chose a far-reaching continuity of the former domestic legal order. Not nearly so many acceded or succeeded to all human rights treaties of their respective predecessor state. This finding supports an independent significance of a rule of acquired rights over and above the significance of international treaties.

II) Practice with Respect to Acquired Rights of Individuals in Particular

If the whole domestic legal order of a predecessor is adopted, acquired rights could be assumed to pose no problem.[2014] Yet, while such a continuity is a good starting point and shows a general positive attitude of a successor state towards a predecessor's legal order and is also a good sign that individual rights will be maintained, it is not the whole truth. The problem lies not in the ever-existing possibility for a state to abrogate or modify the law according to its own domestic, mostly constitutional, prerequisites - a possibility the traditional doctrine of acquired rights has not questioned - but in the limits of that possibility.

2014 Zemanek (n 38), 279; Rosenne (n 44), 273.

As already alluded to, not unsurprisingly, all of the canvassed state laws contained a provision protecting property.[2015] However, the crux with such rights as property, where no generally accepted definition exists and which are still largely defined by domestic law, is that it is mostly in the hands of the successor state which legal positions are defined as property and under which conditions. As was vividly shown in the case of German unification, the constitutional guarantee of property under the GG was of no avail to all "new" citizens, unless the FRG had accepted a certain asset as constituting property under the GG.[2016] Furthermore, other rights or positions theoretically accepted can be undermined in practice when further prerequisites, such as nationality (e.g., in the Sudan) or reciprocity (in some SFRY successor states) are added. This undermining happens most easily in states adopting transmission clauses making the acceptance of the previous legal order subject to the wide requirement of "conformity with the new law".

The picture emerging from the analysis above is that, from the point of view of acquired rights, the politically and internationally often much more violent and dangerous separations or dismemberments of states are generally easier to deal with and run "smoother" since the domestic legal order is less touched. However, it has to be borne in mind that the examples here often contain cases in which the successor states, in fact, held jurisdiction over property legislation long before succession took place. Furthermore, such "smooth" transitions only took place in theory. In practice, new states, while formally guaranteeing rights, especially property rights, routinely tried to exclude "foreigners" from benefits, often through stripping them of their former nationality or simply through discriminatory administrative practice. This discrimination was exemplified by the disenfranchisement of former SFRY nationals in Slovenia, in Estonia's and Latvia's citizenship legislation, and in Sudan's stripping of people entitled to South Sudanese nationality of Sudanese citizenship. Thus while, from a theoretical and formalist perspective, individual rights were upheld in a sweeping manner in the cases of separation or dissolution under scrutiny, in practice, discriminatory treatment of parts of a population entailing the loss of formerly acquired rights could be witnessed.

2015 In almost all of them, this guarantee of property was an individual right, not a mere political goal or guideline for official actions; but see *supra*, section B) I) 1) for the exception of Yemen.

2016 Cf. *BVerfG Rentenüberleitung I* (n 1172) paras. 123-130, 132-133; accepted by *ECtHR Klose and Others* (n 1170); affirmed by *ECtHR Peterke and Lembcke* (n 1178).

Since state unifications were generally amicable, states went to an extended effort to integrate the new population. That amicability does not mean that there was no discriminatory treatment of parts of the population. Yet, in an overall view, in the merger or accession cases under scrutiny here, there were almost no rampant violations of property rights or unjustified ethnic discriminations; the attempt was made to accommodate acquired rights as much as possible. Therefore, besides having a look at the general attitude of states with respect to the former domestic legal order, it is also of significance in how far states were, in practice, attentive to specific individual rights and positions.

All states under scrutiny paid attention to the acquired rights of individuals. None of them completely abolished the former legal order, but there were differences in the amount of recognition: Regulations of successor states concerning acquired rights have varied in terms of length and details.[2017] There are long, meticulously drafted treaty opera as, e.g., for Germany or Hong Kong and Macau, texts that explicitly deal with particular rights and positions. And there are short, taciturn texts, such as for Czechoslovakia, in which the major legal texts did not mention private rights as a specific problem but only provided for the continuity of the legal system in general. Not all states mentioned private rights in their main transmission provisions, with many simply referring to a predecessor's "laws" or "legal acts" that were to be upheld, and the protection of specific rights was left to statutory law. Yet, in the light of politically motivated exclusions of whole parts of the population from the enjoyment of specific rights, it is remarkable that almost no state completely refused to adopt certain private rights, a unity standing in marked opposition to the spotty picture of succession or accession to human rights commitments of the predecessor states. What is more, even states consciously not taking over the previous legal order made a line of exceptions for certain individual rights in order to keep them alive. Germany implemented a relatively sophisticated system of exceptions to the general rule, sometimes realized by putting in place longer or shorter intermediary periods allowing its new citizens to adapt to the new situation. Even if, in general, extending the FRG law to the territory of the former GDR, the FRG upheld several GDR provisions of particular importance to former GDR inhabitants or trans-

2017 Again, the notion of "acquired rights" is used in a broad sense, meaning all individual rights acquired under the domestic legal order of a state and eligible to protection in a case of change in sovereignty.

ferred pension rights into the FRG system. In the same vein, even if its law was already similar to South African law, Namibia included comprehensive clauses providing for the maintenance of almost all individual positions acquired before the transfer into the respective acts. Also the Kosovo, even if referring back to its own autonomous law, basically accepted rights acquired under the Serbian legal order unless the law was of a discriminatory character.

These findings are most obvious in the two areas under special scrutiny - treatment of private property and treatment of pensions rights. In principle, all mentioned states accepted property acquired under the respective old legal system - either by generally adopting the former legal order or by explicitly making exceptions for such acquired rights. The restoration of formerly nationalized property was a wide-spread topic in states with a former socialist political and economic system, e.g., South Yemen, the GDR, and the SFRY. While in Yemen the property regime of South Yemen was, in principle, accepted and compensation was paid to former owners, Germany and the SFRY "direct" successor states generally pursued a policy of restitution, preferably in kind. However, if the state did hand back the property, it had to account for rights private people had acquired to the restituted property in the meantime, most prominently new ownership or certain dwelling rights (such as "occupancy rights" in the SFRY).

Remarkably, even if generally repudiating a former political system and pursing a policy of reversal, in the end almost all states challenged with having to reconcile different interests recognized the legal positions of all parties, even if to a different extent. The problem was generally either solved by prioritizing one of the parties' rights while compensating the other for the loss or by transforming real rights such as dwelling rights into personal rights such as a tenancy. Nevertheless, good faith in the lawfulness of acquisition was a prerequisite for the acceptance of rights acquired under a socialist legal regime. In the wake of the violent conflicts and ethnic cleansing in the SFRY, restitution or acknowledgement of acquired rights became a feature in enforcing housing rights and the "right to return" proclaimed by the international community.[2018] This aspect was underlined in the 2001 Succession Agreement between the successor states of the SFRY.

2018 See e.g. ECOSOC, 'Principles on Housing and Property Restitution for Refugees and Displaced Persons: Final Report of the Special Rapporteur, Paulo Sérgio Pinheiro' (28 June 2005) UN Doc. E/CN.4/Sub.2/2005/17; and the UNSC resolutions *supra*, footnote 1563.

Importantly, several SFRY successors have established commissions or other quasi-judicial bodies to give individuals a forum in which to vindicate these claims.

However, the analysis of the cases brings to light obvious limits of the acceptance of former property rights. Those limits mostly concerned rights to real estate, land, and pertaining natural resources, in particular exploitation concessions. The colonial history of the respective countries should be taken into account when evaluating any relevant measures. The Sino-British Declaration, despite its far-reaching acceptance of individual and human rights, excluded private rights to land in Hong Kong. Eritrea and South Sudan also nationalized all land. While South Sudan seems to have at least accepted acquired rights to land (such as customary rights or usufruct rights), Eritrea arguably has simply abolished all rights to land acquired under the former legal regime. Famously, neither state accepted concession agreements concluded by their predecessors and partly re-negotiated them. They acclaimed their sovereignty over their natural resources by nationalizing them without compensation. Hence, property rights perceived as pivotal to state sovereignty are particularly vulnerable in times of succession.

All states under analysis regulated the topic of the survival of pension rights. Such regulation is remarkable for such an administratively challenging and costly issue. It is notable that war-ridden and poor states, such as Eritrea, initiated a pension fund for their state officials. Furthermore, also pension claims of ordinary civil persons were often protected without regard for the nationality of the pension holder. That regulation has also even found expression in the relatively recent 2001 SFRY Succession Agreement and the 2020 WA between the UK and the EU. Of course, the particularity of pension rights, as compared to those of other property rights, is that they have a current and a prospective value. Claims to payment of pensions in many cases are supposed to be redeemed in a relatively near future. What becomes clear from the foregoing is that, while states protected the current value of such acquired pension rights, they were not ready to guarantee any prospective future value of the pension. The persistence of the social or economic environment determinative for the value of a certain amount of money was never protected. That lack of persistence is what made pension accruements and their holders particularly vulnerable in times of change. To alleviate transition to new economies, some states granted transition periods or *ex gratia* payments.

III) What Can Be Taken from Those Findings?

As alluded to at the beginning of this book, the protection of rights acquired under a national legal order in situations of state succession is a recurring theme in state successions. Few international documents contain an explicit reference to the notion of "acquired rights". Yet, explicit reference is made to the doctrine in one of the most important international agreements on succession issues: the settlement of the claims in one of the largest "waves" of state succession between the five successor states of the SFRY, the 2001 Agreement on Succession Issues. Furthermore, in the recent negotiations leading to a withdrawal agreement between the EU and the UK, the term has regularly been used. In their national laws, states have seldom referred explicitly to the term of "acquired rights". Nevertheless, they have shown a remarkable determination to uphold, in large parts, at least the portion of domestic private law in force between private individuals. The continuation of private law even happened in cases in which the successor stood in marked opposition to the predecessor state and/or if the predecessor's law was very different from its own. Domestic law even persisted when the successor state was not willing to succeed or even accede to international treaties concluded by the predecessor. Even states not taking over the predecessor's legal order in general were attentive to upholding individual rights and positions and made relevant exceptions to the rule. The WA has taken up that tradition and made the protection of "citizens' rights" a priority.

The scope of rights protected after succession has been enlarged and expounded compared to the traditional ideas developed in the middle of the 20th century. For example, as outlined above, intellectual property rights and copyrights are today protected by many constitutions as property and recent international agreements make reference to them. Furthermore, several national laws have explicitly upheld not only written law but also protected tribal rights (South Sudan), rights of indigenous people (Hong Kong), and customary rights in general (Namibia, Hong Kong, South Sudan). The most eminent extension of the original doctrine of acquired rights, however, can be considered to be the inclusion of the protection of permanent residence or "dwelling rights".[2019] That protection became particularly vivid with the inclusion of the "right to return" into the 2001

2019 The Upper Silesian Tribunal, on basis of the Geneva Convention (n 68) (!), had adjudicated rights of residence of private persons under a heading separate from

Succession Agreement. The WA has also affirmed and elaborated on the topic. What has also come across in this study is the "right to have rights", or at least not to be bereaved of that essential status for discriminatory purposes or without good reasons. That issue became relevant in the treatment of former SU or SFRY citizens in some of the successor states, where they were simply "erased" from the registers or had to undergo new, challenging nationalization procedures.

Generally, courts or tribunals, national as well as international, have not explicitly relied on the doctrine of acquired rights. However, the Namibian Supreme Court[2020] and the ECtHR in *Ališić*[2021] applied the content of the doctrine by upholding domestic private rights against successor states. The Eritrea-Ethiopia Claims Commission implicitly acknowledged the doctrine, even if finding it not applicable in the case at hand.[2022] Many judicial bodies have accorded particular significance to the interests of individuals in the persistence of their formerly acquired rights in the process of state-building. While they, due to extraordinary circumstances, have accorded a lot of leeway to the respective states, especially concerning the right of property, in some cases they have also set limits to curtailing rights and, thus, possibly contributed to the evolution of the doctrine of acquired rights. For example, in *Ališić*, the ECtHR in fact awarded the claimants enforceable individual claims against two states by upholding claims under the predecessor's law. In the case of "the erased", the Slovenian Constitutional Court intervened and also the ECtHR found the Slovenian policy in violation of the ECHR. Moreover, international agreements protecting individuals' rights in cases of a change of sovereignty, such as the Succession Agreement or the WA, have insisted on the particular relevance of setting up enforcement mechanisms for the domestic protection of acquired rights.

A recurrent argument, especially of national courts when reviewing national acts in the wake of succession, has been that of "trust" or "legitimate expectations", along with legal security and legal stability. Those were also buzz words in a number of national legal acts. As an example, the Slovenian

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that of "vested rights", Erpelding and Irurzun, 'Arbitral Tribunal for Upper Silesia (2019)' (n 68) paras. 59-64.

2020 *Supreme Court of Namibia Mwandinghi* (n 1687), but as mentioned on the assumption of change of government.

2021 *Ališić et al. v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (2014) Appl. No. 60642/08 ECHR 2014-IV 213 (ECtHR (GC)).

2022 *EECC Final Award on Pensions* (n 1653).

Constitutional Court had rejected the Slovenian policy concerning the "erased" on the basis of trust in the legal regulation and "legitimate expectations". The BVerfG has also limited the power of the FRG authorities to retrospectively make changes to pension accruements acknowledged in the UT according to whether the individuals concerned could have had "legitimate expectations" in the permanence of the pensions regulation. The Hong Kong High Court has claimed that one of the main purposes of the Sino-British Declaration was to avoid a legal lacuna, which would lead to "chaos". Finally, according to its treaty parties, the WA was supposed to protect "life choices" of EU citizens. That aim aligns with much of domestic legislation requiring good faith in the acquisition of a title in order for that acquisition to be protected (cf. the *BVerfG* decision concerning the *Bodenreformland*, Namibian legislation with respect to Walvis Bay, much of the restitution legislation in the FRG, and the SFRY successor states). What could also be detected in practice, especially in the Succession Agreement but also in some national laws, e.g., very detailed ones in Hong Kong and Macau, was a certain de-coupling of protection from an individual's nationality. Both these developments, the focus on "trust" and "legitimate expectations" and the "de-nationalization" could be signs of a move of the doctrine of acquired rights away from its roots in the law of foreigners and towards a right of the individual akin to human rights. Yet, such a result is counteracted by other facts. First of all, none of the authorities cited above advocated "eternal" rights frozen in time and not open to change after succession. The WA stands out as an exception when it guarantees certain rights (but only those) for the lifetime of a person. Continuous state practice, however, has accepted any curtailment or even abolishment of rights as long as the change has not come about in too sudden a manner. The typical tool in such cases has been the introduction of transmission periods to give people the opportunity to accommodate to the new situation. In general, it seems to have been firmly acknowledged that the expectation that the law will stay the same is not protected.

Moreover, the survey of practice shows that nationality is still a relevant category in today's international law, also in cases of state succession. In the legal rules of different successor states, discrepancies concerning the acquisition of nationality can still lead to statelessness and disenfranchisement. Even the WA, as a recent international agreement generously conveying a range of rights, is based on reciprocity of guarantees and belonging by nationality and not on an individual's status as a human being. This reciprocity underlines that the doctrine of acquired rights is still, for better

or worse, intimately connected with minority protection issues. People discriminated against and disenfranchised in cases of a change of sovereignty were routinely stateless persons, persons of an ethnic minority or economically, and socially marginalized. No matter how big these "minorities" in the cases at hand were in terms of numbers, they were never the ruling parts of society after succession.