Chapter V: The Doctrine of Acquired Rights in Cases of State Succession. Status, Content, Value, Limits and Potential

> "*Law must be based on facts - sociological, historical and others - and it must take facts into account. But it can never be a mere reflection of them.*"[2023]

A) Preliminary Remarks

From the coal mines of Upper Silesia, over the ethnic quarrels of Yugoslavian dismemberment and the oil fields in South Sudan to cross-border services post-Brexit, the basic tension underlying the mentioned cases has always been the same - a tension between continuity and change. The continuity in that equation represents not only a factual situation and, simultaneously, an aspiration for stability and foreseeability in international relations but also an individual interest in the continued validity of private relations and way of life. The change side stands for a necessary corollary of development, sometimes even a remedy to injustices and oppression. The doctrine of acquired rights brings that tension down to its application in the domestic sphere, asking for individual's private rights to be internationally respected and hence protecting the stability of the national legal order against the sovereign prerogative of every state to build its internal domestic system as it sees fit, a right that basically flows from Art. 2 para. 1 UNC.

A legal system, first and foremost the international legal system, must always be open to change, otherwise it will not be able to adapt to new developments and challenges. It will become outdated and lose its regulatory function. On the national level, in states with a democratic form of government, such change is additionally justified by the need to respond to shifting political majorities and preferences within the electorate. No matter what source rights spring from, as long as this source stems from positive law, it is open to change and abrogation. Therefore, apart from core human rights attaching to an individual by its very nature as a person (and thus being essentially derived from natural law), eternal, untouchable

2023 Lauterpacht *Private Law Sources and Analogies* (n 61) 304.

rights cannot exist. The question that remains - and that the doctrine of acquired rights tries to answer - is whether there are *limits* to this possibility of change and how to define them. Such limits must be found by weighing against each other the two factors involved in the legal tension - those of stability and change. And the determinants of that weighing process have changed enormously since the beginning of the 20th century.

First, at an early date, the doctrine of acquired rights accepted individuals' interests under international law - long before human rights entered the scene. The doctrine transcended the traditionally impermeable border between domestic and international law. By asking for international rules to govern a genuinely domestic issue - i.e. private rights acquired under a national legal order, it tried to "pierce the veil" of domestic affairs shielded from international scrutiny, Art. 2 para. 7 UNC. Yet, at the inception of the doctrine, international law in essence almost exclusively regulated relations between states on a bilateral basis.[2024] Hence, the recognition of individual interests was generally framed in more "objective" notions such as unjustified enrichment. This framing mirrored the governing picture of the time - that, under international law, the individual was solely an interest of the home state. Further explanations of a doctrine of acquired rights were rooted in territorial notions or ideas of indebted territory. Today, the role of the individual within the international legal order has grown. It has been accorded its own rights and independent standing before human rights courts and international arbitral tribunals. Moreover, the protection of basic human rights has been conceptualized as an obligation *erga omnes* in which all states have an interest. In so far, not only the significance of the "link" of nationality has decreased but international law has widened its scope, and it has generally become accepted that the treatment of a state's own nationals is no longer within its *domaine réservé*.[2025]

Second, at the time when *O'Connell*, *Lalive*, and *Bedjaoui* wrote about succession, i.e. from the beginning until the middle of the 20th century, the factual examples they had in mind were mostly cases of (sometimes involuntary) cessions, decolonization, or even conquer and annexation of territory. That view was only natural as it was in line with how territorial changes frequently happened at the time. But, also in this respect, international law has undergone profound change. With the adoption of the UNC,

2024 On this former feature of international law Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 229.

2025 Cf. in detail *supra*, Chapter III B) II) 1).

all states were obliged to accept each other's sovereign equality, Art. 2 para. 1 UNC. The structure of subordination, often characterizing the former cases of succession, more and more disappeared. Processes rising to the surface were separation, dissolution (often incited by the pursuit of democratic change and self-determination), (voluntary) accession, and merger. Only some happened against a violent background and were preceded by suppression. Some were consensually agreed on. For the future, most likely, the most frequent forms of state succession will be separations and cessions. The two most recent cases of succession, Kosovo and Sudan, pay tribute to this suggestion. Additionally, new forms of change in sovereignty have emerged - the withdrawal of the UK from the EU, though not qualifying as a traditional succession, resembles separation scenarios. Additionally, beyond the cession examples of Hong Kong, Macau, and Walvis Bay, other minor cessions have been reported without the details filtering through.[2026] Furthermore, other transfers of territory have been openly, albeit maybe not seriously, pondered.[2027] These transfers will have to be approached under different prefixes than the succession scenarios of past centuries.

Third, there is room for an updated doctrine of acquired rights. All of the commonly agreed rules of state succession - of which there are few (such as the "moving treaty frontiers" rule,[2028] the permanence of territorial borders,[2029] and probably also the equitable proportion rule with respect to state property and debts[2030]) - are conceptualized from the views of states. They take no particular cognizance of individual rights and claims. In Art. 6 VCSSPAD, individuals' private rights have explicitly been excluded

2026 BBC News, 'Tajikistan Cedes Land to China' (13 January 2011) <https://www.bbc.com/news/world-asia-pacific-12180567>; Roman K Bustonkala, 'Tajik Land Deal Extends China's Reach in Central Asia' *Reuters* (25 March 2011) <https://www.reuters.com/article/us-tajikistan-china-land-idUSTRE72O1RP20110325>; Hanja Maij-Weggen, (European Parliament), 'Parliamentary Question: Cession of Territory by Vietnam to China' (14 February 2020) E-0532/2002 <https://www.europarl.europa.eu/doceo/document/E-5-2002-0532_EN.html?redirect>

2027 Reuters, 'Blinken Confirms the U.S. Does Not Want to Buy Greenland After Trump Proposal' (20 May 2021) <https://www.reuters.com/world/blinken-confirms-us-does-not-want-buy-greenland-after-trump-proposal-2021-05-20/>; on this Thielbörger and Manandhar (n 793) and comment by Reimold, 'Not for Sale? ' (n 793).

2028 *Supra*, footnote 401.

2029 *Supra*, footnote 616.

2030 Arnauld *Völkerrecht* (n 255) § 2 para. 113; Herdegen (n 255) § 30 para. 2; cf. Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 383.

from the scope of the convention. The protection afforded by human rights law and the law on the protection of foreign investments is not without gaps, especially in cases of change of sovereignty, as those laws depend to a great extent on protection by treaty. Since customary international law knows no independent, generally agreed definition of property, property protection still hinges on national law. In addition to those points, human rights and investment law have been subject to severe (political) backlash over the last few years. And this is exactly where the doctrine of acquired rights could come into play.

B) The Positive Legal Status of the Doctrine

It is generally accepted that the sources listed in Art. 38 para. 1 lit. a) - c) ICJ Statute[2031], i.e. international conventions, international custom (as evidence of a general practice accepted as law), and the generally recognized principles of law[2032], are the primary sources of international law covering most of the present law-making processes.[2033] In principle, no formal hierarchy exists between those three sources.[2034] Other categories sometimes

2031 ICJ Statute (n 503).

2032 The attribute "recognized by civilized nations" has become obsolete by today as all nations are considered "civilized"; for many ILC, 'First Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (5 April 2019) UN Doc. A/CN.4/732 paras. 178-186; Thirlway (n 266) 108; Alain Pellet and Daniel Müller, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd ed. OUP 2019) para. 262. Therefore, the ILC now speaks of "the community of nations" which must recognize a general principle, ILC, 'Report on the Work of Seventy-Second Session (2021)' (2021) UN Doc. A/76/10 172.

2033 Verdross and Simma (n 23) 322, § 516; Arnauld *Völkerrecht* (n 255) 117, para. 186; Herdegen (n 255) § 14 paras. 1-2; Thomas Kleinlein, 'Customary International Law and General Principles: Rethinking Their Relationship' in: *Lepard Reexamining Customary International Law* (n 563) 131 133; cf. Thirlway (n 266) 9; Mario Prost, 'Sources and the Hierarchy of International Law: Source Preferences and Scales of Values' in: *Besson/d'Aspremont Handbook on the Sources of International Law* (n 432) 640 643 "starting point"; Tomuschat, 'General International Law' (n 514) 187-188, especially footnote 11, but critical at 201-202 "outdated definition".

2034 Rüdiger Wolfrum, 'Sources of International Law (2011)' in: *MPEPIL* (n 2) para. 11; Arnauld *Völkerrecht* (n 255) para. 283; ILC, 'Third Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (18 April 2022) UN Doc. A/CN.4/753 para. 76; Pellet and Müller, 'Article 38' (n 2031) para. 271. But Prost, 'Sources and the Hierarchy of International Law' (n 2032) 644–645 as well as

mentioned, such as unilateral acts of states or decisions of international organizations,[2035] can be included in that canon.[2036] "[J]udicial decisions and the teachings of the most highly qualified publicists", Art. 38 para. 1 lit. d), constitute merely a subsidiary means for determining rules of law, i.e. they may assist in the process of ascertaining the existence of a rule but are not direct sources of international law. However, the list in Art. 38 is not necessarily exhaustive. For lack of a central legislative organ or superior decision-making authority, international law is not bound to those main formal concepts of sources. Other expressions of state consent can lead to new law.[2037] However, for clarity's sake, this analysis of acquired rights is structured according to the traditional sources of international law as foreseen in Art. 38 ICJ Statute while also considering evidence of further rules.

I) Acquired Rights as a Norm of Treaty Law

Much of the discussion surrounding state succession has focused on succession to treaties.[2038] At first sight, this connection is understandable given

Pellet and Müller, 'Article 38' (n 2031) paras. 272-282 stress the significance of "informal hierarchies".

2035 E.g. Cassese (n 813) 183; Wolfrum, 'Sources of International Law (2011)' (n 2033) para. 10.

2036 Arnauld *Völkerrecht* (n 255) 118, para. 187; Thirlway (n 266) 24–30; for acts of international organisations Herdegen (n 255) § 14 para. 4; Verdross and Simma (n 23) 323, § 517; Tomuschat, 'General International Law' (n 514) 188, footnote 12; differently Wolfrum, 'Sources of International Law (2011)' (n 2033) paras. 10, 40-45.

2037 Verdross and Simma (n 23) 323-327, §§518-522; Riedel (n 563), 388 arguing for "standards of international law […] as a legal category of its own, alongside the traditional sources' triad."; Tomuschat, 'General International Law' (n 514) 188, 202 with respect to "general international law"; cp. also Wolfrum, 'Sources of International Law (2011)' (n 2033) para. 10 "It is the States concerned that eventually decide what constitutes international law." [reference omitted]; Crawford *Brownlie's Principles of Public International Law* (n 3) 18–19.

2038 E.g. (even if embedding it within the more general theory) Craven *Decolonization of International Law* (n 17); Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294); Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283); Hafner and Novak, 'State Succession in Respect of Treaties' (n 294); for investment law, e.g. Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 317; and for human rights law e.g. Kamminga, 'Impact on State Succession in Respect of Treaties' (n 611).

the major importance of treaty law in today's international legal order.[2039] With the VCLT[2040], which has not only entered into force for 116 states[2041] but is widely considered to reflect in large parts customary international law,[2042] a comprehensive and clear set of rules exists from which an analysis could depart.[2043] Additionally, the regularly written form of treaties[2044] and their deposition in treaty collection bases such as the UNTC makes them more accessible and easier to research than constantly changing non-written sources.[2045] The field of state succession in particular lacks a comprehensive customary basis as states have routinely concluded *ad-hoc* agreements.[2046] Thus, often, to work with treaty law would appear to be more fruitful than grappling with the complexities and pitfalls of custom and general principles.

Yet, for state succession cases, there is a strong argument for considering treaty law to be the least appropriate of the three sources when analyzing the protection of individual rights. *If* one could assume that a specific

2039 On the "treaty primacy" in international law Prost, 'Sources and the Hierarchy of International Law' (n 2032) 645–650; Delbrück and Wolfrum (n 266) 49–50; see Pellet and Müller, 'Article 38' (n 2031) para. 296 on the preferred use of treaties by the ICJ.

2040 VCLT (n 291).

2041 See https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

2042 Arnauld *Völkerrecht* (n 255) 121/122, para. 196; Herdegen (n 255) § 15 para. 4; UNSG, 'Aide-Memoire' (n 740) para. 3; cf. *IACtHR Denunciation of the ACHR* (n 512) para. 46. Arguing that the VCLT rules are almost never challenged in practice Aust *Modern Treaty Law and Practice* (n 294) 10–11. See on the relationship between the VCLT and human rights Scheinin, 'Impact on the Law of Treaties' (n 777).

2043 However, Art. 73 VCLT explicitly excludes its applicability to cases of state succession.

2044 Cf. Art. 2 para. 1 lit. a) VCLT „'Treaty' means an international agreement concluded between States in *written* form and governed by international law" [emphasis added].

2045 See also Jan Klabbers and others, 'General Introduction' in: *Klabbers/Koskenniemi et al. State Practice Regarding State Succession* (n 297) 14 16 where it is noted that with respect to the materials submitted by states "most […] related to issues of recognition and state succession in respect of treaties; by contrast, succession in respect of State property, debts, archives and nationality was the topic of only a handful of the documents submitted"; also Klabbers and Koskenniemi, 'Succession in Respect of State Property, Archives and Debts, and Nationality' (n 297) 118.

2046 E.g. the Succession Agreement (n 1447), the Alma-Ata-Declaration (n 1234), the Minsk Agreement (n 1233) and numerous agreements between the Sudan and South Sudan, *supra*, Chapter IV) B) IX).

treaty containing individual rights persisted after a case of succession, i.e. became binding for the successor state, those rights could be considered acquired rights. As discussed above, such a rule is most popularly suggested for treaties protecting human rights.[2047] Yet, if one does not want to fall into circular reasoning, such a general rule, logically, would have to be extraneous to the treaty itself.[2048] Treaty law is based on the consent of *all* parties to the treaty.[2049] The customary third party rule encapsulated in Art. 34-37 VCLT, enouncing that treaties are in principle not binding on non-parties without their consent, is but another expression of that general conviction. To oblige a new state to accept treaties of its predecessor is therefore hard to sustain from the beginning.[2050] Additionally, at least for bilateral treaties and multilateral treaties *not* of an *erga omnes* character,[2051] replacing the predecessor with a successor state creates a new treaty relationship between the successor and the other former treaty party.[2052] As those treaties are regularly the result of a detailed bargaining process between states intending to regulate their *particular* relationship, a change of the treaty partner can fundamentally change the circumstances of the treaty relations.[2053] The *third party rule* also protects the treaty partner, though.[2054] Thus, the clean-slate principle with respect to treaties "can be justified on several powerful bases - the principle of individual State autonomy, the principle of self-determination, the principle of *res inter alios*

2047 See *supra*, Chapter III C) II) 2).

2048 The rationale for the survival of rights must not be taken from the object and purpose of the relevant treaty (Art. 31 para. 1 VCLT), as these two characteristics are confined to the specific instrument.

2049 Thirlway (n 266) 37; Jutta Brunnée, 'Consent (2022)' in: *MPEPIL* (n 2) para. 20; Wolfrum, 'Sources of International Law (2011)' (n 2033) paras. 14-15; Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 376, para. 121; cf. Tomuschat, 'General International Law' (n 514) 189-191; Salacuse (n 455) 51/52.

2050 Compare Strupp (n 2) 92; but advocating the bindingness of "world order treaties" Christian Tomuschat, 'Obligations Arising for States Without or Against Their Will' (1993-IV), 241 RdC 195 247–248.

2051 In comparison, multilateral conventions, as far as they contain *erga omnes* obligations, are not based on the principle of *do ut des*, but each states commits to further a common goal. The treaty's provisions have regularly not been negotiated on an individual basis. See for the pertaining discussion with respect to human rights treaties *supra*, Chapter III) C) II) 2) b).

2052 Cf. Hafner and Kornfeind (n 27), 5; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 402.

2053 Cp. Jennings (n 326), 446.

2054 Delbrück and Wolfrum (n 266) 161 with respect to Art. 8 and 9 of the VCSST; cf. Dumberry, 'State Succession to Bilateral Treaties' (n 295), 24–28.

acta, and the principle that there can be no limitations on a State's rights, except with its consent."[2055]

That finding does not purport to the impossibility of a case where succession to a treaty can be justified. But the reasons for that case would have to be sought outside the treaty or at least would have to have "emancipated" themselves from the specific treaty.[2056] It seems furthermore important at this point to clarify three points. First, rejecting a rule of succession into the treaty does not mean that there can be no "succession" to the legal situation created by the *facts established by the treaty*, in the sense that those facts have to be accounted for.[2057] Second, that rejection would also not foreclose states *deliberately* taking over a predecessor's obligations (cf. the examples of the Czech and the Slovak Republic) without being legally obliged to do so. Third, it would also not forestall the possibility of a state becoming a *new* party to a convention or to agreeing on the novation of a bilateral treaty. Both latter choices would, however, only lead to a bindingness *ex nunc*.

II) Acquired Rights as a Norm of Customary International Law

Several authors have anchored the doctrine of acquired rights in customary law.[2058] Customary law, besides treaties, is often perceived as the most

2055 *Separate Opinion Weeramantry* (n 528) 644; also for the clean-slate approach with respect to treaties Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 474.

2056 ibid. See *ICJ Croatia v. Serbia (Merits)* (n 483) para. 115 "whether or not the Respondent State succeeds […] to the responsibility of its predecessor State for violations of the Convention is governed not by the terms of the Convention but by rules of general international law"; Jennings (n 326), 445 "When that stage is reached, those treaties which are immediately available to a new State will, it is safe to predict, be so because of their purpose and function and not because of a 'succession' from the parent State"; also Marek (n 61) 1, 14.

2057 See O'Connell *The Law of State Succession* (n 2) 78, 100, 103; O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 140; Art. 70 para. 1 lit. b) VCLT.

2058 E.g. Bismuth, 'Customary Principles Regarding Public Contracts Concluded with Foreigners' (n 2) 327 "customary principle"; Reinisch *State Responsibility for Debts* (n 2) 88; Kriebaum and Reinisch, 'Property, Right to, International Protection (2009)' (n 2) para. 17; Hasani (n 2), 143.

important source of international law[2059] and recently its identification has been the topic of a study undertaken by the ILC[2060].

1) General Prerequisites for the Formation of a Norm of Customary International Law

Pursuant to Art. 38 para. 1 lit. b) ICJ Statute, custom is constituted through "general practice accepted as law". According to the still predominant view, two requirements have to be fulfilled. First, there has to be state practice in conformity with the rule, which is backed up by the belief to be legally bound to act in this way (*opinio juris*).[2061] "State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions"[2062] and may consist of "physical and verbal acts"[2063]. However, ICJ jurisprudence on the matter is not without

2059 Wet, 'Sources and the Hierarchy of International Law' (n 508) 627; Aust *Modern Treaty Law and Practice* (n 294) 9; cf. Prost, 'Sources and the Hierarchy of International Law' (n 2032) 645–655 who only discusses treaties and custom as candidate for primary sources. Michael Wood, 'Foreword' in: *Lepard Reexamining Customary International Law* (n 563) xiii xiii "Customary international law remains the bedrock of international law."

2060 ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (n 563) para. 66.

2061 "Two-element approach", e.g. supported by *ICJ Jurisdictional Immunities* (n 496) para. 55; only recently (again) endorsed (even without reference to the following explicit standards) in *ICJ Chagos Opinion* (n 513) para. 149; ILC, 'Second Report on Identification of Customary International Law (Special Rapporteur Wood)' (2014), 2014(II(1)) YbILC 163 paras. 21-31; ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (n 563) Draft Conclusion 2; Wolfrum, 'Sources of International Law (2011)' (n 2033) para. 24; Thirlway (n 266) 65. However, Michael Wood and Omri Sender, 'State Practice (2017)' in: *MPEPIL* (n 2) para. 1 avow that "A rigid distinction between State practice and *opinio iuris* as two independent constituent elements of customary international law is not possible" [italics in original]. Recently, more and more authors support a "deductive" approach and place more emphasis on the *opinio juris* element; for an overview see Kleinlein, 'Customary International Law and General Principles' (n 2032) 144–145 with references.

2062 ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (n 563) Draft Conclusion 5.

2063 ibid Draft Conclusion 6 with further details; comprehensively Wood and Sender, 'State Practice (2017)' (n 2060).

ambiguities. While referring to an "extensive and virtually uniform"[2064], a "settled"[2065] practice, such practice was not meant to "be in absolutely rigorous conformity with the rule" but "the conduct of States should, in general, be consistent with the rule"[2066]. Second, the consistent pattern of action must take place over a certain amount of time, the length of which depends on the consistency and regularity of the practice.[2067] For the building of custom, the practices of some states particularly affected by a potential rule can have more weight than the attitudes of other states.[2068]

2) The Binding Character of Pre-Existing Customary International Law for a New State

There is consensus that the formation of custom, even if "not made by simple majority",[2069] does not require consent of all states and, in fact, can even evolve against the will of some states.[2070] However, according

2064 *North Sea Continental Shelf Judgment (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands),* 20 February 1969, ICJ Reports 1969 3 43, para. 74 (ICJ).

2065 ibid 44, para. 77 [italics in original]; endorsed by *ICJ Jurisdictional Immunities* (n 496) 122, para. 55; repeated in *ICJ Chagos Opinion* (n 513) para. 149. Cf. also ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (n 563) Draft Conclusion 8 para. 1.

2066 *Military and Puramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* 27 June 1986, Merits, ICJ Rep 1986, 14 para. 186 (ICJ). Critical towards this approach in cases of non-settled custom Simma and Alston (n 514), 97.

2067 Cf. ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (n 563) Draft Conclusion 8, para. 2 „Provided that the practice is general, no particular duration is required."; Thirlway (n 266) 74, 76.

2068 *ICJ North Sea Continental Shelf* (n 2063) paras. 73, 74. But see on the conflict in the ILC Thirlway (n 266) 75.

2069 ibid 101.

2070 Treves, 'Customary International Law (2006)' (n 563) paras. 35, 38; Thirlway (n 266) 61, 67 "it is generally recognized that [subject to the exception of persistent objectors] a rule of customary law is binding on all States, whether or not they have participated in the practice from which it sprang"; Brunnée, 'Consent (2022)' (n 2048) para. 16; cf. also ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (n 563) Draft Conclusion 10 para. 3 "Failure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction".

to a widely held, although not uncontested,[2071] opinion, a state that has clearly and consistently repudiated the applicability of a customary norm in *statu nascendi*, a "persistent objector", will not be bound by that norm once it becomes firm law.[2072] Though the problem in practice has not often arisen,[2073] its rationale, depicting customary law as essentially based on the consent of *all* states, could lead to the conclusion that new states, which had not had the opportunity to refute the coming into existence of a rule of international law, could not be bound by it.[2074] Yet, against the background of the move of international law to a legal system being built around certain commonly shared values and the emergence of the category of *jus cogens* norms,[2075] the persistent-objector rule has lost force.[2076] Thus, it is generally held that pre-existing (universal) customary law binds new states,[2077]

2071 Tomuschat, 'General International Law' (n 514) 195/196; Christian Tomuschat, 'Die Bedeutung der Zeit im Völkerrecht' (2022), 60(1) AVR 1 11–12; Treves, 'Customary International Law (2006)' (n 563) para. 39; but see ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (n 563) Draft Conclusion 15 and especially the respective commentary at para. 4 "While there are differing views, the persistent objector rule is widely accepted by States and writers as well as by scientific bodies engaged in international law."

2072 Cf. *Fisheries (United Kingdom v. Norway),* 18 December 1951, ICJ Rep 1951 116 131 (ICJ) "the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt io apply it to the Norwegian coast." For an overview Thirlway (n 266) 99–102; Elias Olufemi, 'Persistent Objector (2006)' in: *MPEPIL* (n 2) paras. 1-18; Brunnée, 'Consent (2022)' (n 2048) para. 16; ILC, 'Third Report on Identification of Customary International Law (Special Rapporteur Wood)' (2015), 2015(II(1)) YbILC 93 paras. 85-95 with numerous references.

2073 Prost, 'Sources and the Hierarchy of International Law' (n 2032) 653 "essentially theoretical"; Brunnée, 'Consent (2022)' (n 2048) para. 16 "virtually no examples of successfully sustained objection"; cf. Treves, 'Customary International Law (2006)' (n 563) para. 39; Olufemi, 'Persistent Objector (2006)' (n 2071) para. 4.

2074 E.g. argued by Rudolf (n 872), 31; also alluding to this point (and referring to the problematic term of "Kulturstaat") Hans-Ernst Folz, 'Zur Frage der Bindung neuer Staaten an das Völkerrecht' (1963), 2(3) Der Staat 319 329; ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (n 563) Draft Conclusion 15, Commentary para. 5; cp. Brunnée, 'Consent (2022)' (n 2048) para. 16.

2075 See *supra*, Chapter III) B) II) 2).

2076 See Tomuschat, 'General International Law' (n 514) 195/196; Tomuschat, 'Die Bedeutung der Zeit im Völkerrecht' (n 2070), 11–12; Treves, 'Customary International Law (2006)' (n 563) para. 39; Brunnée, 'Consent (2022)' (n 2048) paras. 16-18.

2077 Marek (n 61) 1, 5 footnote 4; Jennings (n 326), 443; Treves, 'Customary International Law (2006)' (n 563) para. 38; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 407; Niels Petersen, 'The Role of Consent and Uncertainty

therefore implying a certain legal force of those rules independent of a new state's consent.[2078] Contrary to what the common denomination might sometimes suggest, this is not a question of "succession" to obligations,[2079] but rather the result of a state being born not into a "legal vacuum" but into an environment shaped and constructed by the contemporary international law.[2080] An organized international legal system is, in fact, a pre-condition for recognizing the existence of a new state as such.[2081] Bindingness is

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in the Formation of Customary International Law' in: *Lepard Reexamining Customary International Law* (n 563) 111 112; Arnauld *Völkerrecht* (n 255) 67, para. 107; C. W Jenks, 'State Succession in Respect of Law-Making Treaties' (1952), 29 BYbIL 105-144 107; Stern, 'La Succession d'États' (n 283), 15, 19-20; Dumberry *Guide to State Succession in International Investment Law* (n 14) para. 10.06; Thirlway (n 266) 61/62, 99; Tomuschat, 'Obligations Arising for States Without or Against Their Will' (n 2049), 305–306; Téson, 'Fake Custom' (n 563) 89; Brunnée, 'Consent (2022)' (n 2048) para. 16; Anand, 'New States and International Law (2007)' (n 242) para. 1. For limited bindingness e.g. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 108 "(at least some) customary law and general principles"; Torres Cazorla, 'Rights of Private Persons on State Succession: An Approach to the Most Recent Cases' (n 514) 666–667 "When a succession of States takes place, a minimum standard having to do with the protection of individuals must be maintained."; similarly Badinter Commission, 'Opinion No. 1' (n 306), para. 1 lit. e) "the peremptory norms of general international law and, in particular, respect for the fundamental rights of the individual and the rights of peoples and minorities, are binding on all the parties to the succession"; in genreal critical Craven *Decolonization of International Law* (n 17) especially 13-14.

2078 Alluding to this point Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 152 "their justification cannot be based upon the traditional processes of tacit consent, acquiescence or estoppel"; see also Brunnée, 'Consent (2022)' (n 2048) para. 16. Dismissive of consent as the sole basis of the international legal system Werner, 'State Consent as Foundational Myth' (n 658) 15–16, 24, 28-29; Xuan Shao, 'What We Talk about When We Talk about General Principles of Law' (2021), 20(2) Chinese JIL 219 224/225.

2079 Stern, 'La Succession d'États' (n 283), 120 who speaks of the "coherence" of international law; Jennings (n 326), 450; Folz (n 2073), 329.

2080 Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 101; similarly Folz (n 2073), 331–337.

2081 Kantorowicz (n 1), 6 "the State presupposes the Law - international or national Law - and this idea is borne out by the history of jurisprudence, which shows that no concept of the State has ever been formed that did not imply some legal element". Even Bedjaoui, as mentioned a fierce opponent of the doctrine of acquired rights, admitted that "the competence of the successor State is clearly not unlimited. Its actions should always be consistent with the rules of conduct that govern any State; for it is, first and foremost, not a successor State, but a State - in other words, a subject having, in addition to its rights, international obligations

justified on the basis of values such as the universality of international law[2082] and legal security and stability[2083]. Basic and universally accepted customary norms are binding on a successor state from the moment of its inception as a state in the international system, irrespective of its will.

3) Challenges to the Detection of Norms of Customary Internal Law in the Context of State Succession

As explained, for the determination of custom, the proof of sufficient state practice and pertaining *opinio juris* is essential. Especially in the field of state succession, however, this proof poses eminent problems.

a) The Singularization of Succession Cases

In theory, all states can become subject to a situation of state succession. Already in the approx. 30 years under discussion here, more than 30 states were involved in succession processes as a successor or predecessor state (including cessions). Furthermore, disruptions of the legal scenery evoked by a state succession will have an, at least, indirect influence on a multitude of other states as well, e.g., with respect to treaty relationships, common border agreements, debts restructuring etc. Basic distinctions and categorizations, such as continuity or change of state personality, are heavily dependent on a third state recognizing a successor state.[2084] Their reactions and attitude towards the "new" or the "old" state will be crucially important for the emergence of customary rules on state succession. It therefore may come as a surprise that, according to many commentators,

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the violation of which would engage its international responsibility" ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 100, para. 156.

2082 Anand, 'New States and International Law (2007)' (n 242) para. 1; cf. also Jennings (n 326), 443; Lauterpacht *Private Law Sources and Analogies* (n 61) 129 "The death of the individual and the changes in State sovereignty are, in relation to legal rights and obligations, crises which must be regulated by a rule of law independent of the will of the actual successor".

2083 Cf. Arnauld *Völkerrecht* (n 255) 67, para. 107; Torres Cazorla, 'Rights of Private Persons on State Succession: An Approach to the Most Recent Cases' (n 514) 666–667; Téson, 'Fake Custom' (n 563) 89; Stern, 'La Succession d'États' (n 283), 119–120 refers to a "principe de cohérence".

2084 Cf. also *supra*, Chapter II B) II).

state succession is a "rare occurrence"[2085], producing only sparse state practice. Even in 2018, the UNGA's Sixth Committee states, when discussing the ILC's draft on questions of succession to state responsibility, did not consider state practice sufficient to detect a settled practice.[2086] Yet, due to the extraordinary circumstances generally arising before a genuine change of sovereignty (and not only a change of government) occurs, actually only a small percentage of states will really be subject to succession. Additionally, the scope of any analysis is further diminished by the regular perception of succession cases as "special" and thus not comparable to other cases.[2087]

2085 E.g. ILC, 'Second Report on Succession of States in Respect of State Responsibility (Special Rapporteur Pavel Šturma)' (6 April 2018) UN Doc. A/CN.4/719 para. 16; Aust *Modern Treaty Law and Practice* (n 294) 321; Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 339 „sparse".

2086 ILC, 'Report on the Work of its Seventieth Session (2018): Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During its Seventy-Third Session, Prepared by the Secretariat' (12 February 2019) UN Doc. A/CN.4/724 11, para. 49. See also ILC, 'Second Report on Succession of States in Respect of State Responsibility (Special Rapporteur Pavel Šturma)' (n 2084) para. 16.

2087 Giraudeau (n 1783), 65 "chaque création d'état est un *unicum* et que la théorie de l'effectivité en la matière a ses limites. " [italics in original]; Jennings and Watts (n 27) § 61 "state practice in much of this area has been variable, often dependent on the very special circumstances of particular cases, and based on ad hoc agreements which may not necessarily reflect a view as to the position in customary international law"; Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 339 "practice has not only been sparse, but that it has also been dominated by unusual cases"; Koskenniemi and Lehto (n 255), 182 "Les précédents reflètent des situations politiques idiosyncratiques et ne se prêtent eux-mêmes que difficilement à la généralisation"; also ibid 184 "Mais appliquer des catégories a priori à un événement politique aussi énorme que l'est la dissolution de l'Union Soviétique conduit nécessairement au dogmatisme. Quelle que soit la solution retenue - continuité ou 'simplement' succession - il faut tenir compte des exceptions [...] il faut tolérer quelques modifications dans les rapports juridiques reflétant la nature fondamentale de la transformation politique"; Zalimas (n 1248), 21 "The restoration of the independence of the Republic of Lithuania as well as of the other Baltic States has been a unique phenomenon in contemporary international law and State practice"; Shaw *International Law* (n 266) 1009 "the Hong Kong situation is unusual"; Arnauld *Völkerrecht* (n 255) § 2 para. 104 decribing German unification as a "historically unique example" [own translation from German]; Stern, 'Die Wiederherstellung der staatlichen Einheit' (n 1140) 32 who maintained that aspects of public international law were "secondary" in light of the particular German succession situation. In general Jan Klabbers and others (eds), *State Practice Regarding State Succession and Issues of Recognition: The Pilot Project of the Council of Europe* (Kluwer Law International 1999) 16; ILC, 'Second Report on

Stern, one of the most proliferous scholars in the field of state succession, maintained that "[n]ot one State succession is similar to another State succession."[2088] And of course those interjections are justified. All of the cases are embedded in a particular historical and political environment. As an aggravating factor, the overly wide definition of state succession collates many cases without regarding internal motives, external pressure, domestic legal systems etc., which are significantly different in all cases under scrutiny here. Those factors make it improbable that the "settled practice" required for custom can be found; while state practices in respect to state succession may abound, generalizations are difficult to draw.

b) The Issue of Inferring Custom from Treaty Practice

As already alluded to, the law of state succession is marked by a panoply of bilateral or multilateral *ad-hoc* agreements regulating the consequences of succession. In fact, all of the states under scrutiny have concluded one or more of those treaties with their fellow successor states or the predecessor state. Some of those treaties included explicit clauses protecting formerly acquired rights of individuals or at least provisions relating to the topic.

In principle, it is possible for a treaty rule to encapsulate customary law[2089] or represent state practice[2090], and/or *opinio juris*. The ICJ in *North Sea Continental Shelf* held that a treaty rule may be reflective of customary international law if it is of a "fundamentally norm-creating character"[2091] and had at least a "very widespread and representative participation […] provided it included that of States whose interests were specially affected" or "extensive and virtually uniform".[2092] Yet, while the *ad-hoc* agreements include states particularly involved, one cannot speak of widespread participation. The "virtually uniform" threshold is probably unfeasible in

Succession of States in Respect of State Responsibility (Special Rapporteur Pavel Šturma)' (n 2084) para. 16.

2088 Stern, 'General Concluding Remarks' (n 1240) 208.

2089 *ICJ Jurisdictional Immunities* (n 496) paras. 55, 66; Wood and Sender, 'State Practice (2017)' (n 2060) para. 13; cf. also ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (n 563), Art. 11 para. 2.

2090 Wolfrum, 'Sources of International Law (2011)' (n 2033) para. 26 „the practice of States is nowhere better reflected than in treaties".

2091 *ICJ North Sea Continental Shelf* (n 2063) para. 72.

2092 ibid para. 73.

general,[2093] let alone in the law of state succession[2094]. Additionally, the provisions contained in those succession treaties, specific and tailored to the special circumstances and treaty partners, are of a more contractual nature and hence do not display a "norm-creating character".[2095] Moreover, it is often simply not clear whether a treaty provision is in support of an already existing rule outside the treaty or is necessitated by the absence of such a rule.[2096] Reliance on either assumption can therefore become arbitrary.[2097] In the same vein, to take subsequent state practice as evidence of custom is problematic as states may be assumed to act in a certain way in order to fulfill a treaty and not out of obligation from another source of international law.[2098] Sometimes, in the mentioned succession treaties or

2093 Tomuschat, 'General International Law' (n 514) 196-200. Not even the ICJ seems to have always lived up to this standard, cf. ibid 196-198. In general critical on the detection of custom by the ICJ Rudolf Geiger, 'Customary International Law and the Jurisprudence of the International Court of Justice: A Critical Appraisal' in: *Fastenrath/Geiger et al. From Bilateralism to Community Interest* (n 647) 673 692; Téson, 'Fake Custom' (n 563) 99–102.

2094 Cf. Lauterpacht *Private Law Sources and Analogies* (n 61) 128 "Clearly, if unanimity is the test of a customary rule, then no customary rule of international law has yet been evolved on the question of state succession."

2095 See on this differentiation Jia, 'The Relations Between Treaties and Custom' (n 813) 740.

2096 Pierre-Marie Dupuy, 'Formation of Customary International Law and General Principles' in: *Dupuy Customary International Law* (n 813) 798 806; Treves, 'Customary International Law (2006)' (n 563) paras. 48-49, 65-67; Wolfrum, 'Sources of International Law (2011)' (n 2033) para. 26; Delbrück and Wolfrum (n 266) 52. Cf. Lauterpacht *Private Law Sources and Analogies* (n 61) 128 "A vicious circle is involved in the question whether treaties providing for the taking over of obligations conform to the rule, or state an exception; or whether treaties which exclude succession do so as an exception to a generally recognised principle." Almost identical in wording O'Connell *The Law of State Succession* (n 2) 10 "The attempt to decide whether one particular treaty substantiates a principle or creates an exception to another principle leads only to a vicious circle." Cf. also his rather subejctive interpretation of relevant state practice in the 19th and up to mid-20th century in ibid 106–135.

2097 This is exemplified by ibid 91, footnote 5, holding at the same time that "[t]he most recent treaties do not mention acquired rights, which suggests that practice in this regard is now so well formulated that no treaty provision is regarded as necessary" but at bid 10 that "an extensive examination of treaty provisions is not entirely uninstructive. It is possible to discover and formulate the principles and fundamental considerations which lie behind them."

2098 Simma and Pulkowski, 'Two Worlds, but Not Apart: International Investment Law and General International Law' (n 823) 368/369, para. 20; Schöbener, 'Outlook on the Developments in Public International Law and the Law Relating to Aliens' (n

the associated domestic laws, states have explicitly alluded to other rules of international law.[2099] Eventually, the exact interaction between customary law and treaties remains unclear and case-dependent.[2100] Therefore, keeping in mind the specificity of the treaties under analysis and the limited number of parties, customary rules cannot be inferred.

c) The Issue of Determination of Relevant Acts of State Practice

The field of succession also poses eminent problems with respect to detecting specific state practices.[2101] Succession is a process concerning all branches of state power and can therefore be witnessed in a multitude of state acts. In relation to detecting *opinio juris*, recognition and acceptance of certain consequences of a change of sovereignty are seldom explained in legal language, if at all, by state agents. Vocabulary in the field of state succession is controversial, and states deliberately leave the content of their statetements open to interpretation. That evasiveness makes persuasive interpretation challenging, if not impossible.[2102]

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561) 71, para. 23; very critical about generalizations, in particular which concerns BITs Griebel (n 440) 110; cf. also *ICJ North Sea Continental Shelf* (n 2063) para. 76.

2099 See e.g. preamble of the SFRY Succession Agreement (n 1447) ("Demonstrating their readiness to co-operate in resolving outstanding succession issues in accordance with international law"); ibid., Annex G Art. 2 para. 1 lit. a ("The rights to movable and immovable property located in a successor State […] shall be recognised, and protected and restored […] in accordance with established standards and norms of international law"); Alma-Ata-Declaration (n 1234) ("Desirous of setting up lawfully constituted democratic States, the relations between which will be developed on the basis of […] and the other universally acknowledged principles and norms of international law.

2100 Jia, 'The Relations Between Treaties and Custom' (n 813) 756; Dupuy, 'Formation of Customary International Law and General Principles' (n 2095) 807.

2101 See Rasulov (n 617), 154–155; Klabbers and Koskenniemi, 'Succession in Respect of State Property, Archives and Debts, and Nationality' (n 297) 142, 144; Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 161 "established practice will only provide a very marginal or insubstantial argument in favour of either legal continuity or discontinuity. Not only is practice sharply divergent, but there are the added problems of discerning intent and of binding what are understood to be third parties."

2102 See e.g. ibid 150 "state practice will rarely provide a substantive explanation for the fact of legal continuity. The assumption of rights and duties on the part of a successor state may variably be interpreted either as an explicit recognition of the operation of a norm of succession or as an assumption ad novo of certain

The creation of custom is generally conceptualized as being hammered out by interaction, a certain back and forth, between states.[2103] The doctrine of acquired rights, as a rule to the benefit of individuals, is less apt to be proven in such way.[2104] Additionally, successions are often situations of utmost turmoil, putting into question the whole existence of a state, sometimes involving war. In those existential situations, rules of international law have only a diminished force and appeal to the states involved. State acts do not always follow the commitment to abide by a certain *legal* rule but are often essentially a political choice. A definite ascertainment of *opinio juris* is thus hardly possible.[2105]

4) Interim Conclusions

The formation of customary law is, in general, subject to debate and controversy. In a changing legal landscape, the function, emergence, and detection of custom are naturally subject to proposals for revision. Most recent academic work on the topic, with reference to the mentioned development of an international community of states, circles around the questions whether the *opinio juris* requirement should be more important

international rights and duties (through an act of novation)"; cf. also Koskenniemi and Lehto (n 255), 182.

2103 Simma and Alston (n 514), 99; following them Beatrice Bonafé and Paolo Palchetti, 'Relying on General Principles in International Law' in: *Brölmann/Radi Handbook on International Lawmaking* (n 658) 160 167.

2104 See on this lack of evidence with respect to human rights Simma and Alston (n 514), 99.

2105 See Jennings (n 326), 445/446 "we must beware therefore of drawing inferences about what the legal position is from the facts of political accommodation. The latter are usually entirely without prejudice as to the legal position and in this perhaps more than most fields of international law, so-called practice is to be approached with caution"; Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 78 "Whether a State is following a rule or adopting a convenient form of behaviour that only happens to coincide with it is difficult to determine. In any case, such interpretation needs necessarily to look behind the external façade of what is being done, into the motivations of the actor: why is a certain behaviour being adopted/a statement being made?"; Lauterpacht *Private Law Sources and Analogies* (n 61) 128 "the taking over of financial and other liabilities independently of a treaty is always liable to be interpreted as an act or grace or of political convenience, and not as a matter of legal obligation".

and whether widespread consensus can outweigh a lack of state practice.[2106] Conversely, with reference to the diminishing legitimacy of international institutions, the choice and evaluation of evidence of state practice or *opinio juris* have recently come under even closer scrutiny.[2107] Often, a finding of custom, even by the highest courts, has been derailed as politically motivated or at least dogmatically questionable.[2108] Bearing in mind the findings surrounding the detection of state practice and *opinio juris* in the area of state succession, it seems hardly feasible to make a persuasive case for a customary rule of upholding individual rights. Even if all of the practice collected in Chapter IV could be interpreted as relevant state practice supported by a legal conviction to be bound to act in such way, the rule that could be inferred from such practice would be very vague.

Yet, customary rules are meant to be specific, to lead to certain rules, to "oughts" and "don'ts".[2109] The considerable diversity of answers related to the topic, the manifoldness of individual rights existing under the national legal orders, and the significant differences in the original situations culminating in the change of sovereignty, at least until now, have made it impossible to ascertain a clear-cut rule, i.e. a rule commanding a certain legal consequence in a certain situation. Even if many states generally adopted a predecessor's domestic legal order, especially in private law, this acceptance was never completed automatically or in totality.

That being said, it is important to underline that this lack of custom does not mean that no rules can exist or that states have felt absolutely free to treat private rights as they have seen fit. Quite the contrary, there has been a relatively obvious reluctance to completely overhaul a former sovereign's legal order, even in cases of steadfast political opposition and violent secession. In all cases of proper successions, the majority of private rights have been consciously upheld, sometimes even former rights restituted. Potentially, the issue of acquired rights has not (yet) ripened enough to

2106 See e.g. the contributions to Brian D Lepard, 'Toward a New Theory of Customary International Human Rights Law' in: *Lepard Reexamining Customary International Law* (n 563) 233.

2107 E.g. Daniel H Joyner, 'Why I Stopped Believing in Customary International Law' (2019), 9(1) AsianJIL 31.

2108 Téson, 'Fake Custom' (n 563); Geiger, 'Customary International Law and the Jurisprudence of the International Court of Justice' (n 2092); Giorgio Gaja, 'General Principles of Law (2020)' in: *MPEPIL* (n 2) para. 20.

2109 Téson, 'Fake Custom' (n 563) 90–91.

have grown into customary rules, or perhaps it never will be[2110]. As *Craven* observed:

> "The questions of State succession, precisely because they do involve a disruption to the conditions of normality [...] seem to ask by way of response something more than may be provided by an elaboration of State practice, or a recitation of evidence demonstrating a necessary *opinio iuris*."[2111]

While the doctrine of acquired rights has not developed into customary international law, its call has been heard and responded to.

III) Acquired Rights as a General Principle of Law

1) Prerequisites for the Formation of a General Principle

The source of general principles of law is most often referred to, especially in older texts, when talking about acquired rights.[2112] However, authors often do not clarify whether they are referring to the definition in Art. 38 para. 1 lit. c) ICJ Statute or using the term in a more general manner, nor do they draw the line to customary law.[2113] Having often been considered as a mere subsidiary option in case of non-applicability of treaties or custom,[2114] the topic "general principles of law" has now found widespread

2110 Famously arguing that state succession "is a subject altogether unsuited to the processes of codification" O'Connell, 'Reflections on the State Succession Convention' (n 295), 726.

2111 Craven *Decolonization of International Law* (n 17) 2/3 [italics in original].

2112 Cf. *supra*, footnote 2.

2113 E.g. *McCorquodale/Gauci et al. BREXIT Transitional Arrangements* (n 2) 13 who maintain that "[the] principle of acquired rights is [...] recognised as a matter of customary international law". Also referring to this problem ILC, 'First Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (n 2031) paras. 38-39, 44. Cf. for an overview of authors who actually consider custom and general principles as the same source Kleinlein, 'Customary International Law and General Principles' (n 2032) 145-146, especially foonotes 68, 70 with critique at 146-147.

2114 Wet, 'Sources and the Hierarchy of International Law' (n 508) 627; Thirlway (n 266) 152, 160; Pellet and Müller, 'Article 38' (n 2031) paras. 296-297; Cassese (n 813) 183; Md T Eqbal, 'Historicizing the Dual Categorization of the General Principles of Law by the ILC' (2020), 10(2) AsianJIL 187 189.

academic interest[2115], is currently under consideration by the ILC, and has, so far, been the subject of three reports by Special Rapporteur *Vázquez-Bermúdez*.[2116] Yet, the ascertainment, relevance, and content of these general principles and their relationship with the other sources of international law remain unsettled.[2117] It has often been remarked that the ICJ has shown reluctance to base its decisions only on this source and to refer to Art. 38 para. 1 lit. c) of its statute.[2118] The cogency of this conclusion, however, depends on what understanding of general principles an analysis is based on.[2119] As *Kolb* has underlined:

2115 See e.g. the contributions in Mads Andenas and others (eds), *General Principles and the Coherence of International Law* (Brill, Nijhoff 2019); Marija Đorđeska, *General Principles of Law Recognized by Civilized Nations (1922-2018): The Evolution of the Third Source of International Law Through the Jurisprudence of the Permanent Court of International Justice and the International Court of Justice* (Brill 2020); Dupuy, 'Formation of Customary International Law and General Principles' (n 2095); Craig Eggett, 'The Role of Principles and General Principles in the 'Constitutional Processes' of International Law' (2019), 66(2) NILR 197; Eqbal (n 2113); Shao (n 2077); Jochen Rauber, 'Der "Turn to Principles" im Völkerrecht: Theoretische und methodische Perspektiven auf die Zukunft von Völkerrecht und Völkerrechtswissenschaft' *Völkerrechtsblog* (26 May 2014) <https://voelkerrechtsblog.org/der-turn-to-principles-im-volkerrecht-theoretische-und-methodische-perspektiven-auf-die-zukunft-von-volkerrecht-und-volkerrechtswissenschaft/.>.

2116 ILC, 'First Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (n 2031); ILC, 'Second Report on General Principles of Law (Special Rapporteur Vázquez-Bermúdez)' (n 599); ILC, 'Third Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (n 2033).

2117 ILC, 'First Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (n 2031) paras. 11-41; Eqbal (n 2113), 187; cf. also Kleinlein, 'Customary International Law and General Principles' (n 2032) 131 calling it an "obscure" source; for an overview also Thirlway (n 266) 106–130. Critical on the usefulness of general principles as a source rather than a technique of interpretation Jean d'Aspremont, 'What Was Not Meant to Be: General Principles of Law as a Source of International Law' in: *Pisillo Mazzeschi/de Sena Global Justice* (n 503) 163. On the relationship between general principles and customary law Paolo Palchetti, 'The Role of General Principles in Promoting the Development of Customary International Rules' in: *Andenas/Fitzmaurice et al. General Principles* (n 2114) 47.

2118 Thirlway (n 266) 106, 112-118; d'Aspremont, 'What Was Not Meant to Be' (n 2116); Geiger, 'Customary International Law and the Jurisprudence of the International Court of Justice' (n 2092) 674; Pellet and Müller, 'Article 38' (n 2031) para. 254.

2119 Kleinlein, 'Customary International Law and General Principles' (n 2032) 137/138; Bonafé and Palchetti, 'Relying on General Principles in International Law' (n 2102) 169–171; Wolfrum, 'Sources of International Law (2011)' (n 2033) paras. 37-38; in detail Giorgio Gaja, 'General Principles in the Jurisprudence of the ICJ' in: *Andenas/Fitzmaurice et al. General Principles* (n 2114) 35.

> "There are many different types of principles, ranging from 'principles of international law' rooted in customary law, to municipal law analogies for closing gaps of international law, to principles inherent in the very idea of law, to legal maxims and rules abstracted from a given set of detailed norms by some induction […], and to yet others. What is common to all these principles is that they tend to have a general legal structure, i.e. a normative content which is not limited to a specific set of facts but which can be used in many situations, sometimes throughout the whole legal order, as the basis for legal argument."[2120]

The first ILC report explains that

> "the term 'general principles of law' [under Art. 38 ICJ Statute] makes reference to norms that have a 'general' and 'fundamental' character. They are 'general' in the sense that their content has a certain degree of abstraction, and 'fundamental' in the sense that they underlie specific rules or embody important values."[2121]

Crucially, principles in the sense of Art. 38 para. 1 lit. c ICJ Statute must be "recognized". Even if general principles are regularly described as containing a "natural law element"[2122] or incorporating moral and "extra-legal" values into the international legal order,[2123] they still rest on a consensual basis.[2124] But, similar to the emergence of customary law, consent by all states is not necessarily required.[2125] *Mutatis mutandis*, also general principles of law may be binding for a new state irrespective of its will.

2120 Robert Kolb, *Good Faith in International Law* (Hart Publishing 2017) 3; cf. also the list by Riedel (n 563), 381.

2121 ILC, 'First Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (n 2031) para. 153.

2122 Peters *Beyond Human Rights* (n 436) 428 by reference to *ICJ South West Africa (Second Phase) Dissenting Opinion Tanaka* (n 2) 298.

2123 Kolb (n 2119) 3.

2124 Simma and Alston (n 514), 105; Kadelbach and Kleinlein (n 280), 340; Bonafé and Palchetti, 'Relying on General Principles in International Law' (n 2102) 163; differently Kolb (n 2119) 3 "principles can play a dynamic role and tend to escape to some degree from the all too sharp constraints of a purely consensual international legal order".

2125 ILC, 'First Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (n 2031) paras. 190, 223; ILC, 'Second Report on General Principles of Law (Special Rapporteur Vázquez-Bermúdez)' (n 599) paras. 28, 54; Bonafé and Palchetti, 'Relying on General Principles in International Law' (n 2102) 164.

> "[W]hat is required [...] is essentially the same kind of convincing evidence of general acceptance and recognition [as required] to arrive at customary law. However, this material is not equated with State practice but is rather seen as a variety of ways in which moral and humanitarian considerations find a more direct and spontaneous 'expression in legal form'."[2126]

Hence, the approach to evidence for general principles is more flexible than the approach to evidence for custom.[2127] The first set of draft conclusions on the "Identification of General Principles of Law Formed within the International Legal System"[2128] may serve as a useful and persuasive guideline in this respect. Especially draft conclusion no. 7 sums up:

> "To determine the existence and content of a general principle of law formed within the international legal system, it is necessary to ascertain that:
> (a) a principle is widely recognized in treaties and other international instruments;
> (b) a principle underlies general rules of conventional or customary international law; or
> (c) a principle is inherent in the basic features and fundamental requirements of the international legal system."

Hence, in line with the less formalistic attitude towards the sources of international law described above, the goal is to find evidence of general widespread consent on the existence of such principles.

Possibly the most controversial issue in this respect is whether general principles in the sense of Art. 38 para. 1 lit. c) ICJ Statute can only refer to

2126 Simma and Alston (n 514), 105 [footnotes omitted]. Cf. also *ICJ South West Africa (Second Phase) Dissenting Opinion Tanaka* (n 2) 298.

2127 Tomuschat, 'General International Law' (n 514) 201; ILC, 'Third Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (n 2033) para. 14 where the Special Rapporteur agreed with a "non-formalized process" to identify general principles. This was supposed to be "consistent with the essentially non-written nature of this source of international law and with the approach that can be seen in judicial and State practice".

2128 ILC, 'First Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (n 2031) 75; ILC, 'Second Report on General Principles of Law (Special Rapporteur Vázquez-Bermúdez)' (n 599) 57.

principles derived from the domestic sphere,[2129] or whether they can as well develop from the international plane.[2130] In the first alternative, their ascertainment works through a comparative analysis of domestic legal orders, followed by determining the transposability of a possible common principle to the international order.[2131] Such a transposition can only take place "if they are compatible with the fundamental principles of international law, on the one hand, and if the conditions exist for their adequate application in the international legal system, on the other."[2132] In comparison, general principles of *international* law are developed directly from evidence on the international plane.[2133] Critics consider the acceptance of such general principles of *international* law as a shortcut to the cumbersome work of collecting evidence of state practice as a component of customary law and

2129 Wet, 'Sources and the Hierarchy of International Law' (n 508) 627; Pellet and Müller, 'Article 38' (n 2031) paras. 251-270; Michael Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' (2019), 21(3-4) IntCLRev 307 317.

2130 Simma and Alston (n 514), 102; Crawford *Brownlie's Principles of Public International Law* (n 3) 34; ILC, 'First Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (n 2031) paras. 162, 174, 230-231, 352 and draft conclusion 3 (which, however, is considered an "innovation" by Eqbal (n 2113), 195); Kleinlein, 'Customary International Law and General Principles' (n 2032) 134–137; Kadelbach and Kleinlein (n 280), 339–340; Tomuschat, 'General International Law' (n 514) 192; Brunnée, 'Consent (2022)' (n 2048) para. 19; Shao (n 2077); Bonafé and Palchetti, 'Relying on General Principles in International Law' (n 2102) 161; Riedel (n 563), 383–384; arguably Gaja, 'General Principles of Law (2020)' (n 2107) para. 8; see also ILC, 'Third Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (n 2033) paras. 4, 19.

2131 Cf. ILC, 'Second Report on General Principles of Law (Special Rapporteur Vázquez-Bermúdez)' (n 599) paras. 23-106; ILC Draft Conclusion 4, Annex to ibid.; Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' (n 2128), 317; Pellet and Müller, 'Article 38' (n 2031) paras. 264-270. On the methodological challenges of such approach d'Aspremont, 'What Was Not Meant to Be' (n 2116) 176–178. Paparinskis (n 541) 173 calls for diligence in ascertaining general principles by including diverse state practice. On transposability in particular ILC, 'First Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (n 2031) paras. 225-229; Pellet and Müller, 'Article 38' (n 2031) paras. 268-270.

2132 ILC, 'Second Report on General Principles of Law (Special Rapporteur Vázquez-Bermúdez)' (n 599) para. 22, also para. 74; cf. also Draft Conclusion 6. On the distinction from private law analogies An Hertogen, 'The Persuasiveness of Domestic Law Analogies in International Law' (2018), 29(4) EJIL 1127 1131.

2133 ILC, 'Third Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (n 2033) para. 27.

hence as weakening the structure of international law.[2134] However, also for customary law, it has become more and more accepted that a consistent and almost unanimous *opinio juris* may trump ambiguous state practice. In its *Nicaragua Case*, the ICJ found it sufficient that "the conduct of States should, in general, be consistent with such rules"[2135]. That standard of consensus may not be lowered - in particular, it does not mean mere majority rule.[2136] But in an international community increasingly led by common interests, almost universal and widespread commitment may take a more prominent role.[2137] State practice is relevant, but it is no longer the essential criterion.

> "Progressively, therefore, international consensus takes the leading role. Caution is nonetheless required in relegating the available practice to a minor position. Practice is capable of stabilizing legal propositions and shows that the conduct in issue constitutes not only a passing ephemeral phenomenon, not carried by broad support among the main decision makers, the states. Thus practice remains an essential indicator but must give up its role as a constituent element of general rules of international law. Empiricism has its limits."[2138]

Foreclosing the emergence of general principles on the international plane would "imply that the international legal system could not avail itself of the abstract categories used by all legal systems to fulfil one of the essential functions of the law: settling disputes and maintaining social peace".[2139] It would deny the fact that the international legal system has evolved as far as being based on certain general considerations.[2140] That base does not necessarily mean the rules for establishing customary law are being circumvented. It is more a case of accommodating new ways of expressing state

2134 Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' (n 2128), 321; but Shao (n 2077) thinks this danger is overemphasized.
2135 *ICJ Military and Puramilitary Activities in and against Nicaragua* (n 2065) para. 186.
2136 Tomuschat, 'General International Law' (n 514) 202; Téson, 'Fake Custom' (n 563) 89–92, 109.
2137 Also Riedel (n 563), 385.
2138 Tomuschat, 'General International Law' (n 514) 202.
2139 Statement of ILC member Escobar Hernández cited after ILC, 'Third Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (n 2033) para. 28.
2140 Cf. also Kadelbach and Kleinlein (n 280), 340.

consent and the fact that certain fields of international law, in particular the law on state succession, are not suited to being completely regulated by treaties or custom as the detection of a widespread and consistent state practice is practically unfeasible.

As a consequence of their widespread but diffuse evidence, general principles may, depending on the specific case, encompass general rules and ideas, which, without any other source of international law, will often not entail direct legal rights or duties.[2141] Their function is, more, to influence or reinforce other rules, fill gaps left by custom or treaties, and to give guidance when drafting or interpreting treaties or applying ambiguous rules.[2142] Hence, general principles often need more specification and may only show their potential when applied to a special case.

> "The 'implied consent' of States underlying these general principles can be understood as an 'incomplete consensus' among States, whereby they share a commitment at a general level without agreeing on particular solutions in specific cases."[2143]

The flexibility of general principles and their openness to new developments can be seen as an opportunity rather than as a threat. As long as the consequences of a finding of a general principle are clearly delimited and placed in context, it is more a case of customary law being invigorated and strengthened rather than weakened by such an evolution. Potentially, general principles can even turn into customary law.[2144]

2141 E.g. *ICJ South West Africa (Second Phase) Dissenting Opinion Tanaka* (n 2) 295 "the general principles of law in the sense of Article 38, paragraph 1 (c) […] may be conceived, furthermore, as including not only legal principles but the fundamental legal concepts of which the legal norms are composed such as person, right, duty, property, juristic act, contract, tort, succession, etc."

2142 Cf. ILC, 'Third Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (n 2033) paras. 110-121; Eqbal (n 2113), 189–190; Thirlway (n 266) 107 "This does not mean that a principle is on too elevated a plane to be capable to be applied to a legal problem, but it does not mean that the principle will, by being applied to the case, in effect generate a rule for solving it."; Kadelbach and Kleinlein (n 280), 338–339, 346-347; Kolb (n 2119) 3/4; apparently differently Wolfrum, 'Sources of International Law (2011)' (n 2033) 34, 35, 39.

2143 Shao (n 2077), 255.

2144 Pellet and Müller, 'Article 38' (n 2031) para. 302; Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' (n 2128), 322; Shao (n 2077), 254; Gaja, 'General Principles of Law (2020)' (n 2107) para. 24.

2) Application to the Cases under Analysis

The specific term of "acquired rights" recently has not been popular and only seldom been used in international instruments or rulings. The doctrine of acquired rights' ambit is to protect specific positions of individuals against abrogation or alteration by the state. It protects a longing for permanence and encapsulates basic ideas of legal security and protection of trust, both fundamental values probably known to every legal system in the world.[2145] This general idea has infiltrated all levels, from the domestic to the international. Continuity and stability are also basic pillars of the international legal order and find their expression in such fundamental and long-standing principles as the presumption of the continuity of states or the rule of *uti possidetis*. Indeed, the basic function of the law is to secure transactions and relations between its subjects. The wish for security is not only a human trait, but the trust in the reliability of a legal system is an essential prerequisite of its functioning.[2146] Legal security is in the interest not only of private individuals but also of states. Change is necessary and inevitable, but for the sake of social coherence it must be tamed, must be to some extent predictable.[2147] Hence, the doctrine of acquired rights is undergirded by fundamental values and norms of international and national legal systems.

a) Rights Acquired under a Domestic Legal Order and Succession

The analysis of the practice in succession cases from Yemen to South Sudan, supported by practice in the case of Brexit, has shown that the protection of acquired rights, understood as all individual rights acquired in the domestic legal order of a predecessor state, was definitely used as a guiding principle. Even without explicitly making reference to "acquired rights", the practice and pronouncements of the successor and predecessor states under scrutiny showed an obvious and incessant general commit-

2145 Lalive (n 8) 156, 161/162, 189; considering legal security as a "general principle" of international law Ascensio, 'Art. 70' (n 435) para. 10; for private international law Ziereis (n 58) 75–76, 86; see Tomuschat, 'Die Bedeutung der Zeit im Völkerrecht' (n 2070), 13; cp. also Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 2), 1.

2146 Comprehensively Andreas v Arnauld, *Rechtssicherheit: Perspektivische Annäherungen an eine "idée directrice" des Rechts* (Mohr-Siebeck 2006) 109–114.

2147 ibid 114.

ment to upholding individual rights. All new states, no matter whether emerging from violent conflict or mutual agreement, in principle adopted most parts of their respective predecessor's legal order. That adoption was also prevalent in cases of mere territorial transfer, e.g., in Hong Kong and Macau. It was even the line principally followed in states that were illegally occupied and wished to divest themselves of an oppressive past as well as to connect back to a former existence (e.g., the Baltic States). States not taking over the predecessor's legal order were continuing states enlarging their territory (Germany, Namibia). In the latter cases, individual rights were secured by extensive and detailed provisions exempting them from vanishing.

This finding does not mean that states upheld all individual rights. Most of them felt free to adapt rights to their own legal environment and hence to change their content. Some positions were not accepted at all, but more as an exception than as a rule. Moreover, in many cases in which public authorities curtailed individual positions, national and international courts stepped in and confined such action. Relevant pronouncements of national courts are rare, as their jurisdiction was mostly limited to applying the "new" law and hence to adjudicating on rights endorsed by a new constitution. But decisions from e.g. the Supreme Court of Slovenia, the Supreme Court of Namibia, the BVerfG, or the Hong Kong High Court show that national courts were prepared to endorse continuity as a legal requirement and to set limits to abrogation of rights, sometimes also with reference to international law.

It seems that, throughout the world, states have felt the need to protect the *status quo* for the inhabitants of a territory even if there has been no international treaty and no international custom obliging them to do so. Besides the point that upholding the law on the ground was often the most practicable option, there must have been other reasons for this as well: Some states concluded treaties securing acquired rights several years after they had become independent and already had enacted several reforms (e.g., the 2001 Yugoslav Succession Agreement), several states drew clear lines between some private rights that ought to be upheld and others that were cancelled (cf. the sophisticated rule-exception lists in the annexes of the German Unification Treaty), and a number of states upheld law foreign to the rest of their territory and hence established "legal enclaves" (Hong Kong, Macau, Walvis Bay, Germany, and Yemen). The Brexit WA even went beyond that level of protection by partly according potentially eternal rights.

b) Human Rights Law, the Law on the Protection of Foreign Investment and Succession

The recent developments in the field of human rights law and the law on the protection of foreign investment are further evidence of a general international consensus on the importance of protecting individual positions in cases of succession. Even if dogmatically in the end not completely convincing, the strong and incessant advocacy for "automatic succession" to treaties of a humanitarian character not only by academic writers, but also by international human rights bodies, judges, and sometimes even courts and tribunals is a strong indication of international commitment to the persistence of individual rights. Its invocation may, until it becomes reality, further strengthen the status of the individual under international law and the doctrine of acquired rights.

Albeit not consistent enough to build custom, state practice in this respect has also shown a remarkable determination to uphold major parts of a predecessor's human rights treaties. Even if not being prepared to accept a strict duty to step into a predecessor's shoes and accept all previously guaranteed human rights, almost no state under analysis repudiated all international treaties of its predecessor. Quite the contrary, the normal result of succession was the factual continuity of most treaty commitments. A similar picture emerges when looking at the continuity of investment treaties. Even if those treaties, generally bilateral treaties, were not supposed to survive a change in sovereignty, most of them in practice were not completely re-negotiated, but states (tacitly or expressly) agreed on their continued application or renewal, keeping the individual rights alive. Thus, succession practice in the two fields of international law currently of most relevance for the protection of individual rights is obviously geared towards continuity.

International human rights bodies and investment tribunals have rarely adjudicated on the question of persistence of individual rights in cases of state succession since their jurisdiction is dependent on a treaty that will almost always not survive the change in sovereignty or sometimes has not even been in place in a predecessor state's legal order. Nevertheless, in its groundbreaking *Kurić* judgment[2148], the ECtHR constrained Slovenia's right to curtail individual status rights acquired under a former legal order

2148 *ECtHR Kurić and Others* (n 1364).

by requiring the successor state to justify such action and therefore *prima facie* assuming the persistence of civil status. In *Ališić*[2149], the ECtHR, albeit not explicitly mentioning the doctrine of acquired rights, ruled that private contracts had not automatically ceased to operate when the SFRY dissolved and individuals having acquired rights under such contracts could make claims against the successor state in which a debtor bank was headquartered. It has to be conceded that, with respect to justifying such acts, human rights courts accorded much leeway to the states alleged to have violated human rights in the wake of succession. Especially when it came to decisions with far-reaching consequences for a state's economic order, the ECtHR backed off and declared many of them to lie within the sovereign realm.[2150] Nevertheless, succession cases were not excluded from scrutiny, and a complete dismantling of civil status was not accepted without a justification.

c) The Law on the Termination of Treaties

An important parallel to succession can be found in the termination of treaties since the termination of a treaty conferring individual rights is similar to the case of the (at least theoretical) liquidation of a domestic legal order when succession occurs. Of course, caution is warranted. As repeatedly stated, in contradistinction to a *new* state emerging with full own sovereignty, in cases of treaty termination, the *same* state attempts to terminate the treaty it once chose to conclude. Hence, treaty withdrawal comes closer to the situation of retroactive application of laws than to that of a change of sovereignty. Nevertheless, the pertaining practice is part of the "bigger picture" of evolutions in international law pertaining to the taking of individual rights. Furthermore, some instances of succession, such as cessions, are indeed closer to treaty withdrawal than to other forms of succession.

While withdrawal from treaties granting individual rights is possible, the evolution of impediments to such a withdrawal is visible. Some human rights treaties, amongst them the major instruments of the ICCPR, the ICESCR, or CEDAW, do not contain a termination clause at all and

2149 *ECtHR Ališić* (n 1466).

2150 Cf. e.g. *ECtHR [GC] Jahn and others* (n 1069); *ECtHR Blečić v. Croatia* (n 1398); *ECtHR Klose and Others* (n 1170).

therefore effectively forestall unilateral termination of membership. Beyond that, some human rights and many investment treaties contain "sunset" clauses providing for their (limited) extended validity even after a formal withdrawal. Only recently, has the IACtHR developed new criteria for withdrawal from the ACHR, which had found no explicit basis in the text of the convention.[2151]

Apart from the difficulties associated with treaty withdrawals, there is also a reluctance to retroactively influence rights once conferred. Art. 70 para. 1 lit. b) VCLT, even if not directly applicable to rights of individuals, encapsulates the basic idea that certain situations and rights created by a treaty will survive its termination. Arguably, general consensus has emerged that, once a specific dispute has arisen before an international body deciding on individual claims, the termination of the underlying treaty will have no influence on the proceedings. That consensus, which comes close to Art. 70 para. 1 lit b) VCLT's differentiation between "executed" and "executory" rights, is also reminiscent of the characteristic protection of a "factual situation" by the doctrine of acquired rights. Hence, although there is no general prohibition to withdrawing from a human rights treaty, there at least appears to be agreement that rights acquired under them should not be withdrawn retroactively, once having "crystallized" into a juridical claim and unless specific formal steps for withdrawal were taken in good faith. Admittedly, that development has come under pressure from a recent series of consensual terminations of BITs that purported to have retroactive effect, even abrogated existing "sunset clauses", and were approved of in academic commentary. A recent and particularly significant example is the Termination Agreement of EU states in the wake of the CJEU's *Achmea* judgment.[2152] Yet, apparently, not all EU member states agreed on the appropriateness of that conduct, in particular its retroactive effect. In addition, several investment tribunals have not accepted *ad-hoc* termination of their jurisdiction. Strikingly, when affirming their competence, they did not only rely on "objective" arguments such as procedural fairness or non-retroactivity but paid particular attention to the argument of the "legitimate

2151 *IACtHR Denunciation of the ACHR* (n 512).
2152 *CJEU Achmea* (n 1043).

expectations" of investors[2153]. The issue remains unsettled, and the strength of the practical persuasiveness of these developments remains to be seen.

3) Interim Conclusions

The foregoing description allows a picture to emerge that international practice - diverse as it may be - shows a definitive tendency to delimit the consequences of a termination of individual rights' original legal basis. Even if the abrogation of those rights is not completely forbidden, international law has established several impediments to terminating humanitarian treaties. Even if states are still considered the "masters" of the treaties and the main creators of custom, it seems that international law has increasingly developed so as to bind them to accept a certain *status quo* for individuals even if the legal basis of the former rights disappears. And this is not only the case for treaty withdrawal but also for succession, when the formal legal order of the predecessor lapses. States have shown a remarkable determination to uphold rights acquired by individuals. This upholding has been vigorously requested by international human rights organs. International institutions have not let abrogations go unchallenged but have scrutinized them even after succession. That scrutiny has held true for rights acquired under international law and, even more so, for rights acquired under domestic law. This wealth of practice allows to determine a general conviction of states and the international community to respect situations created by the exercise of individual rights to be determined. In conclusion, it is submitted that the doctrine of acquired rights has evolved as a general principle of international law in the sense of Art. 38 para. 1 lit. c) ICJ Statute.

A particularity of the doctrine is that it can possess a dual character - a general principle with its roots in domestic systems and a principle operating specifically on the international plane: Originally developed from the rule of non-retroactivity of laws as an expression of the guarantee of legal security known to almost all national legal systems in the world, the doctrine of acquired rights is a general principle in the traditional sense, derived from the majority of national legal orders. On the nation-

2153 On the categorization of legitimate expectation as a general principle in investment law Stephan W Schill, 'General Principles of Law and International Investment Law' in: *Gazzini/Brabandere International Investment Law* (n 848) 133 168–170.

al plane, the retroactive withdrawal of rights is directed at one and the same sovereign power. It basically requires the state to act unambiguously and not contradict itself. This requirement is significantly different from requesting a sovereign to comply with the rules of another sovereign, the predecessor. Hence, this "traditional" principle can only be applied in cases of termination of treaties (or cessions of territory) but not in cases of succession where, at least, one "new" state emerges. At least when applied in the particular situation of new states emerging, the principle of acquired rights must be assessed under different precepts - the specifically "international" background of succession. In those cases, it must be understood as a genuine international principle, i.e. a principle emanating from the international plane. That understanding, again, does not mean circumventing the prerequisites of the formation of general principles; it is more a matter of accepting that there are certain situations with a particular international background that cannot exist at the national plane, such as the replacement of one state by another.[2154]

The validity of the findings is therefore partly dependent on the type of succession involved. Especially in cases of mere transfers of territory (cessions), the above-mentioned particularity of the encounter of "new" and "old" sovereignty does not exist since both parties continue and agree[2155] on the terms of the cession. But, as has already been alluded to, the categories of succession are not clear-cut and involve overlap. Thus, similarly, in cases of peaceful and voluntary separation or dissolution of a state into several parts, especially if these parts also beforehand had a say in the state government, such as, e.g., in Czechoslovakia, it could be argued that the mentioned sovereignty concerns do not play out as much as in violent secessions. Depending on the specific facts of the case, such situations may resemble more the situation of the same state binding itself. Thus, depending on the case, the principle of acquired rights can be described as a traditional principle derived from a comparative overview of national legal orders, a genuine international principle, or an intermittent principle switching between both levels. Both the national and the international expression of the principle find their essential reason in a longing for stability and reliability. That international law and domestic principles overlap will regularly be the case and is neither dogmatically inconsequent nor

2154 Which is based on different principles than succession under private law, cf. Shaw *International Law* (n 266) 957.

2155 This of course only holds true for voluntary cessions.

undesirable. In light of the profoundness and generality of such principles as "equity", "legal security", or "good faith", a neat distinction between both areas is illusive and not necessary as they often contain similar rules.[2156]

C) The Content of the Principle

The indefiniteness of the content of the doctrine of acquired rights has often been lamented and has long cast the doctrine's legal force into doubt. While the doctrine, as a general principle of law, is necessarily flexible and defies a clear-cut frame, an analysis of the collected material since 1990 reveals several cornerstones of a definition and expounds its content. What can be stated from the practice surveyed in Chapter IV is that today's principle of acquired rights has not moved far from the mid-20th century definition of the "old" doctrine. In fact, a surprising continuity can be discerned in its basic substance irrespective of the major changes the international legal order has undergone since. Yet, at the time *O'Connell* and *Lalive* wrote about acquired rights, the doctrine was particularly innovative and forward-looking, probably more reflecting law as it ought to be than reflecting already existing law. As explained above, it constituted one of the first doctrines protecting rights and interests of individuals and one of the - at that time - rare examples of an international rule touching upon state domestic issues. Hence, it was not in need of further theoretical definition but of being put into practice.

Regardless of the question whether the doctrine of acquired rights before the Second World War had constituted an independent rule of international law, it is argued here that the developments in international law *after* 1945, rather than substituting the doctrine, in fact allowed it to evolve and defined its contours. At the time, ideas about human rights and the protection of foreign investment fell on fertile soil; they were born into an international order at least attentive to individuals' concerns and aware of the peace-keeping and pro-economic function of continuity in cases of territorial change. Simultaneously, developments in those specialized fields had repercussions for general international law as well. In that way, many of the propositions announced in the 1960s have, in the meantime, been supported by state practice and become positive law.

2156 Cf. Shao (n 2077), 237, 246.

I) Presumption of Continuity of the Domestic Private Legal Order

The first direct consequence of the consistent state practice ascertained above is that, under international law, a presumption of continuity of the private domestic legal order after succession emerged.[2157] That presumption does not run counter to the sovereignty of states as the new state may, at any time, change the law or reject it. It only means that, if a state does nothing, e.g., does not repudiate a law or enact a new one, a presumption exists that all domestic individual rights under such laws are upheld. Put differently - tacit approval of the former law is assumed in case of no indication to the contrary. Also, potentially ambiguous statements and expressions by states can be interpreted in line with the presumption and although the successor may have legislated anew, potential gaps can be filled according to the presumption.

II) Obligation to Respect Factual Situations Emanating from the Exercise of Rights

Beyond that presumption, even if a successor state explicitly rejects (parts of) the predecessor's domestic legal order, it will have to respect acquired rights. The term "acquired *rights*" might in fact be misleading. What is protected by the principle is not specific rights in the sense of legal entitlements that can be enforced at any time. Successor states will have to respect, *not the right, but the particular factual status quo*, the factual situation that has evolved through the exercise of the right and in the persistence of which individuals could have a legitimate interest. As *O'Connell* impeccably wrote already in 1956

> "what is 'inherited' is the state of facts which the now extinguished legal relationship has brought about. The equitable interest which the lender has in this factual situation is described variously as an 'acquired right', 'property right' and 'vested right'. The obligation of the successor State is to respect this interest."[2158]

2157 Such presumption was already postulated by O'Connell, but partly based on philosophical considerations, O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 124, 127, 131.

2158 O'Connell *The Law of State Succession* (n 2) 78 [footnote omitted, emphasis added].

The basic idea underlying Art. 70 para. 1 lit. b) VCLT through its distinction between "executory" and "executed" rights can be transferred to other cases of a subsequent extinction of the legal basis of a right. It is not the right *per se* that is protected, only the situation established by its use.

The duty to "respect" those situations, again, is not supposed to be understood in the form of eternal, never alienable or modifiable positions. States can abolish or curtail rights but jurisprudence has routinely required them to justify any possible aberration from the general principle ("the norm"), bring forward reasonable arguments of public interest, and act in good faith and in an overall proportionate way. Of course, in situations of a massive overhaul of a state's national legal order, such reasons of public interest are often relatively easy to claim. Constitutional or international court decisions supervising succession processes have (rightly) accorded states a wide margin of appreciation when it came to (re-)building their internal political, economic, and legal order after succession. A panoply of reasons, most of them relating to domestic interests, has been accepted here. Especially arguments relating to the need to transfer one legal system into the other, the economic capacity of a state, or sovereignty over a state's natural resources have been brought forward and accepted. Nevertheless, at the very least, the presumption against the abrogation or modification of acquired rights opens the door to international scrutiny. Successor states are not completely free to treat their populations as they want but have to take account of the previous situation. International jurisprudence has shown a clear tendency to conduct a weighing exercise between the reasons for change and the impact on the individuals concerned. That exercise will regularly take place from a general, not an individual, perspective. Admittedly, the doctrine has not come as far as imposing a duty to act in a strictly proportionate way, but behavior must be reasonable, not grossly disproportionate, or discriminatory. The effort a state has to put into its justification, i.e. the gravity or importance of the reasons it has to give for a change of the inherited situation, depends on the mode of succession.

In line with what was said about the state of the law concerning violations of other *erga omnes* obligations, other states are not legally required to intervene in cases of violation but should be able claim cessation and reparation.[2159] Admittedly, due to the malleable standard "to take into account", the variety of ways of abiding by the rule, and especially the large margin of discretion, such an obligation to respect acquired rights is hardly justiciable

2159 See *supra*, Chapter III B) II 2).

and will rarely lead to a finding of a violation. However, even now, it cannot be completely excluded that states will be held accountable when they rampantly ignore substantial and essential private positions without good reason or discriminatorily uphold some rights while denying others. This accountability is exemplified by the ECtHR's finding in *Kurić*. Especially for traditional, long-accepted acquired rights, such as property rights, for which there is a possibility for (at least partial) compensation in money, states will face higher hurdles to justify abrogation than for others. For now, the obligations associated with the principle of acquired rights will tend to be relevant in combination with other rules, such as treaty rules (e.g. Art. 8 ECHR or P I-1), or as guiding principles. But the more the doctrine is applied in future cases, the more concrete and independent consequences could develop.

III) Legitimate Expectations as New Point of Reference

Also of relevance here is that the point of reference for the principle has changed. In the beginning, until the middle of the 20th century, the doctrine was essentially grounded in ideas of objective equity, expressed through the rule of unjust enrichment calculating losses and wins before and after a change in sovereignty or of territorial notions of debts. With the acceptance of a role for the individual on the international plane, it was more and more the individual's point of view and a person's "legitimate expectation" that became the yardstick for the question of which situations ought to be protected.[2160] Such a change of perspective necessarily had to take into account civil domestic matters. National courts such as the BVerfG or the Slovenian Constitutional Court determined whether the plaintiffs had relied on a certain situation in good faith when adjudicating on acquired

2160 The ICJ's holding in *ICJ Obligation to Negotiate* (n 1018) para. 162 that "references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation" does not contradict this submission. The court rejected an inference of such general rule from specific awards and only pronounced on a state's (here: Bolivia's), not individuals', legitimate expectations.

rights after succession. The ECtHR's ruling in *Ališić*[2161] was also a retreat from the state-centered, "equal partition of debts" scheme applied in most international agreements (such as for the SU or the SFRY), where debts were divided on a percentage basis between the successor states without regard to the individual claims. In *Ališić*, on the basis of a civil law approach, the court attributed responsibility for specific payments to the home states of the debtor banks. The court did not ask about enrichment on the part of the states but concentrated on the fact that the original private contracts between the banks and the individuals had stayed intact despite succession. Finally, jurisprudence of investment tribunals repudiating the possibility of retroactively denying claimants standing by terminating a BIT also relied heavily on the argument of legitimate expectations of the (objective) investor. Annex G of the Succession Agreement between the Yugoslav successor states did not rely on enrichment on part of the successor states in order to protect acquired rights, and the WA between the UK and the EU officially proclaimed to be protecting "life choices" of (former) EU citizens.

That being said, even if the principle of acquired rights today relies more on "legitimate expectations" of individuals than on the traditional doctrine, it still does not protect mere expectations, chances, or beneficial circumstances. The rights must have been unconditionally acquired and must have been enforceable under the domestic legal system of the former state. Otherwise, no reasonable basis for a *legitimate* expectation emerges. This prerequisite of acquisition was also endorsed by the EECC decision on pensions.[2162] Substantially, the idea also underlay the decision of the BVerfG when it denied protection to rights purportedly acquired under GDR law shortly before unification. Besides questioning the good faith of the new holders of those rights, the court reasoned that, even under former GDR law, the positions would not have been lawfully acquired. Additionally, the non-permanence of the right to sell cross-border services under the Brexit WA proves that the protection only encompasses established situations, not favorable market conditions.

2161 *ECtHR Ališić* (n 1466).
2162 *EECC Final Award on Pensions* (n 1653).

IV) The Object of Acquisition

1) Acquired Rights as Rights Acquired under Domestic Law

The doctrine of acquired rights was an early attempt to internationalize individual positions existing under domestic law. The attempt was originally motivated by the need to channel, pre-empt, and alleviate ethnic conflicts in the wake of territorial shifts after the First World War. It was also necessitated by the fact that individuals had no status under international law. Since individuals nowadays can hold rights under international law directly, voices are also proposing to protect such international rights as acquired rights.[2163]

While such an extension cannot be precluded from the beginning but would need research beyond the scope of this book, it should suffice here to explain why the common approach to transferring the principle of acquired rights to international rights seems misplaced. The reasoning lies in the continuity of rights under international law after succession generally being based on a rationale different to that behind the survival of domestic rights after a change in sovereignty. But for an international rule, a domestic legal order automatically lapses under a new sovereign as its source, the sovereignty of the predecessor, comes to an end. In comparison, the question of whether rights under international law persist is essentially one about the persistence of their international source.

As shown above, while most treaties lapse on a change of sovereignty, customary law and general principles survive. If the current scope of customary international law or that of general principles does not cover specific human rights, i.e. if there are not enough states that agree on the fundamental nature of such rights, those rights will not survive the change in sovereignty. This result is a consequence of the current state of international law and the conception of its sources, not a task for the doctrine of acquired rights. To argue differently would substitute a diligent determination of state practice with the mere assertion of a rule. For rights acquired under treaties and not protected by customary law, it has to be conceded that Art. 70 para. 1 lit. b) VCLT provides for the persistence of executed rights of *states*. As far as Art. 70 para. 1 lit. b) VCLT is seen as an expression of a general rule also encompassing individuals, it exclusively

2163 E.g. Kamminga, 'State Succession in Respect of Human Rights Treaties' (n 618), 472–473, 481; cp. Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 490–491.

protects factual situations established through the exercise of such rights under treaties, not the rights themselves. Authors arguing for automatic succession to human rights treaties by referring to acquired rights theories therefore unduly overstretch or misinterpret the content of the principle of acquired rights. Hence, while certain "executed" rights or factual situations emanating from the use of rights granted by an international treaty may also be protected by the principle, it cannot vouch for succession into these treaties.

2) Acquired Rights and Public ("Political") Rights

It has often been purported that rights emanating from public law, having an intrinsically "political" character, are not protected by the doctrine. As early as the middle of the 20th century, that distinction has been criticized. In general, the public-private distinction is not even known to all domestic systems, handled differently, and open to development.[2164] Apart from obvious examples, the debate will remain open on which rights qualify as "public",[2165] bringing further (unnecessary) unpredictability to the application of the law. Several rights, such as concession rights or pensions rights, show obvious traits of both fields of law, i.e. they can best be described as rights *sui generis*. As has been exemplified by the early case of *German Settlers*[2166] and by more recent events in the SFRY,[2167] private law can also be deeply imbued by (illegitimate) political motives and can be utilized to pursue aims such as ethnic cleansing and social exclusion. Restitution of property became a major remedy for past injustices in many successor states. In the same vein, in the cases under scrutiny here, states regularly did not distinguish between the upholding of "private" laws or "public"

2164 Shaw, 'State Succession Revisited' (n 259), 85; cf. also Zemanek (n 38), 282, especially footnote 65; Hernández, 'Territorial Change, Effects of (2010)' (n 166) para. 14.

2165 See e.g. Waibel, 'Brexit and Acquired Rights' (n 8), 444 who seems to assume that "economic freedoms under the EU treaties and the permanent right to live and reside in the host member country" are all "public" rights.

2166 While the granting of property to settlers was a matter typically regulated by (German) private law, it was in fact part of a greater policy of "Germanization" of the ethnically diverse territory. It does not seem self-evident that the PCIJ practically disregarded this background, cf. Lauterpacht *The Development of International Law* (n 284) 320–321; Lauterpacht *Private Law Sources and Analogies* (n 61) 193-195, especially 194; Shaw *International Law* (n 266) 1002.

2167 See *supra*, Chapter IV) B) IV).

laws but legislated for the permanence of all former laws except those of a constitution. Hence, a strict public-private distinction is not supported by state practice and too unspecific to constitute a useful basis for a principle of acquired rights. Thus, acquired rights are rights being held by a private person in that private capacity,[2168] no matter whether the right is characterized as "public" or "private" under domestic law.

But what has become clear from the foregoing is that the principle of acquired rights protects the situation established by the exercise of rights if, and only in so far as, there is a legitimate expectation in the permanence of that situation. Such legitimate expectation cannot emerge when the right concerned is intimately linked to the personality of the respective state granting the right. Therefore, voting rights do not come under the scope of the doctrine of acquired rights, not because they are rights derived from public law but because the right to have a say in the community's representation is obviously tightly connected to the personality of a specific social community.[2169] The same holds true for the alleged "right to a nationality", as the right to be officially accorded the status of a member of such a community. No legitimate expectation in its persistence after succession can emerge.

3) Acquired Rights and the Local Nature of the Right

In the beginning, acquired rights were often upheld by courts with respect to "local" rights such as concessions, tenancy, or usufruct rights to land etc., i.e. rights with a particular relationship to land or natural resources. The link seemed obvious because the permanence of acquired rights was often based on the *res cum onere transit* rule. Later, the local character

2168 Rights of civil servants are not covered in this book. But see Baade (n 273); on the Upper Silesian Tribunal and "vested rights" of public employees Erpelding and Irurzun, 'Arbitral Tribunal for Upper Silesia (2019)' (n 68) para. 52.

2169 Today, while the border between permanently resident non-citizens and citizens becomes fluent, the right to vote is often still considered an exclusive right of citizens, cf. Klaus F Gärditz, 'Der Bürgerstatus im Lichte von Migration und europäischer Integration' in Christian Walter and others (eds), *Repräsentative Demokratie in der Krise?: Referate und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Kiel vom 3. bis 6. Oktober 2012* (de Gruyter 2013) 49 65-67, 88–91; Christian Walter, 'Der Bürgerstatus im Lichte von Migration und europäischer Integration' in: *Walter/Gärditz et al. Repräsentative Demokratie in der Krise* (n 2168) 7 22–25.

became prominent since notions of land and territory, i.e. property and sovereignty, are intimately connected. The possession of large parts of the land is eminently important for a country's economic development. Rights to land and resources are regularly associated with power and wealth. They will typically become bones of contention in a change of sovereignty. However, if the doctrine of acquired rights is delinked from the *res cum onere transit* rule and based on a theory of equity, such as unjust enrichment, or legitimate expectations, there remains no compelling reason why (contractual and real) rights to land and natural resources such as property, usufruct, lease etc. deserve more protection than other rights.[2170] *O'Connell* and *Lalive* acknowledged that "all rights of a pecuniary character" were eligible for protection, not only rights with respect to immovable property. The typical example of concessionary rights does not even necessarily have a relationship to territory; it can also relate to (movable) facilities etc. Additionally, other rights, e.g., pension rights or intellectual property rights, have been accepted as subject to protection in almost all succession cases under analysis here but have no relationship to land whatsoever. Therefore, the "local" nature of a right no longer constitutes a prerequisite for protection under the principle of acquired rights.

4) Acquired Rights and Property Rights

O'Connell and *Lalive* maintained that contractual rights were protected as acquired rights.[2171] Also the 2001 Succession Agreement quite explicitly differentiated between acquired rights and property rights, thereby making it clear that both notions were not synonymous. But there are obvious reasons why the right of property was, is, and will remain the most prominent example of an acquired right: The main crux with property is that, in principle, it is eternal unless expropriated by a state and can be transferred and inherited and is therefore not bound to a specific person. Property rights, as other "real rights", are of an extraordinary permanence. In contradistinction, rights emanating from a contract are specific to the persons concluding the contract and can regularly be terminated for several

2170 Crawford *Brownlie's Principles of Public International Law* (n 3) 418 also alludes to the "anomaly" of a stronger protection of concessions as compared to employment contracts or pensions.

2171 O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 140; O'Connell *The Law of State Succession* (n 2) 81, 136; Lalive (n 8) 184.

reasons, last but not least according to a manifest change of circumstances under national and international law. Moreover, in contradistinction to other rights granted by the state, such as basic constitutional rights, crucially, property rights are defined by private law. They are statutory rights, defined and established by the state itself. That national definition makes property rights defy a meaning completely autonomous from national law and hampers the emergence of an international right of property.

5) Acquired Rights and Pecuniary Rights

What also becomes clear from the foregoing is that the original definition of acquired rights as rights "of a pecuniary character" cannot be upheld in its totality today. That requirement was probably originally derived in relation to property and potential compensation for expropriations. In addition, the grounding in the principle of unjust enrichment made it necessary to refer to rights of a monetary value. Now, the mentioned shift from a state-centered approach to an approach taking into account the population's interests has ushered the way to extend the doctrine to other rights beyond pecuniary interests. In many of the cases under review here, especially in the SFRY successor cases, states acknowledged further dimensions of the value of property beyond mere monetary interests. The right to residence or dwelling rights in general are rights with close ties to the right of ownership but also a foremost moral value. Backed by human rights law, especially the right to family life under Art. 8 ECHR, refugees and/or displaced persons in the wake of the Yugoslav conflicts were secured the "right to return" to their homes. Importantly, even if states were under a duty to restitute lost property or tenancy rights to returning individuals, such restitution obviously did not primarily have a pecuniary character; it had a deep moral value - to restitute a "home". That value became obvious in the fact that restitution was primarily owed *in natura*. Additionally, under the UK-EU WA, rights to residence were secured once exercised no matter whether the person had pecuniary interest in the residence.

Moreover, especially indigenous communities live on land with rich natural resources[2172] and can be recognized as collective rightsholders.[2173]

2172 Shelton, 'The Rights of Indigenous Peoples' (n 582) 217, 231.

2173 ibid 217, 227; Fergus MacKay, 'The Evolution and Revolution of Indigenous Rights' in: *Arnauld/von der Decken Handbook of New Human Rights* (n 582) 233 236.

Their connection to the land cannot simply be expressed in monetary terms. Their claims to land are often linked to their livelihood and therefore have a direct connection to the communities' (potential) right to self-determination.[2174] Pecuniary compensation in those cases would not sufficiently account for the significance of communities' "rights to land", which connotes much more, i.e. societal belonging and status, a means of basic nutrition and accommodation, and a spiritual and religious value. For example, South Sudan showed considerable respect for unwritten, customary tribal land rights constituted before succession. In Hong Kong, the rights of indigenous peoples have also been explicitly preserved. In this area, the principle still shows a remarkable link to the protection of minorities.

V) Bearers of Rights - The Relevance of Nationality

The traditional doctrine of acquired rights was perceived as a particular expression of the law on the protection of foreigners in cases of state succession.[2175] A state's own nationals and stateless persons[2176] could not rely on it. This caveat had obvious reasons in the non-existent or only weak status of the individual under international law as well as in the fact that, until the middle of the 20th century, international law was not supposed to interfere in internal affairs of states, especially not in a state's domestic nationality laws. Even at that time, some authorities construed the notion of a foreign person in a non-formalistic way, accepting that the rules could still be relied on even by those inhabitants of a territory who had been subjected to the nationality of the new sovereign but were still targeted because of their foreign origin.[2177] This approach, on the one hand, paid attention to the fact that, in times of succession, the status of citizenship becomes a fluent concept and the individual's will is not always taken into account. But it also, in principle, adhered to the point that only foreigners were eligible for protection. Furthermore, it was based on narrow experience of

2174 See Shelton, 'The Rights of Indigenous Peoples' (n 582) 228; MacKay, 'The Evolution and Revolution of Indigenous Rights' (n 2172) 236; Cotula (n 29), 246.
2175 *Supra*, Chapter I.
2176 For the point that stateless persons cannot be equated with aliens Hailbronner and Gogolin, 'Aliens (2013)' (n 441) paras. 3, 28.
2177 *PCIJ German Settlers* (n 4) 24.

state successions taking place almost exclusively in the form of (forced) cessions.[2178]

Today's succession scenarios are much more variable. The complete demise or emergence of a state raises issues that simply do not appear in cases of transfer of territory. Particular problems arise, e.g., when people try to assert rights acquired under the law of a state that does not exist anymore, as in the case of the GDR. There is also the issue of dissolution of federations and the pertaining loss of a formerly acquired *second* nationality, as was the case in the SFRY, where the exercise of most civil rights was tied to SFRY citizenship. For example, Slovenia required former SFRY citizens to re-register and denied any status to people who did not comply with the requirement (henceforth becoming known as "the erased"). A similar problem had to be tackled when the UK left the EU and British citizens feared losing their rights associated with EU citizenship. Particular frictions also appear when a person's state of residence all of a sudden de-nationalizes that person because of purported "closer" links to another new state. Just compare the example of the Sudan, where, due to administrative incapability and conflicting legislation, thousands of people were left stateless and therefore disenfranchised after South Sudan's independence. The friction is also clear in the case of Ethiopia, which treated some of its former citizens as aliens not able to own property and not protected from being deported to Eritrea just because they had voted in the Eritrean independence referendum. All those (potential) disenfranchisements arose from the tying of rights to citizenship.

As succession is to be seen as a substitution of sovereignty, it is in principle at a new sovereign's discretion to change the domestic legal order. On the other hand, basic individuals' interests are no longer part of a single state's *domaine réservée*. Individuals moving from the auspices of one sovereign to another are not the state's property; they can no longer be traded like pieces of land. Individuals have become the concern of the international community as a whole, and hence their status is no longer completely dependent on their state of nationality. Certain basic individual rights have to be protected by the international community irrespective of the will of an individual's state of nationality, e.g., by customary human

2178 See the examples in McNair, 'The Effects of Peace Treaties Upon Private Rights' (n 62) and *supra*, Chapter I. Arguing that cessions would entail "less upheaval" for private individuals than other forms of succession Dörr, 'Cession (2019)' (n 400) para. 28.

rights law. Advances in protecting stateless persons over the last decades is a further example of such an interest in the human person regardless of nationality.[2179] All those developments show that international law has evolved to giving a status to individuals independent of their home state.

It is especially in cases of state succession where that independence will have to come to fruition. There is a definite need for an international rule protecting acquired rights independently of the law on the protection of foreigners. While the traditional view used to be that a territory's population would become nationals of the new sovereign,[2180] today most voices, despite remarking a tendency to take into account the will of the people, hold that there are no hard and binding rules in this field.[2181] The acquisition and loss of nationality are largely deferred to states' domestic regulation.[2182] Succession is therefore one of the most important factors in becoming stateless.[2183] Examples such as Slovenia, Sudan, Estonia and Latvia show that such disenfranchisement does not always happen "unintentionally" or "by accident".[2184] In light of that background, a principle of

2179 For an overview of the respective efforts and the (limited but discernible) results Göcke, 'Stateless Persons (2013)' (n 449) paras. 6-18.

2180 Castrén (n 8), 486: Crawford *Brownlie's Principles of Public International Law* (n 3) 419 (who, however, makes reference to cases in the wake of the First and Second World War) "the evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality"; cf. McNair, 'The Effects of Peace Treaties Upon Private Rights' (n 62), 384 "it follows that a cession of the sovereignty over a particular area of territory involves *per se* a transfer to the acquiring State of the allegiance and nationality of the nationals of the ceding State who at the time of the cession are connected by a certain tie with the territory ceded. […] it cannot be said that more than a small portion of the field of nationality is at present regulated by public international law." [italics in original].

2181 Hofmann, 'Denaturalization and Forced Exile (2020)' (n 1070) para. 23; Yaël Ronen, 'Option of Nationality (2019)' in: *MPEPIL* (n 2) paras. 9-12; Hailbronner (n 612), 28–29; Neha Jain, 'Manufacturing Statelessness' (2022), 116(2) AJIL 237 245–246; Devaney, 'What Happens Next? The Law of State Succession' (n 283); cf. Dörr, 'Nationality (2019)' (n 499) paras. 16, 37-41. See also the work of the ILC on the issue of 'Nationality in Relation to the Succession of States', https://legal.un.org/ilc/guide/3_4.shtml#top.

2182 ibid paras. 4, 7, 9; Jennings and Watts (n 27) §§ 62(h), 63, 64; Jain (n 2180), 247–248 who shows that states, sometimes intentionally, apply ostensibly "neutral" requirements in order to exclude and disenfranchise parts of their population; cp. in general Göcke, 'Stateless Persons (2013)' (n 449) para. 19.

2183 Jain (n 2180), 245–246; UNHCR, 'Ending Statelessness' <https://www.unhcr.org/ending-statelessness.html>.

2184 See Jain (n 2180).

acquired rights only protecting individuals of a certain nationality would be of no avail in cases of state succession as nationality is a fluent and easily manipulable factor in those situations. Moreover, *international* protection of domestic rights is even more relevant since, in situations of state succession, it is often not clear which sovereign may provide diplomatic protection for each individual. Sometimes, the former home state simply no longer exists. Still, many domestic rights are bound to nationality requirements.[2185] At the same time, several international guarantees conferred by treaties will cease to apply when sovereignty changes.[2186] Therefore, populations subject to a change of territory are particularly vulnerable to a loss of their rights. The international community should grant them basic protection.

This extension of protection would know some precedent. On the basis of the Geneva Convention, the Arbitral Tribunal for Upper Silesia protected vested rights of nationals and non-nationals.[2187] *O'Connell* mentioned that, when Great Britain held a mandate over Palestine, claims with respect to concessions were asserted by some of Great Britain's nationals.[2188] According to his account, those claims were not rejected *prima facie* because of the claimants nationality but because Great Britain did not recognize any international rule to honor such contracts.[2189] A further intriguing example is the 2001 Succession Agreement: For the protection of acquired rights of former SFRY citizens under Annex G, a later change of their nationality was irrelevant. That provision therefore only excluded individuals who were already foreigners at the time of acquisition and could therefore rely on the law protecting foreigners. Acquired rights were supposed to be an exclusive guarantee for those parts of the population especially in danger of losing their rights through a loss of their SFRY nationality. The ECtHR's groundbreaking judgment in *Kurić*[2190] set out that a state was not at complete liberty to withdraw domestic rights from a non-national after succession but had to justify why such rights might be reserved for nationals only. Furthermore, the upholding of specific laws and rights in Namibia or Germany did not distinguish on the basis of nationality (although, of course, those laws

2185 For examples cf. Göcke, 'Stateless Persons (2013)' (n 449) para. 3.
2186 *Supra*, Chapter III C) II) 2) g).
2187 Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 2), 17/18. See in more detail *supra*, Chapter III B) I) 2).
2188 O'Connell *The Law of State Succession* (n 2) 126.
2189 ibid.
2190 *ECtHR Kurić and Others* (n 1364).

mainly applied to former South Africans or East Germans). Moreover, in their respective agreement with the UK or Portugal, Hong Kong and Macau guaranteed the majority of the protected rights mainly to "residents" of the territories, again without regard to the specific nationality.[2191] Eritrea and Ethiopia, though fighting against each other in the war of independence, after succession did not enforce their nationality laws until the new border war erupted.

Therefore, it is submitted that the protection of acquired rights should be decoupled from its roots in the law of foreigners and protect persons subject to territorial change irrespective of their nationality. This decoupling is necessitated by the evolution of international law according international relevance to basic individual rights and having accepted the need to protect individuals in certain circumstances, also against their home state. Succession scenarios are a prime example of the need for such "supra-national" rules. This partial decoupling of status from nationality does not mean that a successor state may not differentiate between its nationals and other persons with respect to the upholding of particular rights. But such a differentiation should not be arbitrary, and the complete exclusion of whole parts of a society from protection of acquired rights merely due to citizenship should not be allowed.

VI) Acquired Rights and Different Modes of Succession

O'Connell justified his conclusion that the new state had to accept a certain *status quo* and indemnify the private rights holders with the argument of the state's "willful extension of sovereignty".[2192] He, in principle convincingly, traced the obligations a state incurred back to its own deliberate decision to take on responsibility for the territory. In fact, it is not the extension that should be the relevant point;[2193] *O'Connell's* thoughts exemplify how it seems more cogent to inquire into the *deliberateness* of the change in sovereignty. This inquiry should be performed in a two-step approach: 1.)

2191 See *supra*, Chapter IV B) VIII) 1) c) and 2) b) also with information on the lack of equal implementation of this policy under domestic law.

2192 O'Connell *The Law of State Succession* (n 2) 78, 100, 103; cf. also O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 140.

2193 Cases of (voluntary) mergers and absorption of another state can be considered similar to the willful extension of sovereignty. Yet, in cases of dissolution or separation no extension of sovereignty takes place.

How much influence did the successor state have on the domestic law on its territory before succession occurred? And 2.) How much influence did the successor state have on the process of succession itself? While the first question obviously asks for the extent to which a state is bound by its own previous decisions (even if taken at a time when it was not yet a proper state or part of another state), the second relates to the way succession occurred and the pertaining possibility for a state to negotiate its terms.

1) Cessions, Mergers, and Absorptions

Cases of *cessions*, in which both states continue and where the change of territory comes into effect by mutual agreement, are the mode of succession for which it is most evident to oblige the receiving state to respect acquired rights of the people on the territory. The receiving state will have a considerable influence on the content of an agreement and can negotiate its terms. It can also refrain from taking over the territory at all. Any encroachment upon the successor's sovereignty is therefore severely diminished. Additionally, the ceding state remains bound by all of its international obligations, not only under customary law but also under human rights treaties, which regularly obligate it not only to respect but also to protect and fulfil the rights contained therein. To agree on a treaty of cession completely divesting the territory's inhabitants of their domestic rights or making it possible for the receiving state to ignore those rights would arguably amount to a violation of the ceding state's international obligations: As far as states are not allowed to dispense of their obligations towards individuals under treaties by intentionally bringing those individuals outside their jurisdiction,[2194] this would also hold true for leaving them to another sovereign simply by

2194 Cp. for the extradition of persons to a country where they could face torture *Soering v. The United Kingdom,* App. No. 14038/88, 7 July 1989 paras. 88, 91 (ECtHR [Plenary]); for the expulsion/refoulement of persons to a country where they could face torture *Hirsi Jamaa and Others v. Italy,* Appl. No. 27765/09, 23 February 2012, Decision on Merits and Just Satisfaction paras. 113, 114 (ECtHR [GC]); and lately for the relocation of asylum seekers to a third country without duly processing the asylum request press release ECHR 197 (2022), Registrar of the Court (n 804) "In light of the resulting risk of treatment contrary to the applicant's Convention rights as well as the fact that Rwanda is outside the Convention legal space (and is therefore not bound by the European Convention on Human Rights) and the absence of any legally enforceable mechanism for the applicant's return to the United Kingdom in the event of a successful merits challenge before the domestic courts, the Court has decided to grant this interim measure to prevent

ceding the territory they live on. That proposition finds support in a 1995 statement of the chairperson of the Human Rights Committee, appended to the committee's concluding observations on the UK's report on Hong Kong, where it is stated that "[o]nce the people living in a territory find themselves under the protection of the International Covenant on Civil and Political Rights, such protection cannot be denied to them by virtue of [...] its coming within the jurisdiction of another State or of more than one State."[2195]

Having said that, even if, in cases of (voluntary) *merger*, formally a new state comes into being, that succession is also based on mutual agreement between the (former) states involved. Until they unite, and therefore in the time they negotiate the terms of their merger, involved states also remain bound by their international obligations. Hence, the arguments for respecting acquired rights of the people on the respective territories are similar to the ones with respect to cession above. The same consequences in principle apply in cases of *absorption* of another state, where the (absorbing) successor state continues to exist. As the state to be absorbed is often in a weaker bargaining position and cannot guarantee acquired rights after succession, it is in the hands of the absorbing state to respect the rights of its new population in a fiduciary manner. In fact, the practice in the analyzed cases of cessions (Hong Kong, Macau, and Walvis Bay), merger (Yemen), and absorption (Germany) in principle supports that supposition. In all of them a far-reaching upholding of acquired rights could be witnessed.

2) Dissolutions and Separations

Cases of *separation* entail the emergence of at least one additional successor state. In cases of complete *dissolution*, a former state disappears, and several new states come to life. Here, sovereignty concerns become more obvious, and there is a basic presumption in favor of the new state's freedom to legislate on its territory. In how far those states are bound to accept rights acquired under the former legal order again depends, first and foremost, on the question of how far they were able to influence the domestic law on

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the applicant's removal until the domestic courts have had the opportunity to first consider those issues".

2195 Human Rights Committee, 'Concluding Observations on the Report Submitted by the United Kingdom of Great Britain and Northern Ireland (Hong Kong) under Art. 40 of the Covenant' (9 November 1995) UN Doc. CCPR/C/79/Add.57 6.

their respective territory before independence, either through collaboration on the federal level or through autonomous powers to legislate. The greater the influence, the more the new states will remain bound by their former (voluntary) decision.

There are cases, such as that of the separation of Czechoslovakia, that did not only happen on an amicable basis accompanied by bilateral agreements negotiated on a fairly even footing, but where additionally both entities had some say in the conduct of public offices before they split. In such cases, sovereignty concerns are minor and a new state - on its new territory - can be held to decisions it had made as a part of the former union. In fact, the Czech and the Slovak republics followed that stance and considered themselves successors to the CFSR with respect to their former territories. They extensively upheld the domestic law and hence the acquired rights. Later differences in treatment emanated more from disparate economic developments in both countries. Similarly, Montenegro opted for almost complete continuity. That development was foreseeable as the country had been accorded far-reaching autonomy under the common constitution with Serbia, especially with respect to the private law order, and its independence had been anticipated in the common constitution.

Other cases of dissolution or separation, such as the SU, the SFRY, Eritrea, South Sudan, and Kosovo, show more problems with respect to acquired rights. In the SFRY, private law jurisdiction was shared between the federation and the republics. In principle, there was therefore not much of a gap when the SFRY dismembered, and all former republics upheld their private law. However, in contrast to the aforementioned cases of the CFSR and Montenegro, there was the additional problem of how to go about rights acquired under the "super"-layer of the vanished federal state or the former parent state. It soon became obvious that the loss of the "common frame" of SFRY jurisdiction and legislation entailed serious drawbacks for individuals. In those cases, states' policies to deprive people of their rights once acquired were more subtle, did not always entail a formal legal act of withdrawal, and did not come under the heading of "expropriation". Successor states torn by a protracted war on their territory, e.g., Croatia and Bosnia and Herzegovina, in the wake of those conflicts applied their - formally neutral - property law in an unequal fashion, thereby severely discriminating ethnic minorities. That discrimination was criticized internationally, and Bosnia-Herzegovina in the 2005 Dayton Peace Agreement was even obliged to secure the safe return of dispelled people. The 2001 Succession Agreement rectified some of the aberrations. Still,

the Slovenian government, for a long time, excluded a huge number of non-Slovenian nationals from basic civil rights, which prompted the Slovenian Constitutional Court to intervene and the ECtHR's epochal *Kurić* judgment. Both found Slovenia bound to recognize a certain *status quo* for non-Slovenian former SFRY citizens. There, we can witness a situation where sovereignty concerns were relevant and were legitimate points of a successor state's perspective as the succession process was not a consensual one, in some cases even tied to extreme violence and war. This process can to some extent explain the fierce opposition to accepting situations that had emanated under the SFRY "roof". However, even before independence, the SFRY republics had a great influence on the private law situation on their respective territory. Reference can therefore be made to an intermediate position where states ought to accept basic status acquired under a former legal order, i.e. may not act in an openly discriminatory way or deny civil status in general, but on the other hand, will be accorded much leeway in adapting any status to their respective domestic order. That path was by and large chosen in those cases. Within the SFYR dismemberment process, the example of Kosovo is special and its choice to re-connect to SFRY law has to be understood against the background of Serbian unlawful oppression and the international military presence on the territory.

The situation was different for the other succession countries listed above. Until briefly before the demise of the SU, the SU successor states to a large extent had no say in property legislation, which was centrally planned by the union. Dismemberment was more a consensual matter with (almost) all states agreeing on the new order with Russia as the continuator state of the SU. In light of that background, the far-reaching continuity of national laws seems to be in line with the outlined systematic. Similar to Kosovo, the case of the Baltic states is to be considered extraordinary in that respect. In contrast, Eritrea and South Sudan did not have much influence on the domestic legal order before succession (for South Sudan, this can at least be stated for the time preceding the CPA). The encroachment on their sovereign equality by the obligation to respect acquired rights would thus have been considerable, even without taking into account their colonial history. Even if the terms of separation in both cases were finally negotiated, the separations were not really agreed on but were preceded by bloody civil war and can better be described as unilateral secessions.[2196]

2196 For a more detailed discussion *supra*, Chapter IV B) VI) and IX).

In a weighing process, these would be significant factors to be taken into account. The factual outcome, as far as discernible for now,[2197] largely aligns with this theoretical weighing process. Eritrea and South Sudan, albeit in principle continuing the domestic legal orders, felt free to openly repudiate some of the laws enacted by the former sovereign and/or private rights acquired under those legal orders, especially when it came to land rights or natural resources. After a long domination by the former parent states, both adopted new land laws changing the tenure system and ensured that land rights in principle belonged to the state. For South Sudan those laws were generally adopted before formal independence in 2011.

VII) The Limits of the Principle

As innovative as the evolution of the principle of acquired rights within the last decades might have been, there are significant limitations to its legal force and its suitability as a remedy for loss of individual positions in cases of state succession. Such limits should not necessarily be seen as shortcomings or distract from the added value the principle carries with it. On the contrary, a diligent and sober analysis of what acquired rights can and also cannot achieve will help to define the principle and to delineate its scope as compared to other rules of international law, thereby making it more readily applicable.

1) No Source of Directly Enforceable Rights

First, due to a lack of a sufficiently uniform and widespread state practice, no definite obligations of states to uphold specific rights in a certain manner can be drawn from the principle. While there are rights more eligible to be protected (such as the right to real property) or certain situations in which a bindingness is more obvious than in others (as in the case of cessions), states in principle are under only a minimum obligation to recognize that individual rights exist and were being exercised at the time of succession, consider their future fate, and justify a potential abrogation. In certain rare and exceptional situations, that duty can condense to a duty to uphold the *factual status quo*, but in many other situations, states

2197 On the difficulties of collecting evidence in both cases see *supra*, Chapter IV B) VI) 4) and Chapter IV B) IX) 4).

might be free to modify the law at little expense. For now, the principle of acquired rights is more a guiding and interpretative principle leading to presumptions, such as the presumption of the continuity of the domestic legal private order, or indirect effects, such as the necessity to justify possible interferences. Other rules will have to be interpreted in lign with it. Hence, the principle of acquired rights is a tool rather than a solution. It displays its full force only in combination and cooperation with other rules of international law. Private rights will cease on a change of sovereignty as long as they are not (presumably tacitly) upheld by the new sovereign. The position of having once acquired a right cannot be directly asserted by individuals before international courts, a consequence of the still incomplete status of the individual under international law. Yet, once states or individuals pursuant to particular rules do have standing under international law, the principle can be invoked as law to be observed.

2) No Material Yardstick but Procedural Rule

It is important to emphasize that the principle of acquired rights as analyzed hereis procedural in nature; it does not create certain material rights but is merely supposed to secure rights already acquired under a domestic legal order. Individuals are not endowed with acquired rights through their mere being but because they exercised those rights according to the prerequisites of the respective predecessor's law at a specific time. Such law can contain discriminatory requirements such as nationality, wealth, ethnic background, language skills etc. The principle of acquired rights is no remedy to such discrimination. This holds especially true for persons being disenfranchised by a former legal system, also stateless persons. The, mostly markedly formal, application of acquired rights - intentionally or not - has turned a blind eye to the political background of the birth of certain rights.[2198]

Therefore, acquired rights take a middle position between human rights as genuine individual entitlements granted to human beings by virtue of being humans and mere derivative rights that are conceptually tied to the individual's home state. The doctrine is a procedural rule based on material considerations of equity. Situations might arise in which several acquired rights contradict each other, such as in the case of restitutions of illegally expropriated premises to which other individuals later acquired rights in

2198 Cf. *PCIJ German Settlers* (n 4) 24-25, see also *ECtHR Blečić v. Croatia* (n 1398).

good faith. Here, the doctrine gives no definitive answer as to which right should trump as long as both rights are formally lawfully acquired. Hence, the doctrine is no general avenue to bring about material justice. In many cases, it may even be perceived as perpetuating unfair conditions. However, this inability does not necessarily constitute a drawback. The principle's "blindness" may also be interpreted as neutrality, as not judging on and evaluating other state acts from the outside and with hindsight. Such a formal understanding of justice may prove to be more acceptable to some states than value judgments perceived as hypocritical double standards. The blindness is also a sober acknowledgment of the fact that time cannot be "turned back" and that not every perceived injustice or politically unwise decision can be erased but has, for every-day life, consequences that cannot easily be undone.

3) Limited Scope of Protected Situations

A point worth repeating here is that the doctrine only protects legitimate expectations emanating from the *exercise* of rights, i.e. the respect for certain settled situations, not for rights *per se*. Such a "non-use" of rights, however, will regularly be the case for rights obliging the state to abstain from interfering in a person's private sphere, which means that those rights are almost never protected by the principle of acquired rights. Furthermore, it also means that what is excluded from protection are opportunities, prospects, or "beneficial circumstances". While this exclusion at first sight might seem obvious, a second glance reveals that there is more to this often-cited, apparently logical, exclusion of "mere hopes" since almost no right exists in a social vacuum. Its value for a specific person will always depend on its usefulness in a certain social environment. Even if a state formally accepts a right, a later change of extra-legal circumstances might render it useless. Not giving divorced unemployed women in the GDR a financial top-up on their pensions, one equating to the amount unemployed women in the former FRG would have received in the case of a divorce, is not to be understood as a question of acquired rights - the GDR women were never vested with a right to this extra amount of money. Their disadvantage is only relative and due to the fact that, in the socio-economic system of the GDR, the acquired pension sum would have been calculated differently and worth more than after unification in the system of the FRG. Similarly, Slovak pensions accrued after separation were worth less than Czech pensions due to the different economic developments in both states.

While trust in the permanence of a situation or a status right is protected to a certain extent, trust in the social and political environment is depicted as a mere - unprotected - expectation. Yet, this difference between a situation and its legal and socio-economic background may not always be easy to draw or justified. Moreover, even if this difference in theory applies to all people, in actual cases of succession almost always only parts of the population had to cope with such life-changing modifications. These unequal consequences cannot be remedied by the doctrine of acquired rights. By detaching rights from their societal background, the theory is again shielded from the respective political discourse.

VIII) Interim Conclusions - the Principle's New Clothes

During the course of this analysis, it has become clear that the content of the doctrine of acquired rights has to be evaluated in light of a new legal scenery: Not only have new types of change in sovereignty over a territory occurred but international law has evolved from a system of coordination to a system of cooperation. The status of the individual within this system of law has been elevated concurrently. These developments, rather than eclipsing the doctrine, have imbued and sharpened its content and sometimes even boostered its evolution into a principle of international law. It may therefore, at first, seem surprising that the basic definition of acquired rights is still akin to the definitions and explanations given more than 60 years ago: Acquired rights are individual rights acquired under the domestic legal order of a state which have to be respected by the successor responsible for the territory. Crucially, what is protected is not the right *per se* but the factual situation established by exercising that right. The doctrine, then and now, is grounded in a fundamental and general principle - the principle of legal security, which encapsulates a timeless truth. At the same time, the principle is open to modification. As *Kolb* has remarked:

> "The general norm does not contain precise and situated normative elements. Such elements would need to be constantly adapted in regard of changing social conditions. The general norm rather encapsulates constant aspects of human life and elementary conditions of justice, such as [...] the protection of legitimate expectations, etc. [...] general principles, which are among the most general and abstract norms of the

legal system, grant a certain degree of permanence and unity of the law across time."[2199]

But the foregoing analysis has as well revealed significant modifications during the evolution from the doctrine to the principle of acquired rights: First, acquired rights have found a new focus. Today, the limits of change of individual rights acquired under a domestic legal order tend to be construed more according to the legitimate expectations of the individuals concerned than with respect to monetary notions of enrichment. Thereby, the principle is more open to recognizing the moral value or extra-pecuniary interests involved in rights than conventional definitions would have been. This evolution seems to have been accepted for the right of permanent residency, especially if that residency constituted the center of a person's private and/or working life. That protection was supported by human rights law, especially the human right to private and family life under Art. 8 ECHR.

Second, I argued that acquired rights should be protected *irrespective of the nationality* of the person concerned. Accordingly, the theory should cut its ties with the law on the protection of aliens. As affiliations of nationality are particularly vulnerable in times of a change of sovereignty over a territory, but at the same time several domestic rights and positions still depend on that link, the protection of the individual must be detached from its nationality. As the basic protection of human beings is considered as part of the international *acquis* and an obligation owed *erga omnes*, similar considerations have to apply to the duty to recognize basic acquired rights in cases of state succession.[2200]

Third, that obligation does not entail upholding a protected situation infinitely. In principle, individuals cannot count on the indefinite protection of their living situations as the scope of protection is measured against the standard of the legitimate expectations of the ordinary reasonable person and a change of the legal situation is something - within certain confines - to be expected in the ordinary course of events. Additionally, the obligation to respect these rights is not absolute but has to be weighed against the legitimate sovereign interest in modifying the domestic legal system. It is an obligation of conduct, not of result. Its effect will have to be ascertained with an eye to the modalities of each specific case.

2199 Kolb (n 2119) 9.

2200 On the need to protect rights of individuals *erga omnes* Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 296–297.

The scope of the duty to respect acquired rights will depend on 1.) the leeway involved for the successor state in negotiating the mode of succession, 2.) the scope of influence the successor state exercised on the initial development of the right under a predecessor's legal order, 3.) the type of the respective right and its importance for the individual concerned, and 4.) an individual's ability to adapt to a new legal environment. In that way, states' legitimate interests in changing and developing their domestic legal order according to their own sovereign choices will be balanced with individuals' legitimate interests in the permanence, foreseeability, and reliability of their legal environment and their social relations. While, in some situations, the granting of interim measures to enable the affected people to adapt to the new situation will be enough, in other situations and for some people, especially persons holding rights for a great part of their lives, a "freezing" of a certain situation should be considered. Hence, as a consequence of the principle, a duty may emerge to only gradually modify a situation. Furthermore, states have to give reasons for altering a legal situation, and modifications may not be discriminatory or arbitrary.

Finally, it must be openly admitted that the protection afforded under the principle of acquired rights is much weaker than that arising from a functioning human rights system or BITs. The principle of acquired rights does not offer a material standard of protection but is procedural in nature. It exclusively refers to domestic rights once established. It is furthermore of a transitory nature, protecting only the legitimate expectation of not being subjected to abrupt changes in one's life. Until now, the principle has not entailed specific obligations or conferred enforceable rights, let alone standing before an international tribunal. Nevertheless, it can be of non-negligible avail in extraordinary cases where such supposedly "superior" mechanisms are not in place or would not work. Succession scenarios are a prime example of such situations.

D) The Potential of the Principle of Acquired Rights

While the material advantages of a principle of acquired rights are not on the same footing as those of the "human rights revolution", the change they can bring in cases of succession is too significant to neglect. But even beyond that field of application and despite the named limits, the principle

of acquired rights can have a positive and decisive impact on protecting individual rights. While several developments in international law have helped to expound the principle, the underlying idea of acquired rights can influence other fields of international law as well. That supplemental influence is due, first and foremost, to what one author has coined the "expansionist potential"[2201] of general principles of law, i.e. the doctrine's function as a generator of invention in international law.

General principles can serve different functions. Most authors agree that they may fill gaps left by customary or treaty law in order to prevent a *non-liquet* decision.[2202] Yet, this supportive function may be elaborated well beyond that. According to *Kolb*, general principles may serve to "elaborate new rules or to sustain a deductive conclusion"[2203], "reinforce the reach and the density of international law"[2204], "provide a tool for the interpretation of customary or conventional norms […] influence the formation of conventional and customary rules of international law, and sometimes also of rules of internal law (legislation)"[2205], "add precision to the scope of application of a conventional or customary rule of international law"[2206], and "blow some flexibility into the law to be applied and sometimes even to develop international law"[2207]. Hence, general principles are not static helpers but can dynamically develop and reinforce international law. They spread basic ideas to other fields of international law not covered by a specific rule. This

2201 d'Aspremont, 'What Was Not Meant to Be' (n 2116) 171.

2202 Gaja, 'General Principles of Law (2020)' (n 2107) para. 21; Kolb (n 2119) 105; ILC, 'Third Report on General Principles of Law (Vázquez-Bermúdez, Special Rapporteur)' (n 2033) paras. 37, 39-73; cf. Pellet and Müller, 'Article 38' (n 2031) paras. 251-253; Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' (n 110) 322; generally Shao (n 2077), 227; only with respect to "general principles of law" (and not general principles of international law) d'Aspremont, 'What Was Not Meant to Be' (n 2116) 171–174.

2203 Kolb (n 2119) 5 ("axiological function").

2204 ibid. ("normative function").

2205 ibid 6 ("normative function", footnote omitted); for the interpretative part Riedel (n 563), 387.

2206 Kolb (n 2119) 8 ("correcting function"); also Delbrück and Wolfrum (n 266) 69.

2207 Kolb (n 2119) 7 ("normative function", footnote omitted); see also ibid 10 "international law, centred on individualistic sovereignty, has always suffered from a distinct lack of means of peaceful change. […] Certainly, one must not exaggerate this function. The judge is not the legislator, and he or she cannot simply reinvent the law as he or she sees fit. But the issue is elsewhere: between the all and the nothing lies the something; and sometimes it is possible to adapt and slightly reshuffle, even if it is not possible to rebuild." Cf. also Riedel (n 563), 387.

unifying function[2208] can be of particular relevance in branches of international law that are in large parts still fractional and touch on a panoply of other fields of international law, such as the law of state succession. Actually, the principle of acquired right's "weakness", undefined and malleable, less forceful and definite compared to other traditional rules as it may be, may become its strength in many situations.

The following thoughts and examples ought not to be understood as all describing the current positive state of the law. Potential implies potentiality, and the doctrine has only comparatively recently been effectively rediscovered so that some of these features are still developing. Additionally, not all of the potential advantages can be neatly separated. It is exactly the core of the holistic approach to general principles that they diffuse all branches, levels, and purported borders of international law. In that way, they can contribute to a more coherent system and development of international law.

I) The Filling of Gaps Left by the Law of State Succession

Besides offering a persuasive and useful fallback position in cases of lack of protection through human rights or investment protection systems, acquired rights today can provide a necessary link and bridge between them, not only, but especially, when they are applied in situations of state succession. The doctrine thereby could consolidate and reinforce the framework of the protection of individual rights when sovereignty changes. As has been laid out above,[2209] the law of state succession is a highly fractional, pitted field of international law with only some (often controversial and unspecific) customary rules, some attempts at codification, and - mainly - *ad hoc* solutions on a bilateral or regional basis. Concurrently, state succession touches upon a panoply of legal fields such as sovereignty, human rights, investment protection, treaty law, state debts etc. In principle applicable to every state in the world, the repercussions of a change of sovereignty have only been experienced by some countries with diverse political, economic, and social backgrounds. Finally, state succession has taken place for centuries now also as part of tectonic shifts in the international legal order, making it almost impossible to build a consistent state practice over a significant amount of time. The field of state succession is therefore a

2208 Kadelbach and Kleinlein (n 280), 347.
2209 Cf. in detail *supra*, Chapter I B).

prime candidate for being governed by flexible, general rules applicable to a multitude of different situations. At the same time, the field draws much inspiration from various factual situations and diverse state practice in several legal areas, thereby bolstering the emergence of general, basic, but widely applicable principles.

What has also become apparent from the foregoing analysis is that the whole field of state succession is obviously not geared towards the individual and, in so far, shows huge lacunae. It speaks volumes that Art. 6 VCSSPAD refuses to formulate a rule and defers solving the problem of the fate of private rights of individuals to (non-existent) law outside the convention. The concept of concluding *ad-hoc* agreements *after* succession has taken place may be common but neglects the fundamental interest in the foreseeability of the legal environment. The often-claimed advantages of utmost leeway for states in solving their disputes after succession,[2210] to favor a "trend towards process" and "flexibility", or to suggest that other approaches would be too stringent or overly ambitious,[2211] are convenient from the state perspective but do not sufficiently consider the interests of the people living on the territory.

It has been shown here that the substance of the principle was applied by governments, legislators, national and international courts, tribunals and commissions in all cases of state succession under analysis. The principle connotes a certain stability of private rights, even when its source, the domestic legal order, lapses, and therefore brings the general, widely acknowledged ideas of stability and legal security to the field of state succession. Therefore, the doctrine of acquired rights may also offer a useful underpinning regarding questions of persistence of rights acquired under human rights treaties or investment treaties once succession has occurred. In the future, states, international organizations, and tribunals may be guided by the principle when dealing with treaty rights already used by individuals, e.g., by bringing a claim before a court. Acquired rights provides a safeguard, an interpretative tool for state behavior. It attempts to

2210 See e.g. Devaney, 'What Happens Next? The Law of State Succession' (n 283) "Trusting that these parties know best when it comes to the division of state property and granting of nationality and so on, I believe would be a more fruitful endeavour for international lawyers rather than what we have been doing much too often to date, namely post-hoc categorisation of diverse instances of state succession which rarely align with the general rules produced by the ILC."

2211 Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 325-328.

fill the legal lacunae left by an evicted sovereign and to restrain the power of states in negotiating the fate of the people on the territory subject to succession.

II) Bridging the Gap Between National and International Law

Since its inception, international law has developed and now overcomes the strict distinction between the international and the national sphere. The empowerment of non-state actors under international law necessitated that such borders vanished.[2212] Today, international law partly regulates domestic issues, such as the treatment of the states' nationals.[2213] General principles can contribute to a further "progressive interrelation of private and public law".[2214] The principle of acquired rights as an *international* guarantee for a *domestic* status is pre-destined to overcome the distinction. As a side effect, this redefined equilibrium between national and international law and their mutual interaction could more than considerably influence the relationship between private international law and public international law.[2215] The central question here becomes whether "private international law [is] being publicised, or are we observing a return of the private?"[2216], i.e. if the elevation of an individual's status under international law is to be interpreted as a taking-over by private international law, as a "proceduralization" of public international law,[2217] or as a de-formalization of private international law, i.e. a move towards the application of general principles of law to domestic rules[2218]. If this development back to national law progresses, the relationship between the two systems will have to be re-calibrated. Until then, the borders of international and national law be-

2212 Cf. Bjorklund (n 880), 261/262; Schill, 'General Principles of Law and International Investment Law' (n 2152) 144.

2213 On the changing character of public international law when regulating domestic issues Michaels, 'Public and Private International Law' (n 54), 122–123.

2214 Kolb (n 2119) 7; on such "radiating effect" also Kadelbach and Kleinlein (n 280), 347.

2215 Michaels, 'Public and Private International Law' (n 54), 138; in general Mills, 'Public International Law and Private International Law' (n 57). On the rules of private international law in cases of state succession comprehensively Ziereis (n 58) and especially on the relationship to public international law ibid 30–35.

2216 Michaels, 'Public and Private International Law' (n 54), 124.

2217 Cf. ibid 133.

2218 Cp. Kotuby (n 58), 415–416.

come permeable, and influences go in both directions through the vehicle of acquired rights.

1) The Inclusion of New, Specific, and Informal Types of Property

The principle of acquired rights and its reference to national law not only partly overcome the gap left by a lack of an international definition of property but are also adaptive to national or regional particularities. From that angle, the doctrine is therefore more open to the specific socio-legal environment of property. The principle may encompass different types of property known to specific legal systems (e.g., "social property") or rights formally not categorized as "property" but substantially equating property (e.g., "occupancy rights"). That openness becomes especially relevant with respect to customary, non-formal property rights, e.g., of tribes or ethnic communities. Since the principle refers to a situation, a factual *status quo* to be protected, it more easily encompasses rights acquired by merely permanent and consistent activity of individuals condoned by the predecessor state. For example, it has repeatedly been lamented that the relationship that tribal communities have with a piece of land and the socio-economic value of ownership of land, sometimes circumscribed by the idea of a "human right to land", is not adequately described by the cumulative effect of several traditional human rights.[2219]

> "[T]he rights that are attached to land are indeed plural and include civil, political, economic and social elements. Land rights can take many forms, from ownership to usufruct (rights of use), and could consist of a bundle of overlapping rights that could include both individual and collective systems of ownership, management and control of resources. From this perspective, the term 'land rights' seems to be slightly more encompassing than the term 'human right to land'. The fact that land rights are plural implies that there is more than one form of right to land, whereas the term 'right to land' would imply that there is only one form of right to be exercised over land. […] This plurality of rights attached to land is connected with the practice of many communities

2219 Miloon Kothari, 'The Human Right to Adequate Housing and the New Human Right to Land' in: *Arnauld/von der Decken Handbook of New Human Rights* (n 582) 81 95; Jérémie Gilbert, 'The Human Right to Land' in: *Arnauld/von der Decken Handbook of New Human Rights* (n 582) 97 101.

> across the globe who exercise their right to land via ancestral customary norms. These customs vary in terms of their content and mechanisms for enforcement, including issues of property, rights of usage, cultural and social practices, access to sources of livelihood and shared usage of resources."[2220]

Here, by mirroring the rights existing before succession occurred, the principle of acquired rights may bring this domestic content under international protection. In that way, the doctrine may also spur the development of international law by looking to concepts of property entrenched in national law but not yet in international law. In so far, through the source of general principles, domestic rights are no longer treated as mere facts[2221] but can influence and propel the evolution of international law.

2) Rectifying the "Implementation Gap"

As one of the trailblazers of the elevated status of the individual under international law, it at first sight seems irrational that the return to the idea of acquired rights is partly based on the weakness of other international systems protecting individual rights. Yet, by no means has the distinction between the international and the national sphere disappeared completely. It seems that nowadays more and more states are even taking a step back and again are claiming domestic spheres outside the reach of international law. The most recent decade has witnessed a backlash against human rights courts and investment tribunals, which are perceived as unduly intruding into national spheres of discretion and deciding about essentially sovereign concerns, including property.[2222] From that perspective, it seems only plausible to favor a doctrine sticking to the set *status quo* under a national law instead of developing external standards from (ever-expanding) "living instruments"[2223].

The distinction between the international and the national sphere is often coalesced with the dichotomy between public ("international") and

2220 ibid 102.

2221 E.g. *PCIJ Certain German Interests (The Merits)* (n 7) 19; alluded to by Judge Morelli in his Separate Opinion in *ICJ Barcelona Traction* (n 266) 222, 234; Strupp (n 2) 85.

2222 Voeten (n 820), 407, 412; see also more generally Orford, 'The Crisis of Liberal Internationalism and the Future of International Law' (n 820), 7–10.

2223 Originally *Tyrer v. the UK,* Appl. No. 5856/72, 25 April 1978 para. 31 (ECtHR).

private ("national") law.[2224] Now, in times of a devaluation of human rights norms and withdrawal from major investment protection systems, the sense behind a theory of acquired rights may lie in providing a backstop position securing individual rights in the presence of rescinding support for international rules. That backstop could be evidenced by the finding in Chapter IV that successor states that politically opposed a predecessor (typically separating states) more often accepted and adopted their respective predecessor's domestic legal order than they accepted its international obligations. Even if other protection systems might, in principle, be more forceful, especially in times of succession and a weaker commitment to international rules, the danger of a legal vacuum for affected individuals is real. In such situations, the principle of acquired rights might be a useful protective tool in comparison to leaving no strings attached to the new sovereign at all.

Beyond that, the mentioned unsatisfactory domestic enforcement of international law and that law's dependence on domestic implementation has, also on the scholarly side, incited a certain trend back towards the "national", i.e. a focus on international law's capability to guide and strengthen national institutions instead of it exclusively operating pursuant to an inter-state scheme.[2225] In that respect, an "added value" of applying an acquired rights theory may thus be the improved enforcement of individual rights under a new state's national laws as compared to enforcement under genuine international norms. For example, before national constitutional courts of a new state, without the assumption of continuity of private law relations, there would be no recognized property to protect, and thus the international right of property would, all too often, be of no avail. Moreover, almost every national law knows the principles of legal security, legiti-

2224 E.g. Piero Bernardini, 'Private Law and General Principles of Public International Law' (2016), 21(2-3) Unif L Rev 184 184 "One may wonder, therefore, what public international law has to do with private law, meaning by that States' national law."

2225 See e.g. Anne-Marie Slaughter and William Burke-White, 'The Future of International Law Is Domestic (or, the European Way of Law)' (2006), 47(2) Harv Int'l LJ 327; Michaels, 'Public and Private International Law' (n 54), 122. For an example of better enforcement on the national compared to the international plane cf. Hofmann, 'Denaturalization and Forced Exile (2020)' (n 1070) para. 16 "[w]hile the limited number of States Parties to these two conventions clearly reflect the unwillingness of States to admit restrictions by international treaties to their exclusive powers regarding denaturalization matters, comparative studies on recent municipal legislation in this field show that many States have changed their nationality laws along the lines suggested in these conventions."

mate expectations, and non-retroactivity of laws.[2226] Judges and lawyers in general will therefore be more familiar with relating principles and more open to their application as compared to applying "foreign" international rules.[2227] The principle of acquired rights may therefore help to translate international expectations into domestic reality.

III) The Application to Similar Forms of Change of Sovereignty or Contested Sovereignty

Countering claims of its "death" or uselessness, recently, the principle of acquired rights has been invoked and was applied to prominent and important international cases. Intriguingly, those cases did not constitute succession scenarios under the traditional definition of the Vienna Conventions. Nevertheless, they showed particular similarities with succession cases as they all emanated from situations of a "willful extension of sovereignty". As general principles might be extended to analogous situations, the principle of acquired rights may be applied to further cases related to protecting individuals' legitimate expectations. Thereby, it could unfold its potential to connect and imbue different fields of international law.

1) Example: Transfer of Territory According to a(n) Judicial/Arbitral Decision

A case in point is transfers of territory as a consequence of a judicial decision, especially as a consequence of border disputes. Admittedly debatable is whether the transfer of territory after a judicial pronouncement happens *ipso facto*, i.e. as a direct and instant consequence of the decision's legal force,[2228] or because of a corresponding, subsequent agreement between the

2226 Cf. e.g. for Slovenia *Slovenian Constitutional Court The Erased* (n 1365); for Germany recently *Anschlussbeiträge,* 1 BvR 798/19, 1 BvR 2894/19, 12 April 2022 (German Federal Constitutional Court [BVerfG]); for the UK Gordon and Moffatt (n 1887) 62–64.

2227 Cp. Kotuby (n 58), 418.

2228 Arguably Gaggioli, 'Art. 6' (n 343) 207, para. 39; against Kohen and Hébié, 'Territory, Acquisition (2021)' (n 286) para. 11 "As a matter of course, other decisions by adjudication (the ICJ or arbitral tribunals) have a declaratory character of what the legal existing situation is and as such they do not create territorial sovereignty."

involved state parties.[2229] Often, the answer to this debate will depend on the particularities of the case, such as on the existence of an underlying settlement. Yet, situations involving border disputes or requests for the demarcation of borders are special in an even deeper respect: A final decision generally ends a situation of insecurity with several authorities claiming sovereignty over a territory. Hence, there is often *no* actual *transfer* of sovereignty or responsibility *de jure*, and therefore no succession, but a *clarification* of areas of lawful authority.[2230] As the ICJ set out in its *Frontier Dispute Case*: "The effect of the Chamber's Judgment will however not be that certain areas will 'become' part of Honduras; the Chamber's task is to declare what areas are, and what are not, already part of the one State and the other."[2231] Nevertheless, before clarification is effected, the competing powers will generally take steps to rule in the territory, leading to a certain set of facts on the ground. The official decision then either sanctions that setting, which normally does not lead to any deepened quarrels with respect to acquired rights, or the factual situation is declared "illegal" and therefore has to be reconciled with the law. In the latter case, the question arises as to how far domestic rights and laws will be upheld. As the mere presence of nationals on the ground is not considered decisive in demarcating borders,[2232] the issue of acquired rights will become vital in many such cases. In 1992, when deciding the mentioned frontier dispute between El Salvador and Honduras, the ICJ reminded that

> "the situation may arise in some areas whereby a number of the nationals of the one Party will, following the delimitation of the disputed sectors, find themselves living in the territory of the other, and property rights apparently established under the laws of the one Party will be found to have been granted over land which is part of the territory of the other. The Chamber has every confidence that such measures as may be

2229 Cf. Hernández, 'Territorial Change, Effects of (2010)' (n 166) para. 2. This alternative would lead to a cession of territory and hence an "ordinary" case of state succession.

2230 This is what distinguishes these cases from occupation scenarios where there is a usurpation of jurisdiction over another state's territory. A court's judgment will then concern the legality of this usurpation, not the demarcation line. In reality, of course, the line between the two situations will seldom be clear-cut.

2231 *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening),* 11 September 1992, ICJ Rep 1992 351 para. 97 (ICJ).

2232 ibid.; Kohen and Hébié, 'Territory, Acquisition (2021)' (n 286) para. 29.

> necessary to take account of this situation will be framed and carried out by both Parties, *in full respect for acquired rights*" [2233].

After the release of the judgment, both parties in fact signed a convention[2234] explicitly dealing with the issue of acquired rights of persons living on the territory and enacted corresponding national laws[2235].

In the case concerning the *Land and Maritime Boundary Between Cameroon and Nigeria*, the court noted in 2002 that "the implementation of the present Judgment will afford the Parties a beneficial opportunity to co-operate in the interests of the population concerned [...]"[2236] and cited the statement of the Cameroon agent that "Cameroon will continue to afford protection to Nigerians living in the [Bakassi] Peninsula and in the Lake Chad area"[2237]. In the same vein, in the frontier dispute between Benin and Niger, the ICJ in 2005 opined that "the determination in regard to the attribution of islands effected above is without prejudice to any private law rights which may be held in respect of those islands."[2238] Therefore, even if not constituting a case of succession in the strict legal sense, such changes in the allocation of jurisdiction over a territory may lead to the analogous questions with respect to acquired rights of private persons. Apparently, both the ICJ and the involved states considered keeping acquired rights a priority.

2233 *ICJ Frontier Dispute (El Salvador v. Honduras)* (n 2230) 400, para. 66 [empahsis added].

2234 Convención sobre Nacionalidad y Derechos Adquiridos en las Zonas Delimitadas por la Sentencia de la Corte Internacional de Justicia del 11 de septiembre de 1992 (15 October 1990) https://www.jurisprudencia.gob.sv/DocumentosBoveda/D/3/1990-1999/1998/11/884A1.PDF (El Salvador/Honduras).

2235 Decreto No. 295, Ley de Creación del Régimen Especial Applicable a las Personas Afectadas por la Sentencia de la Corte Internacional de Justicia del 11 de Septiembre de 1992 (7 February 2013) 398 Diario Oficial 37, https://www.jurisprudencia.gob.sv/DocumentosBoveda/D/2/2010-2019/2013/02/9DB40.PDF (El Salvador); Decreto No. 463, Ley Especial Para la Legalización de los Derechos de Propiedad, Posesión y Tenencia de la Tierra, en la Zona Delimitadas por Sentencia de la Corte Internacional de Justicia del 11 de Septiembre de 1992 (8 November 2007) 228 Diario Oficial 377, https://www.asamblea.gob.sv/sites/default/files/documents/decretos/171117_072930839_archivo_documento_legislativo.pdf (El Salvador).

2236 *Land and Maritime Boundary (Cameroon v. Nigeria: Equatorial Guinea intervening),* 10 October 2002, ICJ Rep 2002 303 para. 316 (ICJ).

2237 ibid para. 317.

2238 *Frontier Dispute (Benin/Niger),* 12 July 2005, ICJ Rep 2005 90 140, para. 118 (ICJ).

2) Example: Expansion of Sovereignty and Rights Without Formal Legal Title

A further case in line is that of an intentional expansion of sovereignty or jurisdiction of a state without ousting another state. That case would, again, not constitute a case of state succession in the traditional sense as there would be no predecessor state from which to derive rights or obligations. Furthermore, the case implies that the rights of individuals living on the territory have been acquired under no formal legal order enacted by a state but are "factual", historical rights acquired through exercise.

As a first, relatively historical, example, cases of occupation of *terra nullius*, territory not under the sovereignty of any state, fall under this category. For example, the territory of Spitzbergen (also called "Svalbard Islands")[2239], an archipelago in the Arctic Ocean, for a long time had been considered *terra nullius*.[2240] Due to its rich natural resources, from the 17th century on Spitsbergen had been of interest to hunters and fishermen, and later to miners.[2241] In Art. 1 of the Treaty of Spitsbergen of 9 February 1920,[2242] concluded between Denmark, France, Italy, Japan, the Netherlands, Norway, Sweden, the UK, and the US, Norway was accorded "full and absolute sovereignty [...] over the Archipelago of Spitsbergen". Nevertheless, the treaty, in its Arts. 2, 6, 7, and its Annex contains guarantees for the exercise of pre-existing rights of individuals. The treaty does hence not only acknowledge the existence of rights of individuals as early as 1920 but, beyond that, protects those rights irrespective of the fact that they were first made use of before a national legal order had been set up on the territory.[2243] Those rights represent informal legal titles created by the fact of actual activity on the territory (cf. Art. 2 "occupiers" of land) exercised for a long time and opposed by no one. According to Annex 1

2239 On the terms see Geir Ulfstein, 'Spitsbergen/Svalbard (2019)' in: *MPEPIL* (n 2) para. 1 and on its general history paras. 5-18.

2240 L. F E Goldie, 'Title and Use (And Usufruct) - An Ancient Distinction too Oft Forgot' (1985), 79(3) AJIL 689 705; Robert Lansing, 'A Unique International Problem' (1917), 11(4) AJIL 763 764; Fred K Nielsen, 'The Solution of the Spitsbergen Question' (1920), 14(1/2) AJIL 232 232; Ulfstein, 'Spitsbergen/Svalbard (2019)' (n 2238) paras. 7-8.

2241 ibid.

2242 Treaty Concerning the Archipelago of Spitsbergen, and Protocol (9 February 1920) LNTS 2 7. On its negotiating history Ulfstein, 'Spitsbergen/Svalbard (2019)' (n 2238) paras. 9-13.

2243 Nielsen (n 2239), 234–235.

para. 9, Norway is even under an obligation to "formalize" titles recognized according to the procedure set out in the Annex by conferring a valid title. According to Art. 7 "[e]xpropriation may be resorted to only on grounds of public utility and on payment of proper compensation".

The treaty is not only concerned with property rights but also deals with rights concerning the ability to *use* the territory,[2244] such as fishing, hunting, or mining rights. Yet, crucially, those guarantees were conceptually still based on the idea that their protection is derived from the personal jurisdiction of a state over its individuals.[2245] Art. 6 explicitly uses the term of "acquired rights" which "shall be recognised" but only means those of the "High Contracting Parties". Furthermore, the case of Spitzbergen represents an example with specific features: a common agreement on its status as *terra nullius*, no unilateral attempt by a state to forcibly occupy, but still a permanent and long-lasting exploitation of the territory.[2246] Moreover, today, the occupation of *terra nullius* has become an unfeasible undertaking as there is no part of the world not under the (formal) sovereignty of a state or still eligible for acquisition.[2247]

However, there are modern cases of an extension of jurisdiction short of full sovereignty that exhibit similar features. Just ponder competing claims with respect to exploiting the "common heritage of mankind",[2248] or the expansion of sovereign rights by acclamation of a so-called "Exclusive Economic Zone (EEZ)"[2249]. Such cases also concern the assertion of sovereign rights over a territory that had formerly potentially been inhabited or made use of by individuals. The evolution of such new spheres of power by states can therefore, even today, collide with an individual's "acquired" positions.

2244 Cf. Goldie (n 2239), 713. Today, a dispute with respect to the scope of these rights has emerged, cf. Hélène de Pooter, 'The Snow Crab Dispute in Svalbard' *ASIL Insights* (2 April 2020) <https://www.asil.org/insights/volume/24/issue/4/snow-crab-dispute-svalbard>.

2245 Cf. Goldie (n 2239), 706, 707, 708, 713. The term of "historic titles" of individuals had been coined for such situations, see Sik (n 8), 134, 141; Andrea Gioia, 'Historic Titles (2018)' in: *MPEPIL* (n 2) paras. 1, 8, 9, 25, 32-35.

2246 Lansing (n 2239), 763–764.

2247 Kohen and Hébié, 'Territory, Acquisition (2021)' (n 286) para. 9. On the protection against forcible acquisition of territory even in situations of "failed states" Daniel Thürer, 'Failing States (2009)' in: *MPEPIL* (n 2) para. 13

2248 Cf. L. F E Goldie, 'Title and Use (And Usufruct) - An Ancient Distinction too Oft Forgot' (1985), 79(3) AJIL 689 DCCXIII.

2249 Cf. Art. 55 – 75 Convention on the Law of the Sea (10 December 1982) UNTS 1833 3. For a recent example of a relevant dispute cf. Pooter (n 2243).

A recent case at hand is the *South China Sea Arbitration*[2250], where the clash between expansion of influence and pre-existing rights played out vividly. China asserted sovereign rights over parts of the South China Sea, and other rights over the Scarborough Shoal. In the waters around Scarborough Shoal, Chinese and Filipino fishermen, and fishermen of other nationalities, had fished for several generations and were now excluded from the region by Chinese authorities.[2251] The arbitral tribunal found these actions of China in violation of international law.[2252] Within its judgment, it explained that

> "[t]he attention paid to traditional fishing rights in international law stems from the recognition that traditional livelihoods and cultural patterns *are fragile in the face of development* and modern ideas of interstate relations and warrant particular protection"[2253]

and went on to say that

> "[t]he legal basis for protecting artisanal fishing stems from the *notion of vested rights* and the understanding that, having pursued a livelihood through artisanal fishing over an extended period, generations of fishermen have acquired a right, akin to property, in the ability to continue to fish in the manner of their forebears. […] Importantly, artisanal fishing rights *attach to the individuals and communities* that have traditionally fished in an area. *These are not the historic rights of States, as in the case of historic titles, but private rights*"[2254].

Significantly, the judges thus acknowledged that individual rights existed that were not derivative of a state's jurisdiction *ratione personae* but emanated from the individuals' *own* status under international law. The tribunal went even further and pronounced a general rule of international law that changes in sovereignty and demarcation of borders were, as far as possible, to have no influence on the rights of private individuals.[2255]

2250 *South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China),* PCA Case No. 2013-19, Award of 12 July 2016.
2251 ibid paras. 761-770.
2252 ibid para. 814.
2253 ibid para. 794 [emphasis added].
2254 ibid para. 798 [emphasis added].
2255 ibid paras. 799, 802. This does not hold true for the EEZ, as in this area general law was superseded by the UNCLOS, cf. ibid paras. 803, 804 (b).

> "Traditional fishing rights constitute a vested right, and the Tribunal considers the rules of international law on the treatment of the vested rights of foreign nationals to fall squarely within the 'other rules of international law' applicable in the territorial sea."[2256]

To underline its argument, the tribunal relied on five judgments: the PCIJ's decisions in *German Settlers*[2257] and *Certain German Interests (Merits)*[2258], the second award of the arbitral tribunal in the case of *Eritrea v. Yemen,*[2259] the *Bering Sea Arbitration*,[2260] the *Abyei Arbitration,*[2261] and the ICJ's *Fisheries Jurisdiction* cases[2262].

While those findings have not gone unchallenged,[2263] they show that such cases of willful extension of sovereign rights are a further field for exploring acquired rights. It has to be noted, though, that the UNCLOS tribunal seems to have stuck to the traditional vision of acquired rights as

2256 ibid para. 808 [footnote omitted].

2257 *PCIJ German Settlers* (n 4).

2258 *PCIJ Certain German Interests (The Merits)* (n 7).

2259 *Eritrea v. Yemen, Sovereignty and Maritime Delimitation in the Red Sea,* Case-No. 1996-04, 16 December 1999, Award in the Second State of the Proceedings (Maritime Delimitation) especially para. 101 (PCA). The Philippines had as well cited from the first award in the case of *Eritrea v. Yemen, Sovereignty and Maritime Delimitation in the Red Sea,* Case-No. 1996-04, 9 October 1998, Award in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute) especially paras. 525-526 (PCA). There, the tribunal found it useful to remind the reader that "Western ideas of territorial sovereignty are strange to peoples brought up in the Islamic tradition and familiar with notions of territory very different from those recognized in contemporary international law" and obliged Yemen to "ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved".

2260 *Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals (US v. UK),* Award of 15 August 1983, UNRIAA XXVIII 263 especially 271.

2261 *Arbitration Regarding the Delimitation of the Abyei Area (Government of Sudan v. the Sudan People's Liberation Movement/Army),* Final Award of 22 July 2009, UNRIAA XXX 145 especially para. 766.

2262 *Fisheries Jurisdiction (United Kingdom v. Iceland),* 25 July 1974, Merits, ICJ Rep 1974 3 especially para. 62 (ICJ); *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland),* 25 July 1974, Merits, ICJ Rep 1974 175 especially para. 54 (ICJ).

2263 Chinese Society of International Law, 'The South China Sea Arbitration Awards: A Critical Study' (2018), 17(2) Chinese JIL 207 paras. 746-777; Stefan Talmon, 'The South China Sea Arbitration: Observations on the Award of 12 July 2016' [2018] Bonn Research Papers on Public International Law, paras. 181-192; National Institute for South China Sea Studies, 'A Legal Critique of the Award of the Arbitral Tribunal in the Matter of the South China Sea Arbitration' (2018), 24 AYbIL 151 235–242.

rights of foreign nationals only.[2264] It is not clear whether that restraint was due to the facts of the case at hand, in which the Philippines claimed a violation of the rights of their own nationals only, or whether the statement was meant to be generally valid.

Be that as it may, what is striking is that the Svalbard Islands and the South China Sea cases seem to endorse a principle of protecting individual rights in cases of extension of sovereignty over the territory, even if those rights were engrained neither in domestic law nor in international law but created by mere usage. Hence, both cases, though admittedly concerning specific situations, are examples of an added value of acquired rights principles. Especially the fairly recent case of the *South China Sea* shows that, despite the worldwide proliferation of human rights treaties and investment protection systems, there are (property) rights that are not protected under either international law or national law. Seen from that angle, the South China Sea dispute may be a door opener for several current claims of indigenous populations to ancestral land on the basis of "informal" or "unwritten" rights exercised before any national domestic order was even able, let alone willing, to recognize them.

IV) Holistic Approach - the Coherence of the International Legal System

What the foregoing pages have clarified is that the principle of acquired rights is suited to being applied with respect to a myriad of rights and to offering guidance in various situations. Even outside the succession context, the principle may help to overcome the sectionally fragmented nature of international law and contribute to the coherence of the international legal system.[2265] The idea of "acquired rights" is not specific to the state succession context: We have seen that similar ideas have evolved in the domestic sphere and also found their place in other branches of international law such as treaty law, investment law, law of the sea, international administrative law, EU law, minority protection, and human rights law. In all those fields, courts have tried to contain the effects of change (related to treaty-withdrawal, succession, regime change, war, or others) upon individuals'

2264 Also mentioning this point Talmon (n 2262), para. 181.

2265 On the value of coherence in international law Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 385); on the role of general principles in achieving this goal Shao (n 2077), 223–224, 229.

lives by applying acquired rights principles. The principle's universality and grounding in the essential values of legal security make it not only suitable for those diverse areas but, at the same time, connects all of them with a common theme - the protection of individuals from unforeseen and abrupt outside interference in their personal lives. Applying the doctrine in such cases may therefore not only support a just solution balancing states' interests in sovereign change with individuals' interests in the maintenance of life courses. Beyond that, on a more abstract plane, it may allow a more holistic setting, cross-referencing, cross-fertilization, and cooperation of several systems of international law.[2266] The interlinked consideration of issues involved in succession could inspire that process with solutions from other fields, e.g., withdrawal from treaties, but at the same time those other fields could draw insights from how states tackled the elementary problems connected with terminating the national legal basis of rights.

Would the EECC adjudicating on the dispute between Ethiopia and Eritrea have reached different conclusions when seeing the situation not only as a laws-of-war but as an acquired rights issue? Would it not have been more cogent to consider that the changes had not been adopted in war times but were only enforced by then? Would the instant terminability of sunset clauses be re-appraised if they were considered an acquired rights issue instead of a mere treaty termination? Similar to the recognition of rights acquired under a foreign legal order in private international law, the doctrine could ensure more coherence and smooth transition between fragmented legal systems by accepting and not repeatedly putting into question established facts in the form of rights or status acquired.[2267] This coherence and smoothness could contribute to more consistency in the international jurisprudential system and combat singularization, "forum-shopping" and fragmentation through diverging judgments of international and national courts. Acquired rights may be a beginning to combining approaches from

2266 On the value of general principles for achieving more coherence Kadelbach and Kleinlein (n 280), 346–347.

2267 Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 385), 282–291, especially 287 where he ponders that "judicial comity for the specialized jurisdictional regimes of other international courts could possibly be considered an emerging general principle of international procedural law". On the still existing "translation issues" Antje Wiener and Philip Liste, 'Lost Without Translation? Cross-referencing and a New Global Community of Courts' (2014), 21(1) IndJGlobal Legal Studies.

all fields of law when it comes to changes with an impact on individual rights.

E) Final Conclusions – Continuity in Times of Change

Drawing upon the collection of material presented in Chapter IV, the foregoing analysis has sketched the evolution of the original doctrine of acquired rights from the middle of the 20th century into a principle of international law and positioned the principle of acquired rights within the current international legal order. Pursuant to the principle, successor states are free to enact their own domestic legal order but have to respect the factual pre-existing situation established by the use of individual rights and pertaining legitimate expectations in the permanence of such situation, be those monetary or moral interests. It is argued here that the acceptance of the pre-existing situations should be irrespective of an affected individual's nationality. Where there is no explicit deviation, the permanence of the former domestic legal order and rights acquired under it should be assumed. What is protected is not the legal position but the factual situation brought about by the exercise of the rights or the positive conferral of the rights. Moreover, states are, in principle, not hindered from abrogating and curtailing rights, there are no "eternal" rights *per se*. But the principle obliges states to take situations established by the use of such rights into account in a fair balancing process against other public duties.

Due to its basis in a permanent but variable and diversified international practice, the principle - for now - does not lead to concrete obligations for states in specific situations but is a forceful guiding and interpretative tool for the practice of states, a gap-filler for customary and treaty law, as well as a means of unification between different areas of international law and within the law of state succession itself. The intensity of the obligation to respect acquired rights depends on the specific circumstances of a case, especially the extent of influence of the successor state on the predecessor's domestic legal order and on the terms of the succession process. The obligation can range from a relatively strict obligation to uphold rights and only exceptionally curtail some of them to a minor obligation of at least installing an intermediary period to help people accommodate to a new situation. The latter option will also include uncompensated expropriations if public necessity so requires. Additionally, the principle of acquired rights

can propel further development of international law in general with the goal of empowering the individual rights holder.

Historically, the acceptance of acquired rights was easier to accomplish since they operated within a politically more homogeneous field. Western countries relied on the common minimum standard to reciprocally acknowledge their citizens' rights, especially property rights. This material standard was owed, however, only between states and was not enforceable by individuals themselves. Additionally, territorial notions of rights were employed.[2268] Later, the doctrine of vested rights became popular in peace treaties concluded after the First World War as a tool for protecting minorities subject to (forced) cessions of territory as a means of war reparations. However, the devastations of the Second World War did not only prove the practical limits of force of the treaties but also precluded the doctrine's development. Outside the common "western" frame, the protection of an individual's property abroad was highly selective and the doctrine of acquired rights was employed discriminatorily. Those double standards made acquired rights difficult to accept for the "newly independent states" and were probably one of the reasons why many of those states, as well as the states diverting into socialist forms of society and economy after the Second World War, outrightly rejected the doctrine. Attempts at the codification of acquired rights in the ILC famously failed. In the following decades, the doctrine, also in light of the phenomenal evolution of the law of human rights and the law on the protection of foreign investment, lost its appeal and fell into oblivion.

The re-discovery of the doctrine over the last years was embedded in a larger development in international law, or maybe even better, a regression of international law. The exponential proliferation of the in principle, much more forceful branches of human rights law and the law on the protection of foreign investment has stopped, their popular support diminished. While this is not the right place for further inquiries into the reasons for such regression,[2269] it has become obvious that states have become keener to rely on their "sovereign prerogative", "domestic sphere", or notions of "sovereign equality" in order to shield themselves from international influence. In this

2268 E.g. Castrén (n 8), 492 "La modification territoriale qui par elle-même est un fait politique ne devrait pas influer sur des droits patrimoniaux privés de caractère non-politique et les Etats doivent respecter également les droits basés sur l'ordre juridique d'un Etat tiers." [footnote omitted].

2269 But see Peter Danchin and others, 'Backlash to the International Legal Order: Breakdown or Breakthrough?' (2021), 115 ASIL Proceedings 249.

light, a principle referring to domestic requirements for the acquisition of rights might seem less intrusive than international "foreign" standards.

With the shying away from multilateral treaty systems with compulsory adjudication and the move to more soft-law instruments, the determination of customary rules of international law has also become increasingly controversial[2270]. It is therefore not completely surprising that courts and academia have turned to the source of general principles. General principles seem like the perfect solution to still the demand for (alleged) general, neutral, procedural rules applicable to all nations in the world. But, simultaneously, they are flexible and undefined enough not to put too much pressure on a state. Concurrently, general principles of international law can be drawn from a myriad of international "legal expressions" and diverse evidence and therefore accommodate the more liberal and flexible approach to sources of international law. A particularity of the principle of acquired rights is that, depending on its field of application, it can be characterized as both at the same time - a general principle finding its roots in domestic systems as well as a principle operating specifically on the international plane.

Yet, it would not do justice to the principle of acquired rights to look at it merely as an auxiliary device, as a principle born out of the need to cover up a messed-up situation, as a fig leaf to a fight for higher aspirations already lost. That view would not only be oblivious to the principle's long history pre-dating the acceptance of the individual as a (partial) subject of international law. It would as well not pay sufficient attention to the doctrine's modern significance, which is shown forcefully in cases of state succession. The surveyed international practice has shown that the principle of acquired rights may serve as promising and useful tool conducive to empowering the individual under international law. But it should not be seen in isolation: The principle is reinforced and expounded by custom and treaties. It is also an amalgam and specific expression of other more general principles such as equity, good faith, and legal security. Only in its farsighted, neutral, equitable, and coherent application together with other rules of international law, always keeping in mind the political background of a case, will it show its full potential. While being aware of the differences between the sources of international law as well as diligent with respect to

2270 Called "identity crisis" of customary law by Mads Andenas and Ludovica Chiussi, 'Cohesion, Convergence and Coherence of International Law' in: *Andenas/Fitzmaurice et al. General Principles* (n 2114) 9 14.

their determination, the possibility of their mutual influence and support should not be foreclosed.

This discussion has focused on the principle's application in cases of state succession. However, the foregoing analysis has proven that it may well be applicable to comparable situations. Even outside extreme situations, the principle of acquired rights may serve as a general motor of cohesion of legal and social systems, of continuity in times of change. Most likely, several new forms of change of responsibility over a territory are about to emerge. It is estimated that the further that development advances, the more the general utility of a category of "state succession" (as a factual description, not as a legal consequence[2271]) will be called into question. State succession represents a cross-cutting theme *par excellence*, involving a multitude of other fields of international law. The principle of acquired rights is a flexible, multifaceted rule of positive law interacting between the national and the international sphere, connecting different areas of international law. Not only can rules of customary or treaty law be interpreted and developed in line with this principle but it will further imbue the content of those other fields. Of course, cross-fertilization between different regimes can only work if their application is context-specific and takes account of the particularities of a case.[2272] Additionally, when constructing such a principle, we should be attentive to the geographical outreach of the analysis.[2273]

Many longing to further empower the individual under international law will be disappointed by the final result of this analysis, that the principle of acquired rights does not yet lead to strict obligations and independently enforceable rights, a finding that is in fact the result of a cautious and sober look at the state practice under consideration. However, even if continuity of the domestic legal order can only be considered a (rebuttable) presumption, under the current international legal system, that path might be the best available to protect individual rights when succession occurs. It should not be forgotten that cases of state succession regularly constitute extreme situations - figuratively speaking, situations of life and death (of a state). Involved states' responsiveness to legal rules will therefore be limited and reactions varied.

2271 *Supra*, Chapter II B) I).

2272 Critical of recent "boundary crossings" José E Alvarez, 'Beware: Boundary Crossings' in Tsvi Kahana and Anat Scolnicov (eds), *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (CUP 2016) 43-93.

2273 On "eurocentrism" ibid 85-87.

Obviously, even within such an expert forum as the ILC, it has not yet been possible to agree on rules for private rights with respect to state succession. Much of the academic analysis with respect to state succession coils between nihilistic capitulation and wishful thinking. Under those circumstances, the determination of a general principle guiding all cases of state succession must be seen as a definite success - all the more as the principle of acquired rights primarily furthers individual interests and not state interests. Moreover, the present status of the principle does not mean that it cannot develop into custom over the years. Yet, in the end, the rule cannot escape the system, and the power of a single principle should not be overestimated. In an international community still largely built on state consent, the emergence of rules proffering to secure basic rights of individuals is remarkable. In a system with only few non-derogable rules, legal presumptions are valuable. Even if not protecting rights as innate but only once acquired, the principle is supposed to secure individual interests often even against an individual's own state of nationality, a crucial point when it comes to individuals' independent status under international law.

The solution proposed here seems to offer an effective, fair and equitable way to also accommodate the interest of states to keep their sovereignty over domestic law and national resources and to modify their domestic law according to their needs.[2274] That path may alleviate states' concerns and counter the backlash against international law. *James Crawford*, a pupil of *Daniel O'Connell*, is reported to have made the comment that "international law is all that remains when 'Brexit' happens or when Donald Trump wins the US Presidential elections".[2275] This idea of international law as a fallback position may well be transferred to the principle of acquired rights: Once profound changes such as successions occur in the international landscape, all that remains for many individuals could be respect for their acquired rights.

Security has always been a main goal of a legal system, probably its *raisons d'être*. Mutual confidence that rules are followed is crucial in international and national law. Trust in the permanence of rules is in the interest

2274 Cp. also Crawford, 'Remarks' (n 420), 21 "It seems to me that a presumption of continuity, except in the case of dependent states, is a fair balance. The rest has to be managed, negotiated."

2275 Cited by La Rasilla del Moral, Ignacio de, 'International Law in the Early Days of Brexit's Past' *EJIL Talk!* (20 October 2016) <https://www.ejiltalk.org/international-law-in-the-early-days-of-brexits-past/>. See also Forcada Barona (n 1903), 212/213.

of states and individuals - even beyond their own existence. For the future, there is much more to be achieved and there is much leeway and room for political and diplomatic activism, something always desperately needed when it comes to protecting individuals in a system mainly constructed by states. New situations for applying acquired rights principles are not remote.[2276] History has taught us that it is not the majority who needs to be especially protected in situations of turmoil; it is the marginalized, the few. A minority's rights and interests will be the first to be thrown overboard when power changes with or without a referendum. There is still some way to go to promptly, adequately, and effectively protect individuals in such situations. It is to be hoped that this evolution will withstand a move back to treating individuals as a mere domestic issue and that human interests as a concern of the international community will not remain an empty promise. It would be disappointing if states after the First World War - at a time when human rights were not referred to as part of positive international law or states conceived as an even loosely associated universal community - managed to accord individuals effective rights before international tribunals against their own state, but today's international comunity shied away from that responsibility, after the purported "humanization of international law"[2277].

We should not be complacent with the current state of the law or cherish the idea that things will work out in the end, that we cannot know what is coming, or that states will best know what to do when succession occurs. Such an attitude would basically mean leaving people alone in situations where they would most obviously need protection. It is the task of those involved in international law to do better with respect to future succession situations - to be better prepared, to find some common ground, and hence to lend a guiding hand to new states and their populations. It is also necessary to remind ceding states that they cannot "sell" their people in the same way as their territory. German unification, the demise of the former Yugoslavia, the separation of South Sudan, they all of course are not going to happen again. But similar problems will arise no matter where they take

2276 Richard Wyn Jones, 'Is Wales Following Scotland in a Bid For Independence?: The Cause Is Growing in Popularity With Young Remainers, But There Are Dissenting Views' *The Guardian* (26 April 2022) <https://www.theguardian.com/commentisfree/2022/apr/26/is-wales-following-scotland-in-a-bid-for-independence>; Pooter (n 2243).

2277 Meron (n 640).

place. It is in our hands to establish rules on how to go about issues of private individual rights in the years to come. As *Schachter* lucidly stated about 30 years ago: "These events are not only the stuff of history; they foreshadow the future."[2278]

2278 Schachter (n 325), 253/254.