Nadja Reimold

Continuity in Times of Change

Acquired Rights and State Succession

Nomos

Beiträge zum
ausländischen öffentlichen Recht und Völkerrecht

Edited by

the Max Planck Society
for the Advancement of Science
represented by Prof. Dr. Armin von Bogdandy
and Prof. Dr. Anne Peters

Volume 328

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Open Access funding provided by Max Planck Society.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de

a.t.: München, Ludwig-Maximilians-Univ., Diss., 2023

ISBN 978-3-7560-1535-1 (Print)
978-3-7489-4339-6 (ePDF)

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN 978-3-7560-1535-1 (Print)
978-3-7489-4339-6 (ePDF)

Library of Congress Cataloging-in-Publication Data
Nadja Reimold
Continuity in Times of Change
Acquired Rights and State Succession
Reimold, Nadja
631 pp.
Includes bibliographic references.

ISBN 978-3-7560-1535-1 (Print)
978-3-7489-4339-6 (ePDF)

1st Edition 2024

Published by
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-7560-1535-1 (Print)
ISBN 978-3-7489-4339-6 (ePDF)
DOI https://doi.org/10.5771/9783748943396

Online Version
Nomos eLibrary

For Theodor and Helen

Acknowledgments

This book has been a journey, in so many respects. It represents my PhD thesis that was submitted in December 2022 and defended in April 2023 at Ludwig-Maximilians-University Munich.

From the first idea about the subject of my PhD until the final publication of the book, not only some time has gone down the river, but many roads have been taken, professional and personal. And a book like this, as many other achievements of these times, would not have been possible without the support from many, many people which I am immensely grateful for. To thank them all in the way they would deserve would go far beyond the confines of such a text.

First of all, my heartfelt thanks go to my supervisor and mentor, Prof. Dr. Dr. h.c. mult. Bruno Simma, former judge at the International Court of Justice and judge at the Iran-United States Claims Tribunal, for his time, advice, constructive critique and his constant interest in my PhD-topic as well as my personal endeavors. As well, I am grateful to Prof. Dr. Christian Walter not only for the time I could spend at his chair for public international law in Munich, but especially for the swift and enlightening second review of my thesis. Prof. Dr. Rudolf Streinz is to be thanked for his willingness to participate as an examiner in my viva in Munich. Prof. Dr. Claus Dieter Classen and his chair offered me "academic shelter" as well as the space and time for development during my years as a research fellow in Greifswald. Further acknowledgment has to go to Prof. Dr. Stefan Talmon LL.M. M.A., who was the first to hint me to the topic of acquired rights. I am as well indebted to the directors of the Max-Planck Institute for Comparative Public and International Law, Prof. Dr. Armin von Bogdandy and Prof. Dr. Dr. h.c. Anne Peters, LL.M. (Harvard), for accepting my book for their prestigious book series "Contributions on Comparative Public Law and International Law" and in particular to Prof. Peters for her invitation to a research stay in Heidelberg.

I also owe much gratitude to my two mentors, Prof. Dr. Dr. h.c. Dr. h.c. Angelika Nußberger M.A. and Dr. Almut Wittling-Vogel, who both provided motivating, thoughtful and personal insights into their professional careers and life choices inside and outside of academia. Dr. Mateja S. Platise

Mjur. (Oxford) is to be thanked for her preparedness to discuss relevant points of the Yugoslav succession process with me.

As well, the numerous colleagues and friends during my times in Munich, Bonn, Heidelberg and Greifswald who offered intriguing conversations, the possibility to present my thoughts, practical help and often also the much-needed distraction from legal issues, amongst them Prof. Dr. Helmut Aust, Prof. Dr. Thomas Burri, PD Dr. Björnstjern Baade, Chun-Kyung Paulus Suh, Stephan Lorentz, Kristina Schönfeld and Dr. Alexander Iben, were essential for the success of this project. Last but not least, I am grateful to Felix who supported and encouraged me during the years of research, writing and the time in between, and therefore has made this PhD a truly common endeavor.

This book is dedicated to my children, who have been my continuity in times of change.

Greifswald, January 2024

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List of Abbreviations

ACHR	American Convention on Human Rights
ACtHR	African Court on Human and Peoples' Rights
A.D.I.L.	Annual Digest and Reports of Public International Law Cases
AFDI	Annuaire Français de Droit International
AG	Advocate General
AHRLJ	African Human Rights Law Journal
A.J.I.C.L.	African Journal of International and Comparative Law
AJIL	American Journal of International Law
ALQ	Arab Law Quarterly
AMDI	Anuario Mexicano de Derecho Internacional
Am.J.Comp.L.	American Journal of Comparative Law
Am Rev Intl Arb	American Review of International Arbitration
Am.U.J.Int'l L.& Pol'y	American University Journal of International Law and Policy
Am.U.Int'l L.Rev.	American University International Law Review
Arbitr Int	Arbitration International
ARIEL	Austrian Review of International and European Law
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
Art.	Article
ARV	Archiv des Völkerrechts
ASA	Association Suisse de l'Arbitrage
AsianJIL	Asian Journal of International Law
ASIL	American Society of International Law

ASIL Proceedings	Proceedings of the Annual Meeting of the American Society of International Law
Aust YBIL	Australian Yearbook of International Law
AYbIL	Asian Yearbook of International Law
Badinter Commission	Conference on Yugoslavia Arbitration Commission
Baltic Y.B. Int'l L.	Baltic Yearbook of International Law
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGBl.	Bundesgesetzblatt (Official Gazette of Germany or Austria)
BIT	Bilateral Investment Treaty
Brexit	British Withdrawal from the EU-Treaties
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BYbIL	British Yearbook of International Law
Cardozo J.Int'l & Comp.L.	Cardozo Journal of International and Comparative Law
Case W. Res. J. Int'l L.	Case Western Reserve Journal of International Law
CAT	UN Convention Against Torture
CC	Constitutional Charter
CEDAW	UN Convention on the Elimination of all Forms of Discrimination Against Women
Cf.	Confer
CSFR	Czech and Slovak Federal Republic
Chinese JIL	Chinese Journal of International Law
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
CJICL	Cambridge Journal of International and Comparative Law
C.L.J.	Cambridge Law Journal

C.L.Q.	Cornell Law Quarterly
CML Rev.	Common Market Law Review
Colum.J.Eur.L.	Columbia Journal of European Law
Colum.J.Transnat'l L.	Columbia Journal of Transnational Law
Colum.L.Rev.	Columbia Law Review
Cp.	Compare
CPA	Comprehensive Peace Agreement (Sudan - South Sudan)
CRC	UN Convention on the Rights of the Child
Crim.L.F.	Criminal Law Forum
Croatian Y.B. Eur. L. & Pol'y	Croatian Yearbook of European Law and Policy
CRPC	Commission for Real Property Claims
CUP	Cambridge University Press
DAngVers	Die Angestelltenversicherung (Zeitschrift der Bundesversicherungsanstalt für Angestellte)
DtZ	Deutsch-Deutsche Rechts-Zeitschrift
Duke J.Comp.& Int'l L.	Duke Journal of Comparative and International Law
EAEC	European Atomic Energy Community
EECC	Eritrea-Ethiopia Claims Commission
EC	European Communities
ECHR	European Convention on Human Rights In footnotes: Reports of the European Court of Human Rights
ECR	European Court Reports
ECtHR	European Court of Human Rights
EEZ	Exclusive Economic Zone
E.H.R.L.R.	European Human Rights Law Review
EJIL	European Journal of International Law
E.J.M.L.	European Journal of Migration and Law

ELR	European Law Reporter
Emory Int'l L.Rev.	Emory International Law Review
ETS	European Treaty Series
Et seq(q).	et sequentia
EU	European Union
EuConst	European Constitutional Law Review
EU Rights Charter	EU Charter of Fundamental Rights
EurJLawEcon	European Journal of Law and Economics
EUSS	EU Settlement Scheme (UK)
Termination Agreement	Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union
FBH	Federation of Bosnia and Herzegovina
FET	Fair and Equitable Treatment
Fordham Int'l L.J.	Fordham International Law Journal
FRG	Federal Republic of Germany
FRY	Federal Republic of Yugoslavia
FYBIL	Finnish Yearbook of International Law
GC	Grand Chamber
GDR	German Democratic Republic
Geneva Convention	Convention Relating to Upper Silesia between Germany and Poland
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide
GG	Grundgesetz (German Constitution)
GoJIL	Göttingen Journal of International Law
GB	Great Britain
GYIL	German Yearbook of International Law
Harv. Int'l L.J.	Harvard International Law Journal
Hastings L.J.	Hastings Law Journal

HgYbIL	Hague Yearbook of International Law / Annuaire de La Haye de Droit International
HJIL/ZaöRV	Heidelberg Journal of International Law /Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
HKBL	Hong Kong Basic Law
HKLJ	Hong Kong Law Journal
HKLRD	Hong Kong Law Reports and Digest
HKSAR	Hong Kong Special Administrative Region
Human Rights Rev.	Human Rights Review
IA	International Affairs
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention against Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Rep	Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICSID	International Center for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICTY	United Nations International Criminal Tribunal for the former Yugoslavia
IDI	Institut de Droit International
ILA	International Law Association

ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
I.L.& S	Islamic Law and Society
IMA	Independent Monitoring Authority
IMF	International Monetary Fund
Ind.J.Global Legal Studies	Indiana Journal of Global Legal Studies
Int.C.L.R.	International Criminal Law Review
Int.C.L.Rev.	International Community Law Review
I.O.L.R.	International Organizations Law Review
J Afr L	Journal of African Law
JC	Joint Committee
J Const L East & Cen Eur	Journal of Constitutional Law in Eastern and Central Europe
JHistIntLaw	Journal of the History of International Law / Revue d'histoire du droit international
J.I.A.N.L.	Journal of Immigration, Asylum and Nationality Law
JIDS	Journal of International Dispute Settlement
JIEL	Journal of International Economic Law
J.Int'l Arb.	Journal of International Arbitration
J.Int'l Econ.L.	Journal of International Economic Law
JIntRelatDev	Journal of International Relations and Development
J Priv Int L	Journal of Private International Law
JuS	Juristische Schulung
JZ	Juristenzeitung
KFOR	UN Security Force "Kosovo Force"
lit.	litera
LJIL	Leiden Journal of International Law

Loy. L.A. Int'l & Comp. L. Rev.	Loyola of Los Angeles International and Comparative Law Review
MEED	Middle East Economic Digest
MPEPIL	Max Planck Encyclopedia of Public International Law
Max Planck Yb UN L	Max Planck Yearbook of United Nations Law
Mich.J.Int'l L.	Michigan Journal of International Law
MJECL	Maastricht Journal of European and Comparative Law
NAFTA	North American Free Trade Agreement
NC	Constitution of Namibia
N.C.J. Int'l L.	North Carolina Journal of International Law
NIEO	New International Economic Order
NILEPET	Nile Petroleum Corporation
NILR	Netherlands International Law Review
NILQ	Northern Ireland Legal Quarterly
no.	Number
Nord J Int Law	Nordic Journal of International Law
N.Y.L.J.	New York Law Journal
N.Y.U.J.Int'l Law & Pol.	New York University Journal of International Law & Politics
OG	Official Gazette
OP	Optional Protocol
OSCE	Organization for Security and Co-operation in Europe
OUP	Oxford University Press
P-I 1	Art. 1 of the First Protocol to the European Convention on Human Rights (Protection of Property)
(op.) para.	(Operative) Paragraph
PCA	Permanent Court of Arbitration

PCIJ	Permanent Court of International Justice
PDRY	People's Democratic Republic of Yemen
Polish Y.B.Int'l L.	Polish Yearbook of International Law
PRC	People's Republic of China
PUP	Princeton University Press
RBDI	Revue Belge de Droit International
RCEEL	Review of Central and East European Law
RdC	Recueil des Cours/ Collected Courses of the Academy of International Law
R.F.S.P.	Revue Francaise de Science Politique
Rev.Int'l Aff.	Review of International Affairs
RGDIP	Revue Générale de Droit International Public
RIDC	Revue Internationale de Droit Comparé
RoY	Republic of Yemen
SAYbIL	South African Yearbook of International Law
SAJIA	South African Journal of International Affairs
SALJ	South African Law Journal
SCC	Stockholm Chamber of Commerce
SEER	Journal for Labour and Social Affairs in Eastern Europe
SFRY	Socialist Federal Republic of Yugoslavia
SGCA	Singapore Court of Appeal (Unreported Judgments)
SGHC	Singapore High Court (Unreported Judgments)
Sri Lanka J.Int'l L.	Sri Lanka Journal of International Law
Stan.J.Int'l L.	Stanford Journal of International Law
SU	Soviet Union
Succession Agreement	Agreement on Succession Issues Between the Five Successor States of the Former State of Yugoslavia
SUDAPET	Sudan National Petroleum Corporation

SYbIL	Spanish Yearbook of International Law
TDM	Transnational Dispute Management
TEU	Treaty on European Union
Tex. Int'l L. J.	Texas International Law Journal
T.Jefferson L.Rev.	Thomas Jefferson Law Review
TMU	Treaty Establishing a Monetary, Economic and Social Union (Germany)
TV	Treaty of Versailles
UK	United Kingdom of Great Britain and Northern Ireland
UKCLA	UK Constitutional Law Association
UN	United Nations
UNC	Charter of the United Nations
UNCITRAL	United Nations Commission On International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
UN-HABITAT	United Nations Human Settlements Programme
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration Mission in Kosovo
UN OHCHR	UN Office of the High Commissioner for Human Rights
UNRIAA	UN Reports of International Arbitral Awards
UNSC	United Nations Security Council
U.Miami L.Rev.	University of Miami Law Review
USA	United States of America
USMCA	United States-Mexico-Canada Agreement

USSR	Union of Soviet Socialist Republics
UT	Unification Treaty (Germany)
U.T.L.J.	University of Toronto Law Journal
Va. J. Int'l L	Virginia Journal of International Law
VCLT	Vienna Convention on the Law of Treaties
VCSSPAD	Vienna Convention on Succession of States in Respect of State Property, Archives and Debts
VCSST	Vienna Convention on Succession of States in Respect of Treaties
Venice Commission	European Commission for Democracy Through Law
VermG	Vermögensgesetz (Germany)
Vienna Conventions	Vienna Convention on Succession of States in Respect of Treaties + Vienna Convention on Succession of States in Respect of State Property, Archives and Debts
WA	Withdrawal Agreement (UK - EU)
WB Act	Walvis Bay and Off-Shore Islands Act (Namibia)
WB Transfer Act	Act to Provide for the Transfer to Namibia of the Territory of and Sovereignty Over Walvis Bay and Certain Islands (South Africa)
WIRO	Wirtschaft und Recht in Osteuropa
YAR	Yemen Arab Republic
YbIDI	Yearbook of the Institute de Droit International
YbILC	Yearbook of the International Law Commission
Yrbk Islam Mid East L	Yearbook of Islamic and Middle Eastern Law
YEL	Yearbook of European Law
ZaöRV/HJIL	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht /Heidelberg Journal of International Law

Zbornik PFZ	Zbornik Pravnog Fakulteta Zagrebu (Proceedings of the Faculty of Law in Zagreb)
ZöR	Zeitschrift für öffentliches Recht

Chapter I: The Notion of Acquired Rights

"[D]ivisions and definitions cannot claim to be true, and therefore cannot prove anything to be true, but must attempt to be useful, useful for the systematic arrangement and scientific understanding of facts, ideas and rules, and moreover many have a certain sentimental and political value."[1]

A) The Diffuse State of the Law on the Issue of Acquired Rights

The question of what happens to rights acquired by individuals under a national legal order when the international legal environment changes is by no means new. For every territory where responsibility has passed over to a new state, the question will probably have arisen for every citizen living there. It therefore comes as no surprise that the issue has been dealt with in a multitude of judicial decisions, academic texts, or even international conventions. Especially in the periods after the First and Second World War, it has regularly surfaced in discussions concerning the ramifications of the re-arrangement of state territories and their populations. The juridical vehicle for such discussion has often been the "doctrine of acquired rights" or "vested rights theory". Through this rule, it has been contended that positions acquired under the legal order of a former state "survived" the change of sovereignty over a territory and a holder was able to assert these positions against the new sovereign.

However, few doctrines in international law are as marked by such a blatant disparity between being regularly touted as a generally recognized principle of international law[2] and the lack of a firm and diligent sub-

1 Hermann Kantorowicz, 'The Concept of the State' (1932), 35 Economica 1 20.

2 E.g. by Daniel P O'Connell, *The Law of State Succession* (CUP 1956) 78; Arnold D McNair, 'The General Principles of Law Recognized by Civilized Nations' (1957), 33 BYbIL 1 16; ILC, 'Fourth Report on State Responsibility (Special Rapporteur Garcia-Amador): Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens - Measures Affecting Acquired Rights' (1959), 1959(II) YbILC 1 paras. 3, 5; Carsten T Ebenroth and Matthew J Kemner, 'The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards' (1996), 17(3) JInt'l EconL 753 778; *South West Africa (Second Phase),* 18 July 1966, Dissenting Opinion of Judge Tanaka, ICJ Rep 1966 250 295 (ICJ); UN Secretariat,

stantiation of that assertion.[3] A vivid example of such a disparity is the treatment of pronouncements from the Permanent Court of International Justice (PCIJ) that ostensibly postulate a doctrine of acquired rights. A decision many commentators refer to is the PCIJ's 1923 advisory opinion

'Memorandum: Survey of International Law in Relation to the Work of Codification of the International Law Commission' (10 February 1949) UN Doc. A/CN.4/1/Rev.1 28, para. 45; Robert McCorquodale, Jean-Pierre Gauci and Lady-Gené Waszkewitz, 'BREXIT Transitional Arrangements and Public International Law' 2, 13; Stephan Wittich, 'Art. 70' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) footnote 72; André Nollkaemper, 'Some Observations on the Consequences of the Termination of Treaties and the Reach of Article 70 of the Vienna Convention on the Law of Treaties' in Ige F Dekker and Harry H G Post (eds), *On the Foundations and Sources of International Law* (T.M.C. Asser Press 2003) 187 187. For custom: August Reinisch, *State Responsibility for Debts: International Law Aspects of External Debt and Debt Restructuring* (Böhlau Verlag 1995) 88; August Reinisch and Gerhard Hafner, *Staatensukzession und Schuldenübernahme: Beim "Zerfall" der Sowjetunion* (Service Fachverlag 1995) 57; Ursula Kriebaum and August Reinisch, 'Property, Right to, International Protection (2009)' in Rüdiger Wolfrum and Anne Peters (eds), *Max Planck Encyclopedia of Public International Law: Online Edition* (OUP) para. 17; Enver Hasani, 'The Evolution of the Succession Process in Former Yugoslavia' (2006), 29(1) TJefferson LRev 111 143; Florian Drinhausen, *Die Auswirkungen der Staatensukzession auf Verträge eines Staates mit privaten Partnern: Dargestellt mit besonderen Bezügen zur deutschen Wiedervereinigung* (Peter Lang 1995) 119–120; Regis Bismuth, 'Customary Principles Regarding Public Contracts Concluded with Foreigners' in Mathias Audit and Stephan W Schill (eds), *Transnational Law of Public Contracts* (Bruylant 2016) 321 327 "customary principle". Less clear with respect to the source: Georges Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (1936), 17 BYbIL 1 9 "We have here to do with an actual and universally accepted rule of positive law."; Vladimir-Djuro Degan, 'State Succession: Especially in Respect of State Property and Debts' (1993), 4 FYBIL 130 151 "the respect of acquired rights […] is the prevailing principle". Against Karl Strupp, *Grundzüge des positiven Völkerrechts* (5th ed. Ludwig Röhrscheid Verlag 1932) 85; ILC, 'Second Report on Succession in Respect of Matters Other than Treaties: Economic and Financial Acquired Rights and State Succession (Special Rapporteur Bedjaoui)' (1969), 1969(II) YbILC 69 85, 99, paras. 79, 148; Volker Epping, '§7. Der Staat als die „Normalperson" des Völkerrechts' in Volker Epping and Wolff Heintschel von Heinegg (eds), *Völkerrecht: Ein Studienbuch* (7th ed. C.H. Beck 2019) 76 198, para. 240.

3 Daniel P O'Connell, 'Recent Problems of State Succession in Relation to New States' (1970), 130(II) RdC 95 134 speaks of a "legacy of confusion"; also Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 2), 1 "agreement is not in sight, either as regards its acceptance into international law or as regards its extent or implications"; cf. also still James Crawford, *Brownlie's Principles of Public International Law* (9th ed. OUP 2019) 415 "the principle […] is a source of confusion since it is question-begging and is used as the basis for a variety of propositions."

on *German Settlers in Poland*,[4] where it declared that "[p]rivate rights acquired under existing law do not cease on a change of sovereignty. […] It can hardly be maintained that, although the law survives, private rights acquired under it have perished."[5] The only inference that can be drawn from this statement is that domestic law will not cease to operate on a territory merely due to a change of sovereign. That, in the case of persistence of the whole national legal order, the encompassed rights would not lapse is a truism not worth of further investigation. Yet, this short excerpt does not answer the question of why the law survives. Additionally, the PCIJ explicitly excluded from its review the question of whether and under what conditions Poland would be allowed to take away or alter these rights.[6] A variety of other international tribunals have pronounced on the issue in a strikingly brief manner without any further explanation or much reference.[7] The persistence of private rights after a change of sovereignty was more often depicted as a matter of course than as a legal principle in need of a juridical basis or substantiation.

4 *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland,* 10 September 1923, Advisory Opinion, Series B No. 6 (PCIJ).

5 ibid 36.

6 ibid. Critical on the precedential value of the judgment ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 74, para. 16. For a discussion of the judgment see *infra*, C) II) 1).

7 E.g. the sole arbitrator in the *Affaire Goldenberg (Allemagne contre Roumanie),* Award of 27 September 1928, UNRIAA II 901 909 declared that "Le respect de la propriété privée et des droits acquis des étrangers fait sans conteste partie des principes généraux admis par le droit des gens." The only source he cited for this far-reaching contention was, however, a reference to the *Case Concerning Certain German Interests in Polish Upper Silesia,* 25 May 1926, Merits, Series A No 7 (PCIJ). For a more detailed analysis of this decision see *infra*, C) II) 3).

A second, and maybe even worse, fault entailed by the engagement with acquired rights is the lack of a concise definition of what the term actually means.[8] Over time, the term has been used to describe a myriad of problems and been employed in diverse contexts.[9] This vagueness and lack of doctrinal substantiation has severely weakened the doctrine's force and fostered doubts as to its legal value.[10] One of the foremost authorities on questions of state succession and acquired rights, *Daniel P. O'Connell*, came to the conclusions that "[t]he doctrine of acquired rights, although not adequately defined, either in literature or in judicial and diplomatic practice, has long been accepted in international law"[11] and "[t]here is little doubt that the respect for acquired rights is a principle well established in international law. Just how far this protection extends, and what exactly is its nature, is a matter of considerable controversy."[12] This conclusion provokes the question of how a doctrine with unclear limits, nature, and content can actually be considered "well established in international law" and what its concrete values are. While there must be some flexibility to adopt a rule to a variety of situations in which it may come into play, a

8 Erik JS Castrén, 'Aspects Récents de la Succession d'États' (1951), 78 RdC 379 490; Pierre A Lalive, 'The Doctrine of Acquired Rights' (Symposium on the Rights and Duties of Foreigners in the Conduct of Industrial and Commercial Operations Abroad, Dallas, Texas, 20.-23.07. 1964) 149, 189; Ko S Sik, 'The Concept of Acquired Rights in International Law: A Survey' (1977), 24(1-2) NILR 120 140; Crawford *Brownlie's Principles of Public International Law* (n 3) 415; also alluding to this problem Michael Waibel, 'Brexit and Acquired Rights: Symposium on Treaty Exit at the Interface of Domestic and International Law' (2017), 111 AJIL Unbound 440 443; cf. Anna Brunner, 'Acquired Rights and State Succession: The Rise and Fall of the Third World in the International Law Commission' in Jochen v Bernstorff and Philipp Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (OUP 2019) 124 128.

9 For a brief overview cf. Sik (n 8).

10 Doubts were expressed e.g. by Lalive (n 8) 189; ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 72, para. 13; recently, Karsten Nowrot, 'Termination and Renegotiation of International Investment Agreements' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law* (OUP 2016) 227 253 "the concept of acquired rights is nevertheless also perceived to remain rather vague and illusive when trying to define its scope of application as well as the normative consequences deriving from it in a specific situation".

11 O'Connell *The Law of State Succession* (n 2) 78.

12 ibid 99; also using the term of "well-established" in this respect Nollkaemper, 'Some Observations on the Consequences of the Termination of Treaties and the Reach of Article 70 of the Vienna Convention on the Law of Treaties' (n 2) 187.

definition leaving a legal concept so obscure as to render it meaningless is not only prone to abuse but cannot become the basis of any significant discussion. It may also lead to some form of academic exasperation.[13]

Nevertheless, this vagueness has not been rectified until today.[14] In 2001, the *Institut de Droit International* (IDI) adopted "guiding principles relating to the succession of States in respect of property and debts".[15] Its provision in Article 25 reads "[s]uccessor States shall in so far as is possible respect the acquired rights of private persons in the legal order of the predecessor State."[16] This statement still does not give much guidance on what exactly might be encompassed by the doctrine of acquired rights. What does "respect[ing]" rights "as far as possible" mean? Does it imply a persistence of the whole national legal order? Is the new sovereign barred from altering or abolishing these rights? For how long? And, most importantly, who defines what is an acquired right? The domestic law of the old sovereign? The new sovereign? International law? Is there a difference

13 Sik (n 8), 140/141 "the term is used in so many different situations that it appears useless to try to achieve a generally applicable definition."

14 See e.g. Patrick Dumberry, *A Guide to State Succession in International Investment Law* (Edward Elgar 2018) para. 10.09 who, in his chapter on "State Succession to Acquired Rights Under Contracts" comes to the conclusion that "[t]he whole debate […] is beyond the scope of this book. Suffice is to say that the doctrine of acquired rights […] is clearly no longer recognized as an *absolute* principle" [emphasis in original]; Yaël Ronen, *Transition from Illegal Regimes under International Law* (CUP 2011) 251 "There is a remarkable consensus that in ordinary cases of state succession, a change in sovereignty does not affect acquired rights of individuals, although the type of rights that are capable of being 'acquired' has for a long time remained controversial". But it does not seem clear whether a consensus can exist if the content of this consensus is in dispute.

15 IDI, 'State Succession in Matters of Property and Debts, Guiding Principles Relating to the Succession of States in Respect of Property and Debts (Rapporteur Ress)' (26 August 2001) <https://www.idi-iil.org/app/uploads/2017/06/2001_van_01_en.pdf>.

16 Which is almost the same conclusion as the one drawn by O'Connell some 45 years before, *see* O'Connell *The Law of State Succession* (n 2) 101 "The principle of respect for acquired rights in international law is no more than a principle that change of sovereignty should not touch the interests of individuals more than is necessary", and even falls short of the IDI's previous work, compare IDI, 'Resolution "Les effets des changements territoriaux sur les droits patrimoniaux" (Rapporteur Makarov)' (1952), 44(II) Annuaire d'Institut de Droit International 471 para. 4 <https://www.idi-iil.org/app/uploads/2017/06/1952_sien_01_fr.pdf>, where it is stipulated that "Le changement territorial laisse subsister les droits patrimoniaux régulièrement acquis antérieurement à ce changement."

between rights derived from private or public law? All these questions remain unanswered by the brief provision.

B) The Reasons for This Confusion

This absence of a clear and workable definition of acquired rights is due to several factors. The doctrine of acquired rights is heavily linked to the rules governing state succession, a field that, until today, has defied successful codification and complete doctrinal penetration. The academic engagement with the issue has been sequential and selective, corresponding to the particular events of succession, rather than continuous.[17] The ambitious projects of the United Nations (UN) International Law Commission (ILC),[18] to draft major and universally applicable conventions setting out the rules of the law of state succession has not yielded the support expected and in the eyes of some observers has been a failure.[19] The first project, the Vienna Convention on Succession of States in Respect of Treaties (VCSST),[20] did not come into force until more than 18 years after its adoption and has still not attracted much participation.[21] A further attempt, the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (VCSSPAD)[22] from 1983 has not yet entered into force.[23] The third topic, nationality in cases of succession, has not

17 Matthew Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (OUP 2007) 27-28.

18 The UN General Assembly's sub-organ entrusted with developing and codifying the rules of international law, cf. UN Doc. A/RES/174 (11) (1947) "Establishment of an lnternational Law Commission" and Art. 13 para. 1 of the UN Charter.

19 See *infra*, Chapter II A).

20 Vienna Convention on Succession of States in Respect of Treaties (22 August 1978) UNTS 1946 3.

21 There are merely 23 parties as of 1 January 2024, cf. https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&clang=_en.

22 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (7 April 1983) UN Doc. A/CONF/117.14 141, Official Records of the United Nations Conference on Succession Vol. II 141.

23 For further signs of reluctance towards the VCSSPAD see also Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis* (3rd ed. Duncker & Humblot 1984) 621, para. 997.

even been cast as an international convention.[24] In 2019, one of the field's leading authors conceded that "[s]tate succession is an area of uncertainty and controversy. […] Indeed, it is possible to take the view that not many settled rules have yet emerged."[25] Many of the rules, such as the often-cited principles of clean slate or universal succession, tend more to constitute fairly broad and general principles delimiting the outer borders of the topic but do not prove helpful in solving actual problems.

This lack of discernible rules might partly be due to the highly political nature of such changes in responsibility. Instances later described as cases of state succession mostly took place in an environment of heated conflict, going to the roots of a state's existence and ideology.[26] They often supplied the battle ground for questions of state sovereignty and self-determination. Their solution entailed settling numerous national identity problems and was part of a post-conflict bargain. Thus, the perception and application of succession norms changed depending on the specific societal and political environment.[27] Succession doctrines have been applied to sanction previous, potentially colonialist, policies, and in particular the doctrine of acquired rights was used and abused to justify double standards and heteronomy.[28] Before the Second World War, European and other colonizing nations felt free to differentiate between "civilized" states, amongst which the respect for acquired rights was purported common ground, and "non-civilized" states for which these rules would not apply.[29] Now, following the

24 Instead, the ILC recommended to the UNGA the adoption of draft articles in the form of a declaration, cf. ILC, 'Report on the Work of its Fifty-First Session' (1999), 1999(II(2)) YbILC 1 20, paras. 44, 45.

25 Crawford *Brownlie's Principles of Public International Law* (n 3) 410. In the book's 8th ed. at 424 Crawford had even spoken of "great uncertainty".

26 Andreas Zimmermann, 'State Succession in Treaties (2006)' in: *MPEPIL* (n 2) para. 4; on the political sensitivity of the questions raised by state succession Rein Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (1993), 42(3) ICLQ 473 473–474.

27 In general Robert Jennings and Arthur Watts, *Oppenheim's International Law: Volume I - Peace* (9th ed. Longman 1996) 210, § 61; Craven *Decolonization of International Law* (n 17) 18- 19; Gerhard Hafner and Elisabeth Kornfeind, 'The Recent Austrian Practice of State Succession: Does the Clean Slate Rule Still Exist?' [1996] ARIEL 1, 2.

28 Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (CUP 2013) 82.

29 Lorenzo Cotula, 'Land, Property and Sovereignty in International Law' (2017), 25(2) Cardozo JInt'l & CompL 219 231–232; Matthew Craven, 'Colonial Fragments: Decolonisation, Concessions and Acquired Rights' in: *Bernstorff/Dann The Battle for International Law* (n 8) 101 112–113; see Alexander P Fachiri, 'Expropriation and

demise of their colonial power, those nations have attempted to bind all new states to recognizing private rights originating from a time before the previously colonized countries gained independence.[30]

A prominent example of those attempts relates to concessions and their *sui generis* character, which became the tool for perpetuating colonial policies.[31] The strict separation between the public and the private sphere[32] allowed international tribunals to shelter contracts concluded between a state and an individual from national jurisdiction by "internationalizing" the contracts.[33] However, rights derived from such contracts were labelled as private rights that had to be respected by the successor state.[34] Those rights often concerned large parts of the domestic key industries and the exploitation of essential national resources.[35] Beyond that, in some cases, the former colonial state had transferred far-reaching rights such as personal jurisdiction in civil and criminal matters to so-called "chartered" foreign companies.[36] Through them, the colonial states tried to retain extensive

International Law' (1925), 6 BYbIL 159 169 who speaks of "semi-babarous countries" and "advanced nations"; cp. also *The Mavrommatis Palestine Concessions (Hellenic Republic v. Great Britain),* 30 August 1924, Dissenting Opinion Judge Moore, Ser A No 2 54 68 (PCIJ) "Mandatory Powers [...] are 'advanced nations', which, by reason of that character, are peculiarly fitted to undertake the 'tutelage' of peoples 'not yet able to stand by themselves'. They are indeed the constituents of the community of nations in which the recognition by its members of the obligations of international law is necessarily and tacitly assumed."

30 Comprehensively on the colonial roots of and the perpetuation of oppressive and unequal doctrines through international legal thought post-1945 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) especially 196-244.

31 Andrea Leiter, 'Protecting Concessionary Rights: General Principles and the Making of International Investment Law' (2022), 35(1) LJIL 55 57.

32 Cf. Michelle Burgis, 'Transforming (Private) Rights through (Public) International Law: Readings on a 'Strange and Painful Odyssey' in the PCIJ Mavrommatis Case' (2011), 24(4) LJIL 873 873 especially 879/880 .

33 On this Leiter (n 31); Miles (n 28) 80–81.

34 ibid 81.

35 Cf. ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 92-93, paras. 113-116; Mohammed Bedjaoui, 'Problèmes Récents de Succession d'Etats Dans les Etats Nouveaux' (1970), 130(II) RdC 455 547–549; for an overview also Jean-Baptiste Duroselle, 'Les Conflits Entre États et Compagnies Privées. Note Introductive' (1967), 17 RFSP 286.

36 Miles (n 28) 28-31; for specific examples Georges Fischer, 'La Zambie et la British South Africa Company' (1967), 17 RFSP 329 329/330; Craven, 'Colonial Fragments' (n 29) 104–109; *Island of Palmas Case (Netherlands v. USA),* Award of 4 April 1928, UNRIAA II 829 858.

economic and political influence while formally releasing the colonized states from their rule. In practice, international law was used as "a vessel for prioritizing the continuation and protection of accrued wealth over attempts at redistribution for the public good."[37] Therefore, especially in the 1960s and 1970s before the background of the call for self-determination of the populations of former colonies, acquired rights proved to be a particularly controversial topic.[38]

This controversy also became palpable in ILC's work. First mentioned during discussions on state responsibility,[39] the doctrine of acquired rights was later extensively dealt with and strongly challenged in the reports of Special Rapporteur *Bedjaoui* concerning the issue of state succession in matters other than treaties.[40] But even in this expert forum, the issue proved so politically loaded that members chose to postpone consideration and closed the topic.[41] What was left from the extensive debate today reads as Art. 6 VCSSPAD: "Nothing in the present Convention shall be considered as prejudging in any respect any question relating to the rights and obligations of natural or juridical persons."[42] As a consequence, a con-

37 Leiter (n 31) 56.

38 Karl Zemanek, 'State Succession After Decolonization' (1965), 116(III) RdC 187 271 described the effect of state succession on municipal law as "the domain in which the most violent disagreement and the most profound misunderstandings reign among scholars."

39 ILC, 'Fourth Report on State Responsibility (Special Rapporteur Garcia-Amador)' (n 2). Within the discussion of the topic of state responsibility the ILC buried its early efforts to codify the law concerning a "minimum standard" for the treatment of foreigners and in turn concentrated on secondary rules, cf. Campbell McLachlan, 'Is There an Evolving Customary International Law on Investment?' (2016), 31(2) ICSID Review 257 260. This left the issue of unlawful expropriations for discussion within the topic of state succession. On the treatment of "acquired rights" in the ILC outside the context of state succession Anna Krueger, *Die Bindung der Dritten Welt an das postkoloniale Völkerrecht: Die Völkerrechtskommission, das Recht der Verträge und das Recht der Staatennachfolge in der Dekolonialisierung* (Springer 2017) 346–349.

40 ILC, 'First Report on Succession of States in Respect of Rights and Duties Resulting From Sources Other than Treaties (Special Rapporteur Bedjaoui)' (1986), 1968(II) YbILC 94 especially 115-117; ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2). For a detailed analysis see *infra*, C) II) 3).

41 ILC, 'Report on the Work of its Twenty-First Session' (1969), 1969(II) YbILC 203 228, para. 61.

42 For Verdross and Simma (n 23) 621, para. 997 "in practice the most important question".

ventional regulation of the question of the persistence of individual rights after a change of sovereignty is virtually non-existent.[43]

Furthermore, since decolonization, the international legal landscape has fundamentally changed. International law has advanced and broadened its scope. It now regulates issues that were formerly shielded from international scrutiny because they came within the "domestic sphere" of a state. In particular, the private law relations within a state were said to constitute such issues.[44] Additionally, international law has moved from a pure interstate system to one taking individuals into account. Within this framework, a prominent role is being played by the prolific number of international mechanisms protecting human rights and foreign investment. Both systems tend to cover some of the field formerly occupied by the doctrine of acquired rights. Over the last 40 to 50 years, these two topics have come much

43 However, it should not be left unmentioned that the ILC's topic "Succession of States in respect of State Responsibility" is still under consideration and in the future might also comprise the application of these rules to injured individuals, see ILC, 'Report on the Work of its Sixty-Ninth Session' (2017), 2017(II) YbILC 1 para. 227; ILC, 'First Report on Succession of States in Respect of State Responsibility (Special Rapporteur Šturma)' (31 May 2017) UN Doc. A/CN.4/708 paras. 23, 133; ILC, 'Second Report on Succession of States in Respect of State Responsibility (Special Rapporteur Šturma)' (6 April 2018) UN Doc. A/CN.4/719 para. 191. However, this goal seems to have been abandoned recently: ILC, 'Third Report on Succession of States in Respect of State Responsibility (Special Rapporteur Šturma)' (2 May 2019) UN Doc. A/CN.4/731 paras. 144-145; ILC, 'Fourth Report on Succession of States in Respect of State Responsibility (Special Rapporteur Šturma)' (27 March 2020) UN Doc. A/CN.4/743 paras. 137-138 and ILC, 'Fifth Report on Succession of States in Respect of State Responsibility (Special Rapporteur Šturma)' (1 April 2022) UN Doc. A/CN.4/751 para. 89. See also, for current work on the topic outside the ILC, Art. 2 para. 1 of IDI, 'Resolution on State Succession and State Responsibility' in Marcelo G Kohen and Patrick Dumberry (eds), *The Institute of International Law's Resolution on State Succession and State Responsibility: Introduction, Text and Commentaries* (CUP 2019) "The present Resolution applies to the effects of a succession of States in respect of the rights and obligations arising out of an internationally wrongful act that the predecessor State committed against another State *or another subject of international law* prior to the date of succession, or that a State or another subject of international law committed against the predecessor State prior to the date of succession" [emphasis added], and the comments by Special Rapporteur Kohen in IDI, 'Final Report: State Succession in Matters of State Responsibility (14th Commission)' (2015), 76 YbIDI 509 524 para. 26, 633, who explained that Art. 2 para. 1 had been inserted to account for the goal to adopt a "broad" definition and to include individuals. But the IDI commission seemed to have been divided on this issue, cf. comments by e.g. Gaja, ibid 630, 632, 640, 641 or Tomuschat, ibid 670.

44 Cf. Shabtai Rosenne, 'The Effect of Change of Sovereignty Upon Municipal Law' (1950), 27 BYbIL 267 269/270, 279, 290.

more to the foreground while academic interest in acquired rights seems to have faded since the end of the 1970s. This shift in focus, of course, again was not conducive to the evolution of a stringent and comprehensive legal theory of acquired rights.[45]

C) What We Talk About When We Talk About Acquired Rights

Every analysis of a legal concept must start from a common denominator - a working definition. This pre-requisite seems especially relevant for acquired rights, where numerous vague definitions have been more or less stringently applied to a panoply of different situations thereby partly obscuring its socio-political context and systematic grounding and leaving in doubt the doctrine's positive legal status. This book adopts a more descriptive approach[46] so as not to preempt the later analysis of current developments. It therefore extracts a definition by carefully analyzing the most influential previous work on the subject. The topic of acquired rights is best founded on preceding work because, to a great extent, the doctrine is a theoretical construct developed in the case law of international tribunals and academic literature up to the 1970s. Based on this preliminary analysis, the remaining part of the book covers more modern expressions of the doctrine, surveying practice of states and international organizations, judicial pronouncements, and academic work from 1990 on.

A generally agreeable and utile definition can best be found by relying on academic work on acquired rights from the 1950s to the 1970s, when the doctrine was analyzed and challenged most extensively. Additionally, later writers routinely referred to that material.[47] But unfortunately, they often blanketly draw on such "classic" definitions without questioning their sources, sociological assumptions, or background. In consequence, the current doctrinal chaos related to acquired rights is only aggravated. The

45 On the place of acquired rights in today's international legal order *infra*, Chapter III.

46 On the advantages of a descriptive approach in general see Anne Orford, 'In Praise of Description' (2012), 25(3) LJIL 609.

47 See e.g. Dumberry *Guide to State Succession in International Investment Law* (n 14) Chapters 10-14, 273-399; Waibel, 'Brexit and Acquired Rights' (n 8); Hasani (n 2), 142; Ebenroth and Kemner (n 2), 778; *McCorquodale/Gauci et al. BREXIT Transitional Arrangements* (n 2) 11; Vaughan Lowe, 'Written Evidence Before the European Union Committee of the UK House of Lords' (2 September 2016) AQR0002 paras. 6, 7 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-acquired-rights/written/38137.html>.

significance of the doctrine of acquired rights cannot be grasped without considering its history and development.

While this book cannot feasibly survey all the work dealing with acquired rights,[48] the doctrine's evolution will be shown in "broad strokes". Thus, after a brief account of the history of the doctrine, a survey of PCIJ case law on acquired rights serves as a starting point. Finally, the most profound, instructive, and popular academic works dealing with the doctrine of acquired rights after the Second World War,[49] written by *Daniel Patrick O'Connell,*[50] *Pierre A. Lalive*,[51] and *Mohammed Bedjaoui*,[52] will be summarized.

I) The Genesis of the Doctrine of Acquired Rights

The protection of acquired rights is, to a greater or lesser extent, known in most domestic legal systems as a principle of the rule of law. Beginning from the 17th and 18th centuries, this principle protected certain domestic rights of individuals against curtailment by the state; the prohibition of retroactive application of laws being part of such acquired rights principle.[53] The doctrine left the purely domestic realm when the vested rights

48 For a rather comprehensive account of literature until 1980 cf. e.g. Jacques Barde, *La Notion de Droits Acquis en Droit International Public* (Les Publications Universitaires de Paris 1981).

49 For the time before 1945 see especially Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 2); Georges Kaeckenbeeck, 'La Protection Internationale des Droits Acquis' (1937), 59 RdC 321.

50 O'Connell *The Law of State Succession* (n 2) especially 77-207; Daniel P O'Connell, *State Succession In Municipal Law And International Law. Volume I Internal Relations* (CUP 1967) especially 237-481; O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), especially 134-146.

51 Lalive (n 8).

52 Bedjaoui (n 35), especially 531-561. Cf. also his work as Special Rapporteur for the International Law Commission : ILC, 'First Report on Succession of States in Respect of Rights and Duties Resulting From Sources Other than Treaties (Special Rapporteur Bedjaoui)' (n 40), especially 115-117; ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2).

53 Cf. Lalive (n 8) 153–154; Sik (n 8), 120; Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 2), 2; Jürgen Basedow, 'Vested Rights Theory' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 1813 1813.

theory[54] was employed to allow the recognition of rights acquired under the domestic legal order of another state.[55] This transposition to private international law was not surprising since the basic rationale behind the domestic rule could also be applied here: "[I]ts motivating' force [...] is in both cases the same; i.e., it expresses a need for permanence and security in social relations."[56] Yet, additional aspects such as the respect for the legal systems of foreign states and the choice between them had to be taken into account.[57] Nevertheless, constructed as a conflict of laws theory, the doctrine of acquired rights remained a rule of domestic law (on how to go about foreign law).[58]

Acquired rights became a term of *international* law in the guise of the discussion around an international "minimum standard" for the protection of aliens.[59] Through the channel of diplomatic protection, the argument of acquired rights of aliens became the way of protecting foreign states' economic interests in a host state. Then, from these rules for states, which were *locally* apart, it was not far to situations where states were disconnected

54 In fact, the term "vested rights" is more often used in international private law constellations than in the public international law context, where the expression "acquired rights" prevails; *see* Ralf Michaels, 'Public and Private International Law: German Views on Global Issues' (2015), 4(1) J Priv Int L 121 130.

55 On the evolution and dogmatic history of the doctrine Basedow, 'Vested Rights Theory' (n 53) 1813; O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 135–136; Lalive (n 8) 153–162; Craven, 'Colonial Fragments' (n 29) 110–111.

56 Lalive (n 8) 156; on its economic advantages Basedow, 'Vested Rights Theory' (n 53) 1816.

57 Sik (n 8), 125; cf. also Basedow, 'Vested Rights Theory' (n 53) 1815–1816 who contends that therefore the theory is not in use anymore in private international law; on comity Alex Mills, 'Public International Law and Private International Law' in: *Basedowet al. Encyclopedia of PIL* (n 53) 1448 1448–1449.

58 For an overview of private law vested rights theories Wilhelm Wengler, *Internationales Privatrecht* (de Gruyter 1981) 23-24; Basedow, 'Vested Rights Theory' (n 53); Michaels, 'Public and Private International Law' (n 54), 130–131 considering the theory as "dead"; cp. Marie-Therese Ziereis, *Die Staatensukzession im Internationalen Privatrecht* (Mohr Siebeck 2021) 223–230. See in general on the role of private international law at that time Charles T Kotuby, 'General Principles of Law, International Due Process, and the Modern Role of Private International Law' (2012-2013), 23(3) Duke J Comp & Int'l L 411 411.

59 Seminally Alfred Verdross, 'Les Règles Internationales Concernant le Traitement des Étrangers' (1931), 37(3) RdC 323-412 especially 354–376. See on the discussion of the standard of "national treatment" *infra*, Chapter III C) III) 1) b).

in *time* (predecessor and successor state).[60] Cases of state succession, i.e. cases in which the former sovereignty and hence the pertaining national legal order were at least *prima facie* extinguished, asked for rules beyond the domestic sphere.[61] It must be stressed though that, from the 19th to the middle of the 20th century, most cases of state succession happened as cessions or annexations.[62] In both situations, only parts of a territory change their territorial affiliation,[63] bringing them close to conflict of law principles.[64]

Some of the first instances where municipal courts were reported to have acknowledged rights acquired under a national legal order of a predecessor state concerned the upholding of titles to land in the new colonies by United States' (US) courts. In 1832, the US Supreme Court in *United States v. Percheman* famously held that

> "[t]he modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property, remain undisturbed."[65]

60 Craven, 'Colonial Fragments' (n 29) 111; Basedow, 'Vested Rights Theory' (n 53) 1813 who explains that "[i]n cases of state succession the conflict of legal rules is one of a temporal nature; it is engendered by the sequence of different sovereigns in the same territory. This is a matter of public international law. Where the conflict arises from the existence of diverse rules of law in different jurisdictions, we are in the domain of private international law" but admits at the same time that "[f]rom an historical perspective, the systematic difference was not generally acknowledged before the 20th century and then only at different times in the various countries". Also Ziereis (n 58) 64–69 speaking of a *sui generis* collision.

61 Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Lawbook Exchange Ltd. 1927) 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". See also Krystyna Marek, *Identity and Continuity of States in Public International Law* (2nd ed. Librairie Droz 1968) 2.

62 For concessions cf. O'Connell *The Law of State Succession* (n 2) 108–129; for cessions Rosenne (n 44), 267. Cp. also the case selection in Arnold D McNair, 'The Effects of Peace Treaties Upon Private Rights' (1941), 7(3) CLJ 379.

63 In more detail on the different forms of succession *infra*, Chapter II C).

64 Lalive (n 8) 162 speaks of a "natural analogy".

65 *United States v. Percheman,* 32 US (7 Pet) 51 (1833) 86/87 (U.S. Supreme Court).

This conclusion was based on the separation between *imperium* (sovereignty), which was transferred, while the *dominium* (property) remained with the owner, the prevalent view in the western sphere at the time.[66] Accordingly, the US Supreme Court opined that a "cession of territory is never understood to be a cession of the property belonging to its inhabitants. The King *cedes that only which belonged to him*; lands he had previously granted were not his to cede."[67]

Later, one of the foremost examples of states acknowledging acquired rights of individuals subject to territorial shifts was the Convention Relating to Upper Silesia between Germany and Poland from 15 May 1922 (Geneva Convention) [68]. Concluded between Germany and Poland after the First World War and the following partition of the highly industrialized border area of Upper Silesia, it was supposed to "alleviate the economic, social, and minority rights implications of the partition"[69] and installed international bodies to adjudicate private claims.[70] The first part of the Geneva Convention contained three heads. Head I stipulated the persistence of German law on the ceded territories in Poland for 15 years, Head II provided for the protection of "vested rights" on both sides of the border, and Head III allowed Poland to expropriate under certain conditions, especially the payment of compensation, large industrial undertakings and large rural

66 *Chicago, Rock Island and Pacific Railway Company v. McGlinn,* 4 May 1885, 114 US 542 (1885) 546 (U.S. Supreme Court); followed by *Vilas v. Manila,* 3 April 1911, 220 US 345 (1911) 357 (U.S. Supreme Court); rather cautious McNair, 'The Effects of Peace Treaties Upon Private Rights' (n 62), 381, 384; Cotula (n 29), 228–232. On the evolution of this distinction and the Russian approach Veronika Bílková, 'Sovereignty, Property and the Russian Revolution' (2017), 19(2) JHistIntLaw 147. On the use of the distinction especially by European scholars Leiter (n 31), 63–64.

67 *United States v Percheman* (n 65) 87 [emphasis added].

68 Convention Relative à la Haute-Silésie (15 May 1922) LNTS 9 465 (Germany/Poland). On the significance of the Convention at the time Michel Erpelding and Fernando Irurzun, 'Arbitral Tribunal for Upper Silesia (2019)' in: *MPEPIL* (n 2) para. 6.

69 ibid para. 2.

70 In detail on those "groundbreaking experiments" ibid.; Georges Kaeckenbeeck, 'The Character and Work of the Arbitral Tribunal of Upper Silesia' (1935), 21 Transactions of the Grotius Society 27; Michel Erpelding, 'Local International Adjudication: The Groundbreaking 'Experiment' of the Arbitral Tribunal for Upper Silesia' in Michel Erpelding, Burkhard Hess and Hélène Ruiz Fabri (eds), *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I* (Nomos 2019) 277; Michel Erpelding, 'Mixed Commission for Upper Silesia (2017)' in: *MPEPIL* (n 2); Marta Requejo Isidro and Burkhard Hess, 'International Adjudication of Private Rights: The Mixed Arbitral Tribunals in the Peace Treaties of 1919-1922' in: *Erpelding/Hess Peace Through Law* (n 70) 239.

estates in Upper Silesia. The Geneva Convention later became the basis of one of the pioneering judgments on acquired rights.

II) The Reception by the PCIJ

Between 1923 and 1939, the PCIJ issued several decisions dealing with the issue of acquired rights. These decisions have been variously interpreted and even taken as evidence or precedent for diverse and, at times, opposing conclusions.[71] Hence, these influential judicial pronouncements will be briefly revisited here.[72]

1) The German Settlers Case (1923)

The first and one of the most important PCIJ decisions on acquired rights was its advisory opinion on the rights of *German Settlers in Poland* of 1923[73]. Pursuant to Art. 87 of the Treaty of Versailles of 28 June 1919 (TV)[74] parts of the German territory had been ceded to Poland. Most settlers on the ceded territories acquired (pursuant to Art. 91 TV) Polish nationality. At the same time, Poland signed the "Minorities Treaty"[75] thereby undertaking to respect several rights of ethnic minorities on its territory. Before the cession, the German Reich had concluded with some settlers on the ceded territories *Rentengutsverträge* with respect to real property now situ-

71 The Arbitral Tribunal and the Mixed Claims Commission for Upper Silesia produced a rich jurisprudence on acquired rights, too. However, while the case law of the PCIJ was regularly cited and hence had an immense influence on the academic discussion surrounding the topic of acquired rights, the jurisprudence springing from the Geneva Convention (n 68) was less referred to, probably because it was perceived to be confined to the very special circumstances of the Upper Silesian question. Therefore, while the following analysis will look at the PCIJ jurisprudence in detail, there will be several references to the case of the Arbitral Tribunal as well as the Mixed Claims Commission for Upper Silesia as well.

72 In the following, unless indicated otherwise, all factual information on the cases is taken directly from the court's judgments.

73 *PCIJ German Settlers* (n 4).

74 Treaty of Peace between the Principal Allied and Associated Powers and Germany (28 June 1919) 225 CTS 188, 13(3 Supplement: Official Documents (Jul. 1919)) AJIL 151.

75 Treaty of Peace between the Principal Allied and Associated Powers and Poland (28 June 1919), 13(4 Supplement: Official Documents (Oct. 1919)) AJIL 423; cf. Art. 93 TV.

ated in Poland but had not yet transferred full ownership to them. Poland perceived itself as the legitimate owner of these lands according to Art. 256 sentence 1 TV, which reads "[p]owers to which German territory is ceded shall acquire all property and possessions situated therein belonging to the German Empire or to the German States." Poland intended to expel the German settlers from these territories and had taken pertinent measures.[76]

The court found that Poland had thereby violated the settlers' rights under the Minorities Treaty and hence had acted contrary to international law.[77] Acquired rights to the possession and use of movable or immovable property were civil rights protected under the Minorities Treaty. The fact that Poland's actions were not openly discriminatory or that some Polish nationals, who had bought property from Germans, could also be affected by them, was not decisive, since the persons were targeted in particular because of their German origin.[78] Even if the settlers were not yet the legal owners of the land, the *Rentengutsverträge*, as special kinds of purchase agreements, led to a judicially enforceable "vested" right to the transfer of property, which the settlers could not have been arbitrarily deprived of by the German Reich.[79] Property already transferred to the settlers could no longer be transferred to Poland, and hence the successor state was obligated to respect this transferal and enforce it.[80] The political background had no impact on this conclusion and did not bring these contracts within the exclusive ambit of public law.[81] Even if it might be understandable that the Polish government wished to undo a policy aimed at "Germanizing" the territory, this action was forbidden by the Minorities Treaty.[82] With respect to these contracts, the PCIJ now prominently added:

> "Three views have been suggested.
> The first is that the contracts are of a 'personal' nature and exist only as between the original parties, […] so that the obligations of the former cannot be considered as having passed to Poland. The reasons why this hypothesis is not acceptable may be found both in what has been said as to the legal nature of the rights of the holder under the Rentengutsver-

76 Cf. for the factual background of the case *PCIJ German Settlers* (n 4) 6/7.
77 ibid 23, 43.
78 ibid 24.
79 ibid 29–35; equally for *Pachtverträge* ibid 41-42.
80 ibid 35.
81 ibid 33, 39.
82 ibid 24-25.

> trage and in what is now to be said concerning the effect of a change of sovereignty on private rights.
>
> Equally unacceptable is the second view, that the Rentengutsvertrage have automatically fallen to the ground in consequence of the cession of territory. *Private rights acquired under existing law do not cease on a change of sovereignty. No one denies that the German Civil Law, both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be maintained that, although the law survives, private rights acquired under it have perished.* Such a contention is based on no principle and would be contrary to an almost universal opinion and practice.
>
> There remains the third view that private rights are to be respected by the new territorial sovereign. *The general question whether and under what circumstances a State may modify or cancel private rights by its sovereign legislative power, requires no consideration here. The Court is here dealing with private rights under specific provisions of law and of treaty*, and it suffices for the purposes of the present opinion to say that even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty."[83]

Hence, the PCIJ opined that a mere change in sovereignty did not have an effect on formerly acquired rights. It did that, crucially, on the assumption that German domestic law remained in force after succession.[84] The court itself underlined the confines of the judgment: Beyond special treaties such as the Minorities Treaty, it explicitly did not decide on the ability of the successor state to abrogate or alter such rights. While limited, the court's finding with respect to a persistence of acquired rights seems straightforward in support of such a rule. Later the judgment again underlined that "no treaty provision is required for the preservation of the rights and obligations".[85] The critique that the PCIJ's decision was solely based on specific, individual treaty provisions and was therefore not relevant for gen-

83 ibid 35/36 [emphasis added].

84 Cf. O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 134.

85 *PCIJ German Settlers* (n 4) 38. The court at ibid 38-39 added that the TV recognized the principle of respect for acquired rights.

eral international law[86] thus cannot be upheld in totality. One caveat must be added, however: It is not clear whether the PCIJ's insertion that "no one denies" (that domestic law continued to operate on the territory) referred to a general authority or to the specific states of Germany and Poland. Hence, it could be argued that, in this special case, neither of the directly involved "parties"[87] questioned the continuity that was, therefore, presumed by the court. No decision was reached on whether the persistence of the law was dependent on the successor state's will or not.[88] Be that as it may, the holdings in *German Settlers* were widely seen as endorsing the doctrine of acquired rights.[89]

2) The Mavrommatis Concessions Cases (1924-1925)

The *Mavrommatis Concessions Cases*[90] concerned concessionary contracts for public works in Palestine, concluded between a Greek national, *Mavrommatis*, and the Ottoman Empire. The case was brought by Greece as a matter of diplomatic protection.[91] While, with respect to the "Jaffa Concessions", preliminary contracts had been concluded in January 1914 and some preliminary investigations had been conducted, the main contracts were only signed in January 1916 by the competent Ottoman authorities and but never approved, as would have been legally required by Ottoman domestic rules. In 1918 to 1919 Great Britain (GB) captured Palestine, which in 1920 officially became a British mandate[92]. On 10 July 1929, the Treaty of Sèvres[93] was signed but never entered into force. The British Empire was

86 E.g. ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 85, para. 78.

87 This term is used with caution as the decision of the court was an advisory opinion and hence did not involve "parties" in the strict legal sense.

88 It later was provided for in Art. 1 of the Geneva Convention (n 68).

89 Cf. e.g. *UN Secretariat Survey of International Law* (n 2) 28, para. 45. Critical on the value of the judgment as precedent for a theory of acquired rights ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 74, para. 16.

90 *The Mavrommatis Palestine Concessions (Hellenic Republic v. Great Britain),* 30 August 1924, Ser A No 2 (PCIJ); *The Mavrommatis Jerusalem Concessions,* 26 March 1925, Series A No 5 (PCIJ).

91 *PCIJ Mavrommatis Palestine Concessions* (n 90) 12.

92 British Mandate for Palestine (23 September 1922), 17(3 Supplement: Official Documents (Jul 1923)) AJIL 164.

93 Treaty of Peace between the Allied Powers and Turkey (10 August 1920), 15(3(Supplement: Official Documents (Jul.))) AJIL 179.

not willing to acknowledge all of *Mavrommatis*' concessions and, in 1921, gave some of them to another concessionaire. On 24 July 1923, Greece and GB signed the Treaty of Lausanne[94] and the annexed Protocol XII[95], which entered into force for the two states on 6 August 1924. Greece maintained that GB was bound to the concession contracts with *Mavrommatis* and was obliged to either adapt them to the new economic realities or to pay compensation.

The 1924 case mainly concerned the PCIJ's jurisdiction over the case, which it framed as a matter of interpretation of GB's mandate and Protocol XII. Since concessions, such as the Jaffa Concessions, which were only granted after 29 October 1914, did not fall within the Protocol's ambit, the question remained as to whether general international law protected them. The court opined that

> "Protocol XII [...] leaves intact *the general principle of subrogation* [...]. *The Administration of Palestine would be bound to recognise the Jaffa concessions*, not in consequence of an obligation undertaken by the Mandatory, but *in virtue of a general principle of international law* to the application of which the obligations entered into by the Mandatory created no exception."[96]

It seems important to be aware that this statement was an *obiter dictum*. The court, at least the majority opinion, deriving its jurisdiction from the mandate and the Protocol,[97] was not called upon to adjudge the protection of concessions outside the Protocol. Accordingly, the PCIJ again did not define the consequences of such "subrogation" but touched the issue only in

94 Treaty of Peace (24 July 1923) LNTS 28 11, 18(1 Supplement: Official Documents (Jan. 1924)) AJIL 4.

95 Protocol Relating to Certain Concessions Granted in the Ottoman Empire (24 July 1923), 18(2 Supplement: Official Documents (Apr. 1924)) AJIL 98.

96 *PCIJ Mavrommatis Palestine Concessions* (n 90) 28 [emphasis added].

97 Several dissenting judges considered the application inadmissible because being outside the court's jurisdiction, see *The Mavrommatis Palestine Concessions (Hellenic Republic v. Great Britain),* 30 August 1924, Dissenting Opinion Judge Finlay, Ser A No 2 38 (PCIJ); *PCIJ Mavrommatis Palestine Concessions, Dissenting Opinion Moore* (n 29); *The Mavrommatis Palestine Concessions (Hellenic Republic v. Great Britain),* 30 August 1924, Dissenting Opinion Judge Bustamante, Ser A No 2 76 (PCIJ); *The Mavrommatis Palestine Concessions (Hellenic Republic v. Great Britain),* 30 August 1924, Dissenting Opinion Judge Oda, Ser A No 2 85 (PCIJ); *The Mavrommatis Palestine Concessions (Hellenic Republic v. Great Britain),* 30 August 1924, Dissenting Opinion Judge Pessôa, Ser A No 2 88 (PCIJ).

passing. Furthermore, the relationship between GB and Palestine was one of a protectorate and later mandate and not a state succession in the strict sense.[98] Consequently, the 1925 decision on the merits did not stipulate any aspects of the persistence of the concessions outside those of the regime of Protocol XII.[99]

3) Cases Concerning Certain German Interests in Polish Upper Silesia (1925-1929)

The PCIJ's decisions in the cases concerning *Certain German Interests in Polish Upper Silesia*, especially the *Case Concerning the Factory at Chorzów*,[100] also evolved from the situation in the territories ceded to Poland by the German Reich under the TV. In 1915, the German Reich contractually mandated the Bayrische Stickstoffwerke AG to build "for the Reich" a factory in Chorzów, situated in Upper Silesia, and to acquire the pertaining land.[101] The German Reich "to a certain extent" controlled the Bayrische Stickstoffwerke AG, which ran the factory and retained rights to a certain amount of the factory's surplus.[102] After the conclusion of the TV, in December 1919 a new enterprise, the Oberschlesische Stickstoffwerke AG, was established.[103] While on 29 January 1920 (19 days after the TV came into force) the Oberschlesische Stickstoffwerke AG was registered as the new legal owner of the factory at Chorzów, the latter's "management and working" remained "in the hands of the Bayrische Stickstoffwerke"[104].

98 On protectorates cf. Marja Trilsch, 'Protectorates and Protected States (2011)' in: *MPEPIL* (n 2); on mandates Ruth Gordon, 'Mandates (2013)' in: *MPEPIL* (n 2). For a detailed definition of the term "succession" see *infra*, Chapter II.

99 *PCIJ The Mavrommatis Jerusalem Concessions* (n 90) 27. *See also* Palestine Mandate (n 92).

100 *Case Concerning Certain German Interests in Polish Upper Silesia,* 25 August 1925, Preliminary Objections, Series A No 6 (PCIJ); *PCIJ Certain German Interests (The Merits)* (n 7); *Case Concerning the Factory at Chorzów (Claim for Indemnity),* 26 July 1927, Jurisdiction, Series A No 9 (PCIJ); *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory),* 16 December 1927, Series A No 13 (PCIJ); *Case Concerning the Factory at Chorzów (Claim for Indemnity),* 13 September 1928, Merits, Series A No 17 (PCIJ); *Case Concerning the Factory at Chorzów (Indemnities),* 25 May 1929, Order, Series A No 19 (PCIJ).

101 *PCIJ Certain German Interests (Preliminary Objections)* (n 100) 8.

102 ibid.

103 ibid.

104 ibid 9.

On 14 July 1920, Poland enacted a national law allowing the Polish state to transfer real property of the German Reich or German reigning houses enlisted in the land registry to its own treasury, reverse changes in the register with respect to such lands after the day of armistice, i.e. 11 November 1918, and evict persons from the territory. On 15 May 1922, Germany and Poland concluded the Geneva Convention.[105] On 1 July 1922, the competent municipal court, by then Polish, declared null and void the registration of the Oberschlesische Stickstoffwerke AG as owner of the factory at Chorzów.[106] Invoking Art. 256 TV and Polish law, it transferred the ownership of the factory to the Polish state.[107] In July 1922, the factory was taken under the factual control of Poland.[108] In December 1924, several owners of large agricultural estates in Polish Upper Silesia were informed of the intent to expropriate them pursuant to the Geneva Convention.[109] Germany, pleading a violation of the TV and the Geneva Convention, espoused the individuals' cases before the PCIJ.[110]

The PCIJ found Poland in violation of the Geneva Convention even if the measures were not openly discriminatory.[111] It made clear from the beginning that it considered the factory at Chorzów as private property regulated by Art. 6 of the Geneva Convention, not Art. 256 of the TV.[112] The decisive point for the loss of power to alienate property was not the armistice but the transfer of sovereignty.[113] Hence, the expropriations

105 Geneva Convention (n 68).
106 *PCIJ Certain German Interests (Preliminary Objections)* (n 100) 9.
107 ibid.
108 ibid.
109 ibid 10-11.
110 Cf. ibid 5; *PCIJ Certain German Interests (The Merits)* (n 7) 12. Later, Germany claimed reparation as its own right, cf. *PCIJ Case Concerning The Factory at Chorzów (Claim for Indemnity) (Merits)* (n 100) 25/26.
111 *PCIJ Certain German Interests (The Merits)* (n 7) 24, 33, 34, 44, 81-82.
112 Cf. *PCIJ Certain German Interests (Preliminary Objections)* (n 100) 17–18, 41; *PCIJ Certain German Interests (The Merits)* (n 7) 30-31; *PCIJ Case Concerning The Factory at Chorzów (Claim for Indemnity) (Merits)* (n 100) 39–40, 42. In light of the order of events, the links between the German state and the private companies and especially the closeness of the property transfer to the conclusion of the TV (for a detailed display of the facts ibid 18-21), this conclusion does at least not seem self-evident.
113 *PCIJ Certain German Interests (The Merits)* (n 7) 29-31.

were not legal under this regime and compensation was due.[114] The case was eventually settled by mutual agreement.[115] It must be underlined that the court's final finding was based on the provisions of the Geneva Convention, not on general international law. Nevertheless, the court did not miss the opportunity to allude to rules outside the treaty, namely when interpreting the respective treaty provisions:

> "Having regard to the context, it seems reasonable to suppose that the intention was, bearing in mind the régime of liquidation instituted by the peace treaties of 1919, to convey the meaning that, subject to the provisions authorizing expropriation, *the treatment accorded to German private property, rights and interests in Polish Upper Silesia is to be the treatment recognized by the generally accepted principles of international law*."[116]

Since general international law allowed for expropriations for public purposes, judicial liquidations and similar measures were not prohibited by the Geneva Convention. Compared to that

> "*the expropriation allowed under Head III of the Convention is a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights*. As this derogation itself is strictly in the nature of an exception, it is permissible to conclude that no further derogation is allowed."[117]

According to the judges, even if the TV did not explicitly say so, it clearly acknowledged the principle that private rights were not touched by a change in sovereignty.[118] Moreover,

114 Which became the subject of contention in *PCIJ Factory at Chorzów (Claim for Indemnity) (Jurisdiction)* (n 100) and *PCIJ Case Concerning The Factory at Chorzów (Claim for Indemnity) (Merits)* (n 100).

115 Cf. *PCIJ Factory at Chorzów (Order)* (n 100) and the accompanying Annex.

116 *PCIJ Certain German Interests (The Merits)* (n 7) 21 [emphasis added]. But against this conclusion *Case Concerning Certain German Interests in Polish Upper Silesia,* 25 May 1926, Merits, Dissenting Opinion Judge Count Rostworowski, Series A No 7 86 90–92 (PCIJ).

117 *PCIJ Certain German Interests (The Merits)* (n 7) 22 [emphasis added]; confirmed in *PCIJ Factory at Chorzów (Claim for Indemnity) (Jurisdiction)* (n 100) 27.

118 *PCIJ Certain German Interests (The Merits)* (n 7) 31. Cp. also ibid 41 „[Art. 256 Treaty of Versailles] must, in accordance with the principles governing State succession - principles maintained in the Treaty of Versailles and based on considerations

> "[i]f Poland wishes to dispute the validity of this entry, it can, in any case, only be annulled in pursuance of a decision given by the competent tribunal; this follows from the principle of respect for vested rights, a principle which, as the Court has already had occasion to observe, forms part of generally accepted international law".[119]

This much cited sentence might not have been unambiguously or well phrased,[120] but it essentially emphasized the court's reference to domestic law as the basis for establishing[121] acquired rights before succession. While being competent to look to domestic law as a "fact" of evidence for state behavior, the PCIJ felt unable to interpret it.[122] In sum, while the judgment can be read as a strong affirmation of a principle of vested rights under general international law, the court stopped short of setting out its scope and ramifications, especially the question of compensation. This reticence was mainly due to the judgment's restricted jurisdictional basis in the Geneva Convention.[123]

4) The Lighthouses Case (1934)

In April 1913, the Ottoman Empire granted and prolonged concessions to a French firm for the management, development, and maintenance of lighthouses. After the Balkan wars, some of the Ottoman territories where the lighthouses were situated were ceded to Greece.[124] After the First World War, the situation was finally dealt with in the treaty of Lausanne[125] from July 1923 and its pertaining Protocol XII concerning concessions.[126]

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of stability of legal rights - be construed in the light of the law in force at the time when the transfer of sovereignty took place."

119 ibid 42.

120 Which led to the next dispute before the court, *PCIJ Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory)* (n 100).

121 As opposed to terminating or altering, ibid 18/21; *PCIJ Case Concerning The Factory at Chorzów (Claim for Indemnity) (Merits)* (n 100) 33-34.

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

123 Cf. in this respect ibid 21 where the court stated directly after confirming vested rights as a principle underlying the Geneva Convention: "However that may be, it is certain that expropriation is only lawful in the cases and under the conditions provided for in Article 7 and the following articles".

124 On this history of the cession cf. *Lighthouses Case (France v. Greece),* 17 March 1934, Series A/B No 62 9–10 (PCIJ).

125 Treaty of Lausanne (n 94).

126 Cf. *PCIJ Lighthouse Case* (n 124) 10.

The *Lighthouses Case*[127] concerning the acceptance of those concessions by Greece was again based on the specific provisions of Art. 1 and 9 of Protocol XII providing for subrogation. Here, the PCIJ reserved the right to inquire more deeply into establishing the domestic right[128] since this was required by Art. 1 of Protocol XII only protecting rights "duly entered into".

5) Interim Conclusions

In sum, while it is true that the PCIJ in several cases, in particular those of *German Settlers* and *Certain German Interests*, seems to have emphatically endorsed a "principle" of acquired rights, the hard-law basis for this contention is relatively thin. None of the cases were decided solely by reference to this principle; the linchpin to solving the dispute was always the application of relatively explicit and detailed treaty provisions. However, the PCIJ repeatedly used the principle as a tool for interpreting these stipulations.[129] Statements with respect to acquired rights based in sources outside treaties were generally not within its jurisdiction and therefore made *obiter dicta* or within an (formally non-binding) advisory opinion. These points considerably delimit the function of those statements as precedents. Furthermore, all of the mentioned PCIJ cases were instances of a cession of territory or of a mandate.[130]

It remains unclear whether and on what basis the PCIJ intended to protect acquired rights outside treaties. Its pronouncement in *Certain German Interests* that "the expropriation […] is a derogation from the rules generally applied in regard to the treatment of foreigners *and* the principle of respect for vested rights"[131] tends to suggest a significance of the dcotrine of acquired rights besides that of the law on foreigners. Yet, in *German Settlers*, it highlighted the discrimination because of the settlers' German origin. What seems beyond doubt is that the PCIJ did not base the protection of acquired rights simply on a principle of non-discrimination. The mere fact that the

127 ibid.
128 ibid 18.
129 *PCIJ German Settlers* (n 4) 38; *PCIJ Certain German Interests (The Merits)* (n 7) 21, 31, 41.
130 The *Panevezys-Saldutiskis Railway Case,* 28 February 1939, Ser A/B No 76 4 (PCIJ) dealing with the independence of the Baltic states from Russia was declared inadmissible for want of exhaustion of local remedies.
131 *PCIJ Certain German Interests (The Merits)* (n 7) 22 [emphasis added].

same treatment was accorded to nationals and non-nationals alike did not render the abrogation of private rights lawful *per se*.[132] The PCIJ repeatedly emphasized the domestic origin of acquired rights. What is striking in this respect is the court's formal approach and its far-reaching deference to national law and national institutions. In several cases, it turned a blind eye to the political background of how the domestic rights emerged. Resultingly, even positions formed in pursuance of a policy of ethnic discrimination or the establishment of (private) firms for the potential circumvention of reparation duties were sanctioned by its jurisprudence.

III) The Academic Reception

Since the judicial preoccupation with the doctrine was pronounced but limited, it seemed obvious that legal academia would embark to fill this void. Three of the most influential authors on the topic of acquired rights are Daniel Patrick O'Connell, Pierre A. Lalive, and Mohammed Bedjaoui.

1) Daniel Patrick O'Connell

One of *O'Connell*'s books or articles is cited in almost every later piece about the issue of acquired rights. He examined the topic with a breadth and profoundness seldom seen before.[133] *O'Connell* did not only recount practice and jurisprudence but interpreted the case law as well as doctrinally processed it. He developed a coherent theory rather than simply presenting the doctrine as a mere means to achieve a certain end. He was an academic enriching his legal analysis with philosophical ideas,[134] which

132 Cf. ibid 22, 32/33; referring to this statement *PCIJ Factory at Chorzów (Claim for Indemnity) (Jurisdiction)* (n 100) 27; *see also* Matthias Hartwig and Ignaz Seidl-Hohenveldern, 'German Interests in Polish Upper Silesia Cases (2011)' in: *MPEPIL* (n 2) paras. 21-22.

133 In fact, he seemed much more interested in issues of state succession to domestic law than to treaties, cf. only the length of chapters XI and XII as compared to IV-X in O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3); *cf.* James Crawford, 'The Contribution of Professor D.P. O'Connell to the Discipline of International Law' (1980), 51 BYbIL 1 4.

134 Arman Sarvarian, 'Codifying the Law of State Succession: A Futile Endeavour?' (2016), 27(3) EJIL 789 797; for an exmple cf. O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 131.

requires a careful differentiation between his ideological underpinnings and the legal analysis.

a) Legal Basis

According to *O'Connell*, the obligation to respect acquired rights was a "general principle" underlying "the whole problem of state succession".[135] This obligation was not inherited from the former sovereign.[136] The principle of acquired rights, in *O'Connell*'s view, meant that, because of the new state's willful extension of sovereignty, it was under an international obligation to accept the pre-existing state of facts and especially an individual's equitable interest in that factual situation.[137] This international obligation was based on the principle of unjust enrichment, which itself constituted a part of international law derived from philosophical propositions.[138] Another feature of his theory was that, when sovereignty changed, the private law relations between the territory's inhabitants and their right of property were said to survive:[139] "[R]ights acquired under the predecessor State survive change of sovereignty because the law that created them survives."[140]

b) Possibility to Abrogate

According to *O'Connell*, since the new state's obligation (*vinculum juris*) towards a title-holder was not inherited from the former sovereign, that obligation was not identical with the obligation of the predecessor, and the new sovereign was therefore free to adapt the acquired rights to its own legal order.[141] The new state had the same rights as other states, and acquired rights were not strengthened merely by the change of sovereignty.[142] They

135 O'Connell *The Law of State Succession* (n 2) 78.
136 ibid 78, 130, 137, 138.
137 ibid 78, 100, 103; cf. also O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 140.
138 ibid.
139 O'Connell *The Law of State Succession* (n 2) 78/79 with reference to *United States v Percheman* (n 65); O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 139.
140 ibid. This is a similar finding to the one in *PCIJ German Settlers* (n 4) 36.
141 O'Connell *The Law of State Succession* (n 2) 99–100, 131.
142 ibid 100, 134.

could therefore be terminated under two prerequisites. First, abrogation needed to be by "specific and express" acts of the successor state; a presumption in favor of the persistence of acquired rights existed.[143] Second, the minimum standard of treatment had to be complied with, and thus the expropriation could not be discriminatory or arbitrary and compensation had to be paid.[144] This duty to pay compensation was a consequence of *O'Connell*'s reference to the principle of unjustified enrichment as a basis of the doctrine.[145] The compensation was not intended as reparation for an illegal act but as compensation for the sacrifice of the former holder of the rights.[146] As an equitable recognition of the loss endured by an individual for the common good, the compensation "need not be the maximum".[147] *O'Connell* closed by summarizing that "[t]he principle of respect for acquired rights in international law is no more than a principle that change of sovereignty should not touch the interests of individuals more than is necessary."[148]

c) Nature of the Right

O'Connell's picture of possible acquired rights was fairly wide. "Private law obligations" for which this principle could come into play ranged from national debt (towards international organizations, other states, or private creditors) to obligations under administrative or concessionary contracts.[149] He repudiated the view that acquired rights had to be of a corporeal na-

143 Which had to be acknowledged by national judges, ibid 101. For domestic cases Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 2), 3 "The judge has so to interpret and apply new laws, even if their terms are indistinct as to this point, that no retroactive force be ascribed to them, no vested rights disturbed."

144 O'Connell *The Law of State Succession* (n 2) 102.

145 ibid 103, for concessions 131/132, for administrative contracts 137.

146 ibid 104 with reference to Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 2).

147 O'Connell *The Law of State Succession* (n 2) 104 proposes a standard of "lowest market value of the interest" but confesses that this standard is "only rudimentary" in diplomatic practice. For administrative contracts he proposes "in most cases" the contract price, "but it may be a lower market value", ibid 137. For debts "the standard of compensation [...] must be the value of the creditor's investment at the moment of change of sovereignty", ibid 149.

148 ibid 101.

149 ibid 77.

ture,[150] but insisted that "any right [...] of an assessable monetary value" was encompassed.[151] These rights had to be "properly vested", which was determined by domestic law and required acquisition in good faith.[152] Such rights had to be judicially enforceable,[153] meaning that contingent rights and future expectancies could not qualify as acquired rights.[154]

To distinguish expectancies from rights, *O'Connell* seems to have used the expression of "liquidated" claims, as compared to "unliquidated" claims, which would not warrant protection.[155] As early as 1956, he had therefore excluded *torts* from the category of acquired rights because their "unliquidated" character did not lead to an "interest in assets of a fixed and determinable value".[156] However, even at that time, he seems to have doubted the rigidity of this proposition and eventually only excluded tort debts the value of which was not *determinable*.[157] In his 1970 contribution, he conceded that "many concrete factors, including the continuing nature of the wrong, and its adoption by the successor State, as well as its liquidated or unliquidated character, are to be taken into account, and the factors may require different evaluation in different types of successions of States."[158] With respect to *state debts*, the creditor's interest was an acquired right that had to be respected by the successor state.[159] Again, an equitable interest existed "in the money advanced", leading to a duty to compensate in case of termination.[160] Excluded from succession were so-called "odious debts",

150 ibid 80/81, 136.
151 ibid 80-81 "undertaking of investment of a [...] permanent character", which required more than the exercise of a profession, ibid 82.
152 Cf. ibid 83-85, 134.
153 ibid 84.
154 ibid 84, 85 „must not have been voidable at the option of the predecessor state"; ibid 134 "must not be conditional either on the continued survival of the predecessor State, or upon any other factor which cannot be fulfilled."
155 ibid 81.
156 ibid 201, 206.
157 ibid 206, 207.
158 O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 164.
159 O'Connell *The Law of State Succession* (n 2) 180–181.
160 ibid 146–147; ibid 149 "[T]here is a detriment to the creditor, and detriment, allied with a presumption of benefit, is sufficient to constitute unjustified enrichment". In the case of an overindebted/insolvent predecessor, the successor State in *O'Connell*'s opinion owed compensation only "to the value of the creditor's interests" ibid 191. On the partition of debts in general ibid 145–192.

i.e. debts incurred for the waging of a war (probably against the successor state) or against the will and interest of the people and the state.[161]

d) The Public-Private Divide

According to *O'Connell*, rights derived from public law in general would not survive a change in sovereignty.[162] His definition of public rights as contingent on the continuity of sovereignty,[163] however, seems to be based on a circular argument. For rights of a mixed private and public nature, he admitted that there are no "hard and fast rules".[164] He was also aware that not every legal system knows the public-private distinction and hence concluded that the distinction could not be universalized.[165]

Concessionary contracts, i.e. "a licence granted by the State to a private individual or corporation to undertake works of a public character […] and involving the investment […] of capital" are a special topic in this respect, because of their "mixed public and private" nature.[166] They may also consist in the grant of […] rights over State property […] [or] may be merely a grant of occupation of public land".[167] Since *O'Connell* considered the concessionaire's rights to be essentially private in nature, they constituted acquired rights,[168] and compensation was due in case of termination as long as they somehow enriched the successor state.[169] *Administrative contracts*, i.e. "all those arrangements made by the State or its functionaries with private individuals for the supply of goods and the carrying out of public works" were also considered governed by private law.[170] "The more locally identified is the contract the greater is the presumption that it has

161 ibid 187–188. *O'Connell*, however, reckons the enormous potential for abuse of this concept.
162 ibid 82, 83.
163 ibid 82, 83, 134.
164 ibid 82.
165 O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 129.
166 O'Connell *The Law of State Succession* (n 2) 107 [footnote omitted]; cf. also Gleider I Hernández, 'Territorial Change, Effects of (2010)' in: *MPEPIL* (n 2) para. 19.
167 O'Connell *The Law of State Succession* (n 2) 106.
168 ibid 107, 131.
169 ibid 134–135.
170 ibid 137, 144. O'Connell added that "administrative contracts have usually been assimilated in practice to administrative debts".

benefitted the absorbed territory."[171] Pension claims of civil servants, for *O'Connell* also rights of a mixed character in which the private part was more prominent, qualified as acquired rights if, under the national law of the successor state, an unconditional claim to their payment existed.[172] Furthermore, if the individual had paid some money and hence "earned" a part of the pension, this constituted an acquired right.[173] Consequentially, all pensions given on a discretionary basis did not fall into this category.[174]

e) Holders of Acquired Rights

The majority opinion of the time saw international law as a system functioning solely between states and one that accorded only very subordinate legal status to the individual. *O'Connell* doubted this interpretation.[175] He emphasized that the inability to assert claims against one's own state due to a lack of domestic enforcement mechanisms did not mean that nationals could not be the holders of such rights. He, thus, argued that also nationals of the new sovereign were entitled to have their acquired rights respected.[176] At first sight, this argument seems somewhat at odds with his insistence in other places on the link of the doctrine to the protection of aliens.[177] However, the constellation he was referring to was when, after the change of sovereignty, former nationals of the predecessor acquired the nationality of the successor.[178] Therefore, *O'Connell*'s thesis did not mean a retreat from the law on the protection of aliens as the basis for the doctrine of acquired rights. What it implied was that the mere change of citizenship, often imposed on the population and, at least at that time, the regular result

171 ibid 144.
172 ibid 193.
173 This was irrespective of the rights' potential conditional character, ibid 199.
174 ibid 200.
175 ibid 85, 148.
176 ibid 86-90. Cf. also with respect to pension claims of civil servants, ibid 196.
177 E.g. O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3) 139-140.
178 This was the same set of circumstances as in *PCIJ German Settlers* (n 4) 24 where it was held that inhabitants of the ceded territory, even if now of Polish nationality, were protected by the Minorities Treaty and the general principle of respect for vested rights if they were targeted because of their German origin.

of a transfer of territory,[179] should not be decisive in protecting individuals' rights. The new sovereign should be prohibited from discriminating indirectly by basing is treatment on "foreign" origin while formally targeting its own nationals.

2) Pierre A. Lalive

Compared to *O'Connell*'s analysis, *Lalive*'s approach seems far more case-law centered and based on the literature and jurisprudence of the doctrine rather than being opinion-oriented.[180] By paying much deference to state practice and exposing a relatively cautious approach, his piece is, generally, more an empirical survey than a doctrinal analysis. Since his analysis was published as an article, it of course covers considerably less substance than *O'Connell*'s analysis.

a) Legal Basis

Lalive rejected the classification of the doctrine of acquired rights as a general principle of law in the sense of Art. 38 para. 1 lit. c) ICJ Statute.[181] He, too, grounded the theory in the existing law on the protection of foreigners, which he considered as customary law.[182] Mentioning the principle of unjust enrichment,[183] he based the doctrine of acquired rights less on legal rules and more on philosophical or sociological ideas of justice, security, continuity, and the stability of legal relations.[184] He found the "origin of the principle of acquired rights […] in legal individualism […] used in most cases as a defense against state interferences with the interests and rights of individuals and as a plea in favor of social *status quo*."[185]

179 Jennings and Watts (n 27) §64; McNair, 'The Effects of Peace Treaties Upon Private Rights' (n 62), 384; Crawford *Brownlie's Principles of Public International Law* (n 3) 419; cf. Strupp (n 2) 86.
180 Lalive (n 8).
181 ibid 193.
182 ibid 152, 183, 198–199, 200.
183 ibid 193.
184 ibid 162, 165.
185 ibid 151 [italics in original].

b) Possibility to Abrogate

Lalive made it clear that the principle of acquired rights in his eyes did not mean that the successor state was not able to adopt new legislation or otherwise modify individual rights.[186] However, even if these rights were defined by domestic law, international rules, especially the rules protecting foreigners, regulated the possible measure of interference.[187] *Lalive* maintained that not every injury to pecuniary rights of a foreigner in the normal course of events would warrant compensation as such duty would inhibit development.[188] Compensation was only owed if "the sacrifice demanded to the holder of the right" was "considerable and [...] exceptional".[189] Such was the case in situations of the abuse of rights and arbitrary conduct.[190] Additioally, according to *Lalive*, compensation was due if the taking directly benefitted the state or another party chosen by the state as the taking then entailed enrichment.[191] He conceded that the amount and modalities of compensation were controversial.[192]

c) Nature of the Right

Lalive used the expression "acquired rights" in a wide and general sense. In accordance with what was, in his opinion, "the prevailing view in international law", he saw it as synonymous with that of subjective rights.[193] He, however, seemed to assume that acquired rights must have a pecuniary character,[194] and included "ownership in immovables" as an "archetype" of acquired rights,[195] "[o]wnership in movables, other real rights",[196] as

186 ibid 167, 190-191.
187 ibid 191–192, 194, 195.
188 ibid 192-194.
189 ibid 193, citing Kaeckenbeeck, 'La Protection Internationale des Droits Acquis' (n 49).
190 Lalive (n 8) 195–196. Thus, in cases of general fiscal measures, confiscations of a penal character, or the creation of a state monopoly, no compensation was due, ibid 193.
191 ibid 193, with respect to expropriations 197.
192 ibid 197.
193 ibid 153 „every existing right is, thus, an acquired right".
194 ibid 152, cf. also 153.
195 ibid 183.
196 ibid.

well as contractual (or "personal") rights.[197] Mere interests, future expectations, and good will were not protected.[198] Excluded were also "individual liberties, such as freedom of trade or industry".[199]

d) The Public-Private Divide

Lalive is in line with *O'Connell* when declaring that only private rights and not public ones are able to survive a change in sovereignty.[200] Only certain rights of a mixed public and private character, such as concessions, may be encompassed "because of their contractual basis and, perhaps, their economic value."[201]

e) Conclusions

Even in this brief summary, *Lalive*'s uneasiness with the notion of acquired rights becomes palpable. While advancing a sweeping scope of acquired rights, he seems not to be too sure about the doctrine's legal grounding. Consequently, his analysis of its ramifications, especially the existence of a duty to compensate, seems to be selective and not underpinned by a general theory. *Lalive*'s piece shifts between the arguments in favor of and against the duty to compensate a violation of acquired rights without making a definite decision.[202] In the end, he did not accord any significant legal relevance to acquired rights beyond the guarantee of a minimum standard for foreigners.

This reluctant approach to the doctrine might have been induced by events taking place after the end of the Second World War. Those events called into question some of the beliefs strongly held before and foreshadowed a shift in thinking.[203] *O'Connell*'s conviction from 1956 that "[t]he doctrine of acquired rights is perhaps one of the few principles firmly

197 ibid 184.
198 ibid 187, 189, 192.
199 ibid 188, also footnote 81.
200 ibid 166.
201 ibid 166/167.
202 ibid 200.
203 Cf. ILC, 'Report to the General Assembly on the Work of its Fifteenth Session: Appendix II - Memoranda Submitted by Members of the Sub-Committee on State

established in the law of state succession, and the one which admits of least dispute"[204] would soon be debunked: Only two decades later, the political climate had shifted. In the years from 1950 to 1980, the number of members in the UN had grown from 60 (with the admission of Indonesia) to more than 150 states,[205] among them many countries evolved from colonial rule. Those countries, eager to free themselves from the dictates of the past and the obligations undertaken in their name by the colonial states, naturally had a different view on the subject of rights preceding their independence. By the end of the 19th century and the beginning of the 20th century, the concept of acquired rights was based largely on the western idea of a common free market and hence implemented only within European states and the US but largely ignored in colonial territories.[206] Many newly independent states nationalized parts of their economic sectors, and battles were fought about the standard of compensation.[207] In those years, the "New International Economic Order" and the "right to self-determination of peoples" became buzzwords influencing the discussion about state succession and, with it, the theory of acquired rights.

> "Decolonization was a moment of disciplinary anxiety and introspection; a moment at which the emancipation of the colonized world had to be accompanied by the simultaneous emancipation of the idea of international law. The discourse of succession was thus not merely a language through which the transition from one status to another might be managed, but the language in which the full implications of colonialism and its unravelling could be explored and discussed."[208]

Therefore, the "generally recognized" and "never challenged" principle of acquired rights came under pressure, even in such expert fora as the ILC.

Responsibility (The Duty to Compensate for the Nationalization of Foreign Property)' (1963), 1963(II) YbILC 237 241–242.

204 O'Connell *The Law of State Succession* (n 2) 104.

205 For exact nos. please refer to https://www.un.org/en/about-us/growth-in-un-membership.

206 Craven, 'Colonial Fragments' (n 29) 111–114; Craven *Decolonization of International Law* (n 17) 45–51; Cotula (n 29), 229–232. For an example of an unequal application of the doctrine O'Connell *The Law of State Succession* (n 2) 141–143.

207 Cf. Anghie (n 30) 209–213. For more details on the standard of compensation see *infra*, Chapter III C) III) b).

208 Craven *Decolonization of International Law* (n 17) 6. Generally on state succession in the colonial context Brunner, 'Acquired Rights and State Succession' (n 8) 128–130.

It was first[209] discussed under the heading of "responsibility of states"[210] before it was dealt with under the topic of "State Succession in Matters Other than Treaties."

3) Mohammed Bedjaoui

In fact, one of the reasons that the issue of acquired rights was not easily side-tracked and proved to be utmost controversial was the special rapporteur on the topic: *Bedjaoui*, an Algerian jurist, politician, professor, and diplomat, whose attitude towards acquired rights was completely different to that of his colleagues. He displayed his peculiar angle especially in the second report on state succession in matters other than treaties.[211] At first glance, his report can only be interpreted as an outright dismissal of the doctrine, a manifesto against a tool of the rich to subordinate the poor. *Bedjaoui* concluded that "the theory of acquired rights is useless and explains nothing."[212] He faced firm opposition, even from the commission, thanks to his mix of political argumentation with legal analysis, the comparatively scarce quotations and evidence for his assertions and his almost agitated and often one-sided choice of examples and vocabulary siding with one side of the political spectrum.[213] Essentially, he brought the ideological and socio-economic battles fought on the international diplomatic plane, especially within the UN General Assembly (GA), to the table of this expert body. There were two factors that made it easier for *Bedjaoui* to launch such an up-front attack on the doctrine of acquired rights. First, he could emphasize cases of the doctrine's hypocritical application, especially

209 An even earlier mention of "vested rights" took place during the ILC discussion of the law of treaties, but the issue swiftly excluded from the scope of the discussion, see ILC, 'Draft Articles on the Law of Treaties with Commentaries' (1966), 1966(II) YbILC 187 265.

210 ILC, 'Fourth Report on State Responsibility (Special Rapporteur Garcia-Amador)' (n 2).

211 ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2).

212 ibid 100, para. 153; ibid 99, para. 148 "The concept of acquired rights is not only indefinable and full of ambiguities, but also ineffective. International law has not raised it to the status of a principle. It is largely influenced by political considerations".

213 Cf. e.g. the critical statements by Kearney, ILC, 'Summary Records of the Twenty-First Session, 1001st Meeting: Succession of States and Governments: Succession in Respect of Matters other than Treaties' (1969), 1969(I) YbILC 57 59-62, paras. 17-35.

the political and sometimes almost arbitrary claims of exceptions to it.[214] Second, he could refer to its often weak legal substantiation and ambiguous grounding in international practice.[215]

However, a closer look at *Bedjaoui*'s thoughts reveals that, apart from the ideological gulf existing between him and most of his western colleagues, his basic assumptions were not that different from those of his colleagues. Yet, *Bedjaoui* applied the theory of acquired rights to another socio-economic reality and viewed it from a higher plane. He called into question the background *O'Connell* and *Lalive* had tacitly implied. While, until his analysis, the maintenance of the *status quo* had been displayed as a good thing to achieve for the individual, *Bedjaoui* saw in it a means to perpetuate empire and oppression. The cornerstone of his analysis was the sovereign equality of states, which had to be achieved between the formerly colonized and the other states. In his eyes, the idea of acquired rights was a threat to this equality.[216] Consequentially, he did not delve into the discussion about different kinds of rights but questioned the very basis of the doctrine.

Bedjaoui separated. Either there was a transferal of duties from the predecessor to the successor state, an idea he rejected from the outset[217] and an assumption under which a duty to respect acquired rights would require more from the successor state than from the predecessor, who would be free to abolish individual rights once granted. Or, if acquired rights existed by virtue of an independent international rule, this rule would exceptionally target successor states and hence again not be in compliance with his vision of sovereign equality.[218] Yet, these statements show that parts of his opposition were grounded on assumptions not even advocated by proponents of acquired rights. For example, much of his critique was built on a pure "succession theory",[219] which, however, was rarely advocated at the time. Furthermore, while it would obviously be discriminatory to impose a duty

214 ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 84, 87, 88, 89, paras. 75, 87, 88, 91, 94-97, 101-102, 104; Bedjaoui (n 35), 535.

215 ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 72, 73/74, 85, 92, paras. 9, 13, 15, 79, 120; Bedjaoui (n 35), 535/536, 537.

216 ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 73, 76, paras. 15, 27.

217 ibid 77, 84, paras. 28–32, 72; Bedjaoui (n 35), 537.

218 Cf. ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 79, 80, paras. 45, 50; Bedjaoui (n 35), 539–540.

219 Cf. ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 74, 84 paras. 17,72.

to respect "inviolable" or "absolute" rights only upon the successor state, *Bedjaoui* later acknowledged that there was, in fact, unanimity of opinion that there was no pecuniary right that could not be curtailed for public purposes.[220] Moreover, the argument that an obligation derived from international law could be considered an "exceptional burden" for the successor state can be followed only to a certain extent: If acquired rights were conceptionally derived from a minimum standard for the protection of aliens, a supposition also *Bedjaoui* did not depart from,[221] the predecessor state would also have been bound to abide by that standard.

In *Bedjaoui*'s opinion, under the doctrine of acquired rights, what the successor state under the theory of acquired rights had to vouch for was the "equitable" interest of the individual emanating from a potential contractual agreement between predecessor and individual. Here, *Bedjaoui* had a point when insisting[222] that this was something the successor had neither consented to nor played a role in its inception. Instead, the predecessor, often the colonial state, was responsible for the domestic law on its territory. Hence, acquired rights obliged the successor to accept certain "facts" established by the predecessor that might not have been relevant or would have led to different consequences under its own domestic law. Here, it became obvious that what *O'Connell* depicted as mere (ostensibly objective) facts was in reality not always something commonly agreed on. They were not given; they were a legal construct, a juridical evaluation of a certain social reality.

Bedjaoui also differentiated between the principle of acquired rights and the "problem of compensation",[223] themes that had been intrinsically linked in *O'Connel*'s and *Lalive*'s writings. This separation allowed *Bedjaoui* to question the existence of an independent rule of compensation when measures of expropriation or nationalization were considered as legal.[224] By depicting compensation not as a part of the primary duty to respect acquired rights but as a secondary duty when a wrongful act had been committed, he referred the question of compensation to the law of state

220 ibid 99, para. 149; cf. also Bedjaoui (n 35), 533.
221 ibid 540.
222 ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 80, para. 50; cf. also Bedjaoui (n 35), 537.
223 ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 85, 93; Bedjaoui (n 35), 549–561.
224 ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 86, paras. 84, 85.

responsibility.[225] However, another point became apparent as well. One of the reasons why *O'Connell* and *Lalive* had elaborated immensely on the question of compensation was that they had assumed the persistence of the domestic legal order after the change in sovereignty. While *Lalive* had not even discussed this permanence, *O'Connell* based this assumption on his general – openly philosophical instead of juridical[226] – theory of state succession. Now, if neither the permanence of the legal order carrying the rights with it nor the possibility to abrogate those rights was in dispute, the only significant discussion had to evolve around the existence of and amount of compensation for the curtailment of rights.[227] *Bedjaoui*, with his radical negation of almost all classic assumptions, showed that this belief was not shared generally. He explained the persistence of most national legal orders in past cases of succession as mere political convenience.[228]

Bedjaoui, nevertheless, did not claim a complete clean slate but explicitly maintained that also new states would be bound by international law.[229] His reliance on the principle of sovereign equality can also be read as referring to notions of equity and fairness. Compared to *O'Connell* and *Lalive*, he applied those rules to different facts and emphasized their embeddedness in a certain set of political realities.[230] He linked them to a people's right to self-determination about its resources.[231] Instead of the individualistic approach applied by *O'Connell* and *Lalive*, *Bedjaoui* saw equity primarily as a principle to be given effect between states; individual interests had to take a step back in the name of public interest.[232] Consequentially, he advocated that non-discrimination was the most foreign citizens could ask for.[233] With

225 ibid.

226 Daniel P O'Connell, 'Recent Problems of State Succession in Relation to New States' (1970), 130(II) RdC 95 124, 127, 131 "[C]ontinuity of law is a philosophical proposition and not a prescription of positive law."

227 Cp. ibid 134 "It may be useful to establish as a principle that private rights survive a change of sovereignty, but the real point at issue is whether the successor State is obliged to respect those rights after that event."

228 ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 76, para. 23.

229 ibid 100, para. 156 "Le problème des droits acquis, et d'une manière plus générale les règles de succession d'Etats en matière économique et financière, doivent être envisagés dans ces perspectives nouvelles."

230 Bedjaoui (n 35), 544.

231 ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 75, para. 20.

232 ibid 83/84, paras. 70, 71; see also ibid 73, para. 15.

233 ibid 82, paras. 59, 63-66, 68.

nationals having no (internationally guaranteed) right to be compensated for expropriation,[234] foreigners could not claim compensation at all. Equity was not achieved on a case-by-case basis indemnifying individual losses but by rectifying systematic and historical injustices between states. He contended that "to terminate a privileged situation is not discrimination, but the means of restoring the equality which was previously disrupted in favour of the former metropolitan country."[235]

This contention was especially relevant for decolonized countries, in which the social and economic realities were not the same as those of the colonizing states. The duty to pay compensation, and hence limit a state's power to expropriate or nationalize by its ability to pay, placed a much higher burden on newly independent states with their emerging national economies; a standard protecting the *status quo* inhibited their independent development.[236] *Bedjaoui* alluded to the fact that not all rights in colonial territories were acquired in a "normal" way, and concessions were given to individuals for free or at very low prices.[237] Additionally, a special status for aliens disadvantaged states with more foreign nationals on its soil and/or investing there. These disparities led *Bedjaoui* to consider states emerging from decolonization as being in a special situation in which the "classic" rules of state succession would not be applicable.[238] He found it "*clear that decolonization and the renewal of acquired rights are contradictory*. Either decolonization or acquired rights must be sacrificed."[239] Nevertheless, and even contrary to what *Bedjaoui* himself sometimes asserted,[240] he did not completely abandon basic ideas of individual equity and unjustified enrichment.[241] For him solely, but importantly, the

234 ibid 86, para. 82.
235 ibid 83, para. 70.
236 Cf. Crawford *Brownlie's Principles of Public International Law* (n 3) 415; Jörn A Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' in Otto Depenheuer (ed), *Eigentum: Ordnungsidee, Zustand, Entwicklungen* (Springer 2005) 131 141.
237 ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 93, para. 121; Bedjaoui (n 35), 551.
238 Cf. ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 90, paras. 106, 107; 97, para. 90; Bedjaoui (n 35), 544–546.
239 ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 91, para. 108 [italics in original, footnote omitted]; also Bedjaoui (n 35), 546.
240 Cf. ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 96, para. 32; Bedjaoui (n 35), 554, 555.
241 Cf. ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 94, para. 123.

prefix of the calculation was different.[242] Hence, "all the profits obtained by concessionary enterprises, […] should be taken into account in disputes concerning compensation claims" as well as the connected disadvantages for the territory.[243] Therefore, "enrichment can be considered legitimate in the case of decolonization; it is not unjustified, since it constitutes compensation for the exploitation of the territory during the preceding decades."[244]

4) Interim Conclusions

In sum, where *O'Connell* saw continuity, *Bedjaoui* underlined disruption[245] in the development of international law. This comparison brings to light the biased choice of examples by both authors glossing over potential contradictions. While *Bedjaoui* advocated decolonization as a situation completely different from other cases of succession, *O'Connell* defended the application of the law on state succession also in those cases, only subject to limits under the general principle of abuse of law.[246] *O'Connell* depicted examples not supporting his theory as exceptional or not well reasoned.[247] Those examples were, in turn, used by *Bedjaoui* to show the non-existing unanimity of legal opinion. The juxtaposition of these two authors is exemplary for the discussion of the time. It shows not only the essential and

242 Cf. e.g. ibid 92, 95, paras. 120,129; Bedjaoui (n 35), 550; also critical Craven, 'Colonial Fragments' (n 29) 122. For the general acceptance of international rules by the newly independent states see also Ram P Anand, 'New States and International Law (2007)' in: *MPEPIL* (n 2) paras. 17-19.

243 ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 94, para. 123. Cf. also Bedjaoui (n 35), 552; Craven, 'Colonial Fragments' (n 29) 122.

244 ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 96, para. 132; ibid 93, para. 121 "The colonized pass judgement, not on the individuals whose property is affected and who may indeed merit protection, but on a general policy for which they draw up a balance-sheet that precludes the payment of any compensation because there is a balance in favour of the former metropolitan country".

245 Bedjaoui (n 35), 532; ILC, 'Second Report on Succession in Respect of Matters Other than Treaties' (n 2), 71, para. 7.

246 O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 140–144. Cf. also Zemanek (n 38), 290 who concludes that "in most respects the traditional rules of state succession are still valid and being applied. […] Even the protection of vested rights of foreigners […] was never denied in principle", even if earlier describing the practice of new states after independence as "stormy and spotty", ibid 286–287.

247 See O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 142; O'Connell *The Law of State Succession* (n 2) 126.

basic tension underlying the principle of acquired rights – that between (inevitable) change and (necessary) continuity in international law – but also the particular interests involved – a state's sovereignty over its domestic economic and legal systems and individuals' interest in the maintenance of their rights acquired under a domestic legal order. Authors were divided on the legal grounding of the doctrine of acquired rights, on the aptness of its application in specific situations and its concrete consequences; they were not divided on acquired rights' general concept This agreement makes it possible to extract a common definition from the surveyed material.

IV) A "Classic" Definition of Acquired Rights

In essence, the classic doctrine of acquired rights denotes the idea that certain pecuniary rights (1.) conveyed by a domestic legal order (2.) to private individuals (3.) deserve special protection by international law against alteration or abrogation by a new sovereign over a territory. While the topic has often been dealt with outside the context of state succession, this book looks exclusively at acquired rights in cases of state succession (4.) as defined in Chapter II. It inquires into how far the respective successor state is obliged to respect rights acquired under a predecessor's domestic legal order. The terms of "acquired rights" and "vested rights" are used synonymously.

1) Pecuniary Rights

Until the 1970s, the classic, historically developed definition of acquired rights clearly referred to pecuniary rights, i.e. rights having a monetary value and being open to compensation in case of abrogation.[248] This connection seems natural as, originally, the theory of acquired rights was heavily linked to notions of property.

248 Cf. also the conscient change of wording from "les droits des particuliers" to "les droits patrimoniaux" by IDI, 'Resolution "Les effets des changements territoriaux sur les droits patrimoniaux" (Rapporteur Makarov)' (n 16), 356, 357.

2) Domestic Rights

The core of the doctrine of acquired rights lies in its reference to domestic law. Protecting rights after a change of sovereignty required that they were unconditionally and judicially enforceably granted under the domestic law of the predecessor state.[249] Acquired rights, despite being accorded a fairly wide scope, did not comprise mere interests or expectations.[250] A certain market position or future expectations were not protected.[251] Hence, the classic "principle" of acquired rights was constructed as a procedural rule rather than a material one in the sense that it does not connote the idea of certain substantive rights. The question posed is whether and in how far such domestic position was protected by international law beyond some outer limits such as the prohibition of abuse of rights or fraudulent conduct as well as the already mentioned "odious debts".[252]

What was not encompassed in the traditional doctrine were rights derived from international law.[253] This omission was partly due to the almost non-existent status of the individual under international law at that time.[254] Additionally, the protection of acquired rights under international law rests on a slightly different reasoning than the protection of individuals' domestic rights. Within the context of state succession, the issue of acquired rights under international law becomes one of the obligatory character of pre-existing international law for a new state. This issue is a necessary preliminary question for the obligation of a successor state to respect domestically acquired rights and will therefore be dealt with in the coming chapters. However, it plays out on a different plane and triggers different, though

249 Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 2) 2, 9; on the jurisprudence of the Upper Silesian Tribunal Erpelding and Irurzun, 'Arbitral Tribunal for Upper Silesia (2019)' (n 68) para. 54; similarly Zemanek (n 38), 283; insisting on the domestic basis as prerequisite for protection *Case Concerning the Barcelona Traction, Light and Power Company, Limited,* 5 February 1970, Separate Opinion Judge Morelli, ICJ Rep 1970 222 233 (ICJ) (albeit not talking about a succession scenario).

250 A point underlined by ibid 236; with respect to the Upper Silesian Tribunal Erpelding and Irurzun, 'Arbitral Tribunal for Upper Silesia (2019)' (n 68) para. 56.

251 Also Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 2), 3. *The Oscar Chinn Case,* 12 December 1934, Series A/B No 63 88 (PCIJ) (not connected to state succession).

252 Cf. *PCIJ Certain German Interests (The Merits)* (n 7) 37-39; O'Connell *The Law of State Succession* (n 2) 187; Ronen *Transition from Illegal Regimes* (n 14) 252–253.

253 But cf. Sik (n 8) 127.

254 On relevant developments since then see *infra*, Chapter III B) II).

partly comparable, issues than the acceptance of rights acquired by individuals under a domestic legal order. It will therefore have to be distinguished from the original doctrine, even if both concepts can influence each other.

a) The Public-Private Divide

The traditional doctrine excludes from succession public law, which is said to be "political" and intrinsically tied to a state's sovereignty.[255] In the same vein, a separation running like a thread through the publications on acquired rights is the often-advocated separation of rights acquired under public or private domestic law. This exclusion finds repercussion in the differentiation between *imperium*, sovereignty, and *dominium*, property, with only the latter surviving succession. Yet, even at the beginning of the 20th century the distinction was not embraced unanimously.[256] Furthermore, as shown, exceptions were made for rights of a purportedly "mixed" or *sui generis* character, such as concessions. The PCIJ and academia at times have shown an overtly formalistic stance, only looking at the legal form of acquisition. Yet, "in case of doubt" the respective right was included in the protection.[257]

255 Cf. e.g. *PCIJ Certain German Interests (The Merits)* (n 7) 17 "The reservation [...] rather [relates] to constitutional and public law provisions the maintenance of which would have been incompatible with the transfer of sovereignty"; Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 2), 8, 11, 12; O'Connell *The Law of State Succession* (n 2) 82, 83; Lalive (n 8) 166/167; Hernández, 'Territorial Change, Effects of (2010)' (n 166) paras. 13-14; Drinhausen (n 2) 120-124, 153; Martti Koskenniemi and Marja Lehto, 'Succession d'États de l'ex-U.R.S.S. avec examen particulier des relations avec la Finlande' (1992), 38 AFDI 179 199. Cp. also the widely held opinion that treaties of a "political" character would not survive succession, e.g. for many Matthew Craven, 'The Problem of State Succession and the Identity of States under International Law' (1998), 9(1) EJIL 142 156; Matthias Herdegen, *Völkerrecht* (21st ed. C.H. Beck 2022) § 39 para. 3; differently Andreas v Arnauld, *Völkerrecht* (4th ed. C.F. Müller 2019) para. 109.

256 E.g. Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 2), 12 even alluding to the German concept of "subjektiv-öffentliche Rechte".

257 Cf. e.g. *PCIJ Lighthouse Case* (n 124) 20 "It is true that a contract granting a public utility concession does not fall within the category of ordinary instruments of private law, but it is not impossible to grant such concessions by way of contract, and some States have adopted the system of doing so". This categorization was upheld even if these concessions were granted by "decree law" and were revocable by parliament. See also O'Connell *The Law of State Succession* (n 2) 193–198, including pension claims of civil servants.

b) Property Rights

Traditionally, acquired rights have mostly been discussed under the heading of "property", and sometimes even equated with it.[258] On the one side, the use of the term "property" leads to a simplification of the topic, since property may denote all rights belonging to a person, rendering a definition of each and every sub-subject futile. There appears to be an intuitive idea of what "property" means. On the other side, the subject of property is manifestly dependent on domestic legislation. In fact, property is something pre-determined by domestic law.[259] Also Art. 8 VCSSPAD, insofar reflective of customary law,[260] defines state property as "property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State." This dependency is what makes the right of property one of the most intricate (human) rights, its content and scope being both diversified and constantly and deeply disputed between and within nations.[261] The idea of acquired rights is thus at the same time both more and less comprehensive than the idea of property. Some pieces of property might not have a pecuniary character, which would exclude them, at least, from the traditional doctrine of acquired rights. At the same time, acquired rights might encompass positions acquired in a predecessor state while not being known in a successor country or not having a proprietary nature there.

c) Real Rights and Contractual Rights

Most authors and the PCIJ include not only real rights (rights *in rem*) but also contractual (personal) rights in any discussion of acquired rights.[262]

258 Cf. e.g. *Continuity of the German Reich,* GSZ 6/53, 20 May 1954, BGHZ 13 265 para. 107 (German Federal Court of Justice [BGH]) "wohlerworbene Rechte ist ein altrechtlicher Ausdruck für das, was man heute Eigentumsgarantie nennt"; also Drinhausen (n 2) 50-51, 176.

259 Malcolm N Shaw, 'State Succession Revisited' (1994), 5 FYBIL 34 86; *PCIJ Panevezys-Saldutiskis Railway Case* (n 130) 18.

260 Shaw, 'State Succession Revisited' (n 259) 86.

261 See for a detailed discussion of the international protection of property *infra*, Chapter III.

262 O'Connell *The Law of State Succession* (n 2) 136. Alluding to the diversity of national legal systems on this question Lalive (n 8) 184; Lauterpacht *Private Law Sources and Analogies* (n 61) 132, footnote 3; Kriebaum and Reinisch, 'Property, Right to,

This inclusion seems natural as the characterization, regulation of content, and acquisition of domestic rights are a sovereign prerogative and enrichment can also be caused by contractual rights. What should not be overlooked, however, is that the PCIJ's case law might have included contractual rights (such as the *Rentengutsveträge*), but all cases in which it affirmed the duty of a state to respect acquired rights were linked to real property.[263] The examples most authors cite also relate to concessions, titles to land, or titles to buildings, works, or enterprises on it, i.e. contractual rights *ad rem*. The field of state succession is heavily linked to territorial notions.[264] Detracting the definition of acquired rights from the title to land and including purely contractual rights deviates from the "factual" scenario *O'Connell* had relied on and the division between *imperium* and *dominium* the US courts had relied on. While it is plausible to argue that the possession of a piece of land is a fact and that such a situation has to be acknowledged, this conclusion is less compelling for a right emanating from a contract between two individuals, a purely theoretical legal construct.

3) Bearers of Acquired Right

Traditionally, it has often been asserted that only foreigners could benefit from the doctrine of acquired rights.[265] This assertion was natural as a state's behavior towards its own citizens and the pertaining domestic law were long seen as an inner-state affair only marginally regulated by interna-

International Protection (2009)' (n 2) para. 17; Reinisch *State Responsibility for Debts* (n 2) 90–91 and footnote 421. For authors only including rights *in rem* into the protection see Lauterpacht *Private Law Sources and Analogies* (n 61) 132; Reinisch *State Responsibility for Debts* (n 2) 88, footnote 409.

263 In the *PCIJ Oscar Chinn* (n 251) concerning favourable business conditions (outside a succession context) the court the court denied that the individual held an acquired right.

264 See for example the recurrent requirement that a contract had "benefitted the territory", O'Connell *The Law of State Succession* (n 2) 112-114, 144. On the special status of "localized" treaties see *infra*, Chapter III C) II) 2).

265 E.g. Castrén (n 8), 491; O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 139, 140; Lalive (n 8) 152, 183, 198-199; Bedjaoui (n 35), 540; ILC, 'Fourth Report on State Responsibility (Special Rapporteur Garcia-Amador)' (n 2); Epping, '§7. Der Staat als die „Normalperson" des Völkerrechts' (n 2) 198, para. 241; also *ICJ Barcelona Traction - Separate Opinion Morelli* (n 249) 233.

tional law.[266] Yet, citizenship lines are regularly blurred during successions, and, beyond its relevance as an international minimum standard, the doctrine's particular significance should not be discarded too easily.

Furthermore, acquired rights were depicted as rights of private (foreign) individuals against the state. But in fact, not only natural persons but also private legal entities that had been granted personality by domestic law were included in the protection.[267] Such protection even extended to territorial sub-divisions of the state and municipalities.[268] Hence, every legal entity able to possess rights under a state's domestic law could be the holder of acquired rights. Within these limits, there seems to be no obvious compelling reason for excluding from protection those states that had acquired rights under the *private* municipal law of another state, e.g., through state-owned private companies.[269] As long as states do not derive the rights from a relationship of equals (such as under international law)[270]

266 Insisting on this point Zemanek (n 38), 271, 289; Verdross and Simma (n 23) 627, §1004, 631, §1012; still Jost Delbrück and Rüdiger Wolfrum, *Völkerrecht: Vol. I/1 Die Grundlagen. Die Völkerrechtssubjekte* (2nd ed. de Gruyter 1989) 175, 183/184; Malcolm N Shaw, *International Law* (6th ed. CUP 2008) 1001; McNair, 'The Effects of Peace Treaties Upon Private Rights' (n 62), 386–389; Hugh Thirlway, *The Sources of International Law* (2nd ed. OUP 2019) 199; see also Katja S Ziegler, 'Domaine Réservé (2013)' in: *MPEPIL* (n 2) paras. 3-5; for property law Christian Tomuschat, 'Die Vertreibung der Sudetendeutschen: Zur Frage des Bestehens von Rechtsansprüchen nach Völkerrecht und deutschem Recht' (1996), 56 ZaöRV 1 6; cf. for the international recognition of domestic corporate entities *Case Concerning the Barcelona Traction, Light and Power Company, Limited,* 5 February 1970, ICJ Rep 1970 3 para. 38 (ICJ).

267 IDI, 'Resolution "Les effets des changements territoriaux sur les droits patrimoniaux" (Rapporteur Makarov)' (n 16), para. 2.

268 Cf. e.g. *PCIJ Certain German Interests (The Merits)* (n 7) 74-75 with respect to the (German) city of Ratibor; *U.S. Supreme Court Vilas v. Manila* (n 66) 346, 356, 360; IDI, 'Resolution "Les effets des changements territoriaux sur les droits patrimoniaux" (Rapporteur Makarov)' (n 16), para. 3; Ebenroth and Kemner (n 2), 781–782; for a more recent case cf. *City of Cheb v. FRG,* RO 5 K09.1350, 2 December 2010, ILDC 2879 (DE 2010) (Administrative Court Regensburg).

269 In favour of the inclusion of state-owned companies as long as they are "organisationally definitely separated from state organs" e.g. Delbrück and Wolfrum (n 266) 183.

270 In contrast, issues surrounding acquired rights of states under public international law are in fact issues about the possibility of change of international law without states' consent. Also in this direction Sevin Toluner, 'Changing Law of the Sea and Claims Based on the Principle of "Respect for Acquired Rights"' in Sevin Toluner (ed), *Geçmişi anımsayıp geleceği yönlendirme. Remembering the Past While Moving Forward in the Future* (Beta Basım Yayım Dağıtım 2017) 35 36–38, 45. The

but are dependent on the upholding of the domestic legal order, they might as well be eligible to rely on the doctrine of acquired rights. The general ideas of equity and unjustified enrichment could also apply to them.

4) In Cases of State Succession

This book focuses on the application of the doctrine of acquired rights in cases of state succession. Questions of state succession naturally transcend the domestic sphere[271] and cannot be pictured as mere private international law principles solving conflicts in time or space.[272] Therefore, this book will not be concerned with (private) international law theories related to acquired rights (often denoted as "vested rights theories") without a link to a change in sovereignty.[273]

PCIJ's holding in *Question of the Monastery of Saint-Naoum (Albanian Frontier),* 4 September 1924, Advisory Opinion, Series B No 9 16 (PCIJ), while literally mentioning the "vested rights" of the Serb-Croat-Slovene-state in substance merely concerned the demarcation of borders and territorial claims of a State potentially once acquired. The redundancy of claiming "acquired rights" in such cases is shown by Barde (n 48) 52–92, who, after reciting several "precedents" comes to the conclusion that an "acquired right of a state" cannot be taken away without the latter's consent.

271 Sik (n 8), 128; Kaeckenbeeck, 'The Protection of Vested Rights in International Law' (n 2), 10; Marek (n 61) 2 "Since they break the framework of municipal law, the birth, extinction and transformation of States can be made subject of a legal enquiry only by reference to a legal order which is both higher than State law and yet belongs to the same system of norms".

272 Also Ziereis (n 58) 64–69 describing the collision as *sui generis*.

273 Examples are the international law on social security (see Angelika Nußberger, 'Social Security, Right to, International Protection (2009)' in: *MPEPIL* (n 2) paras. 17, 22, 26), the country-of-origin principle under EU law (Ralf Michaels, 'EU Law as Private International Law?: Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory' (2006), 2(2) J Priv Int L 195; Basedow, 'Vested Rights Theory' (n 53) 1816–1820), or rights acquired by employees of international organizations, sometimes called "international administrative law" (Hans W Baade, 'The Acquired Rights of International Public Servants: A Case Study in the Reception of Public Law' (1966-1967), 15 AmJCompL 251; Sik (n 8), 127; recently Rishi Gulati, 'Acquired Rights in International Administrative Law' (2021), 24 Max Planck Yrbk UN L 82; for jurisprudence see e.g. *Mirella et al. v. Secretary-General of the United Nations,* Judgment No. 2018-UNAT-842, Case-No. 2018-115, 29 June 2018 (UN Appeals Tribunal)).

D) The Task Ahead

At the outset, the aspect many readers not familiar with the topic of acquired rights would probably have assumed the main bone of contention to be was whether rights derived from the former domestic legal order could be terminated. However, this point was not really in dispute. The general supposition was that there was no absolute domestic right that could not be abrogated or modified for public purposes.[274] While the use of the word "acquired" purported to speak for added stability, in reality it meant very little. What, however, was not agreed on was (1.) whether the protection of acquired rights was merely a logical consequence of the permanence of the private domestic legal order after succession,[275] and (2.) under what exact circumstances the termination of such rights was possible. To a certain extent, the first question may seem to be a purely academic problem as most new states have, explicitly or implicitly, opted for the continuity of their predecessor's national legal order.[276] However, whether this action was taken out of legal necessity or for the sake of utility often remains in the dark.[277] And even if such permanence could be assumed, this does not conclusively answer the question of what consequences a later abrogation of such rights would entail, e.g., whether compensation was due.[278]

After having been one of the "hot topics" of international law during the heydays of decolonization, the issue of acquired rights has almost sunk into oblivion since the 1970s. Many questions have been left unanswered.

274 Also Sik (n 8), 141 "Once we rightly accept that permanence cannot be the aim of any law and would be contrary to the function of the law of regulating political, economic, and social, developments in an orderly fashion, we have to accept also that there cannot be an absolute maintenance of existing rights."

275 Cf. Zemanek (n 38), 278–279; Rosenne (n 44), 273 calling it a "preliminary point".

276 See for "older" cases Sik (n 8), 128; O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 123, 126, 127; Zemanek (n 38), 278, 279; Rosenne (n 44), 268. For recent state practice from 1990 on *infra*, Chapter IV.

277 For political choice Epping, '§7. Der Staat als die „Normalperson" des Völkerrechts' (n 2) 197/198, para. 240. Apparently of the opinion that the very fact of adoption speaks against the continuity of the national legal order Rosenne (n 44), 268 and 279. In more detail *infra*, Chapters IV and V.

278 To deny like Zemanek (n 38), 279 and with reference to him Crawford *Brownlie's Principles of Public International Law* (n 3) 415, footnote 40 the doctrine's relevance in case of continuity of the national legal order, partly begs the question. This proposition assumes a willful re-enactment of the national legal order. It neglects the question whether – if the national legal order would persist *regardless* of the will of the successor state – this would still entail the duty not to change the rights granted by it.

The doctrine's legal foundation has not been dealt with in judicial cases, which have primarily sought to find a practicable solution for the dispute at hand. While there has been a considerable amount of literature, the topic was often treated relatively superficially, and the staggering events of decolonization outpaced more in-depth scholarly reception. Probably the doctrine appeared so popular and applicable in so many areas, so broad and flexible, that it came to be seen more as an empty promise than as a solid component of international law. In practice it was rejected by the newly independent states, i.e. the majority of successor states at the time.

Additionally, the international legal system has undergone profound changes since those times: the elevated status of the individual, the deepened relationship between international and national law, the shift in the international system "from bilateralism to community interests",[279] to name but a few. Those changes have shifted the perception of international law, and some even speak of its "constitutionalization"[280]. Moreover, the sort of territorial changes being experienced now are different to those of decades ago. Since Prof. *O'Connell*'s death in 1979, major waves of successions have taken place outside the colonial context; the fall of the iron curtain let huge federations crumble and disappear. Concurrently, more territories have pursued their path to independence and the right to self-determination has gathered force. Hence, the need has now become more pressing to inquire into the current status of the doctrine of acquired rights under international law – all the more as the term has resurfaced lately in different areas: It would be of interest to know what has tempted the International Tribunal for the Law of the Sea (ITLOS), the British House of Lords, and international investment tribunals, to name but a few, to invoke a doctrine purportedly buried decades ago.

In order to find answers to the mentioned questions, an analysis of the topic requires, first, a definition of the term state succession (in Chapter II) before the main arguments for the continued relevance of the doctrine of acquired rights can be discussed in Chapter III, and current state practice

279 Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994), 250 RdC 217.

280 E.g. Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009); Stefan Kadelbach and Thomas Kleinlein, 'International Law - A Constitution for Mankind: An Attempt at a Re-Appraisal with an Analysis of Constitutional Principles' (2007), 50 GYIL 303.

illuminated in Chapter IV. Chapter V then analyses and processes those findings and concludes.

Chapter II: State Succession

"Considerations of justice and of economic stability in the modern world probably require that in any system of general codification of international law the question of State succession should not be left out of account. The law of State succession prevents the events accompanying changes of sovereignty from becoming mere manifestations of power."[281]

A) The Need for a Definition

Even if there seems to be more than abundant writing on state succession,[282] the literature has not ceased to underline that the subject is of utmost obscurity and vagueness and replete with controversy.[283] Multiple

281 *UN Secretariat Survey of International Law* (n 2) 28/29, para. 46.

282 Cf. only Francisca Markx-Veldhuijzen, 'Selected Bibliography' in Pierre M Eisemann and Martti Koskenniemi (eds), *State Succession: Codification Tested Against the Facts* (Martinus Nijhoff 2000) 927.

283 E.g. James G Devaney, 'What Happens Next? The Law of State Succession' in Jure Vidmar, Sarah McGibbon and Lea Raible (eds), *Research Handbook on Secession* (Edward Elgar (forthcoming)) available online at https://gcils.org/wp-content/uploads/2020/11/GCILS-WP-2020-Paper-6-Devaney.pdf "State succession is a notoriously opaque area of international law"; Sarvarian (n 134), 789 "The succession of states is one of the most complex, challenging and politicized fields of international law"; Verdross and Simma (n 23) 608, para. 973 "most controversial part of interational law" [own translation from German]; Crawford *Brownlie's Principles of Public International Law* (n 3) 410 "State succession is an area of uncertainty and controversy."; Brigitte Stern, 'La Succession d'États' (1996), 262 RdC 15 27-28 "l'un des problèmes les plus complexes du droit international [...] apparemment anarchique"; Stefan Oeter, 'German Unification and State Succession' (1991), 51 ZaöRV 349 352 "chaotic"; Stefan Oeter, 'State Succession and the Struggle over Equity: Some Observations on the Laws of State Succession with Respect to State Property and Debts in Cases of Separation and Dissolution of States' (1995), 38 GYIL 73 73 "never was much more than a set of more or less elaborate principles of adaptation to changed circumstances, abstract principles otherwise known under notions such as *clausula rebus sic stantibus* and duty to renegotiate *bona fides*" [italics in original]; Shaw, 'State Succession Revisited' (n 259), 35, 97 "an area of especial confusion and inconsistency [...] rules of state succession are marked either by their absence or their inconsistency"; Vassillis Pergantis, *The Paradigm of State Consent in the Law of Treaties: Challenges and Perspectives* (Edward Elgar 2017) 189–190; Andreas

challenges are associated with identifying and applying rules on state succession. A main reason for the more than cautious attitude towards the assertion of any hard and fast rules lies in the subject's close relationship and interdependence with other fields of international law, in particular with the notions of sovereignty and statehood.[284] State succession represents a cross-cutting theme *par excellence*, a factual situation of disturbance that questions almost every other legal fact under international law. Instances *later* described as state succession were often politically loaded, associated with major societal upheavals and the disruption of whole peoples, territories, lands, and culture.[285]

Questions about the prerequisites and consequences of the emergence or demise of a state or the transferal of authority over a certain territory necessitate answers about the basis and scope of sovereignty, generally understood as the "supreme authority within a territory",[286] but probably still one of the most elusive concepts[287] of international law. Every discussion on state succession will hence give rise to all the political, sociological, and legal discussions around these far-reaching and often highly disputed

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Zimmermann and James G Devaney, 'Succession to Treaties and the Inherent Limits of International Law' in Christian J Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edward Elgar 2016) 505 505/506 and the pertaining footnotes; Hafner and Kornfeind (n 27), 2.

284 Shaw, 'State Succession Revisited' (n 259), 36; Martti Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' in: *Eisemann/Koskenniemi State Succession* (n 282) 65 96–102.Generally on the relationship between state sovereignty and succession Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevenson & Sons Limited 1958) 319; for succession to treaties Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 511. Cp. Georg Jellinek, *Allgemeine Staatslehre* (3rd ed. Verlag O. Häring 1914) 270–275 who negates that the coming into existence of a state is a matter of law "Das Volkerrecht knüpft daher an das Faktum der staatlichen Existenz an, vermag dieses Faktum aber nicht zu schaffen" ("International law presupposes the fact of a state's existince, but it cannot establish it." [own translation from German]).

285 However, such rupture does not always have to take a violent form; cf. only the examples of the peaceful separation of Czechoslovakia and German unification; in detail *infra*, Chapter IV B) II) and V).

286 Samantha Besson, 'Sovereignty (2011)' in: *MPEPIL* (n 2) para. 1; *cf. also* James Crawford, 'State (2011)' in: *MPEPIL* (n 2) para. 40 "plenary competence that States prima facie possess"; Marcelo G Kohen and Mamadou Hébié, 'Territory, Acquisition (2021)' in: *MPEPIL* (n 2) para. 5 "Territorial sovereignty refers to the plenitude of a State's competences over a territory."

287 See Besson, 'Sovereignty (2011)' (n 286) paras. 1-4.

issues.[288] Even the basic division between continuity and succession is dependent on the theories and corresponding controversies about defining a state.[289] With this in mind, one might be tempted to completely negate the significance of state succession as a distinct category of international law. At the very least, considerable doubt can be cast on whether labelling a situation as a case of state succession implies any distinct rules and consequences apart from those of more general international law.[290] State succession was often used as a "box" into which several unidentifiable or diplomatically intractable cases were assigned.[291]

As mentioned, the ILC's codification work on succession issues has not met with much support.[292] Currently, further work is under way concerning state succession in respect of state responsibility.[293] While its relevance and appeal to the international community remains to be seen, for the existing conventions, states or international organizations have supported only some of the provisions and many are not considered as having crystal-

288 Cf. Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 507; Lalive (n 8) 148/149 "Like the concept of sovereignty, that of 'acquired rights' is not a subject to be studied easily in a scientific, unbiased, and dispassionate manner".

289 Cf. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 98–99; Marek (n 61) 1–2.

290 Cf. Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 515; Sarvarian (n 134), 812; generally Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284).

291 The ILC in several cases separated issues of state succession from other topics in order not to burden the work on these topics with the mostly intricate and politically sensitive problems of state succession. E.g., Art. 73 ("The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States […]") was inserted into the Vienna Convention on the Law of Treaties (23 May 1969) UNTS 1155 331 because the ILC found it more appropriate to leave the analysis of succession into treaties to a separate working group, cf. ILC, 'Second Report on the Law of Treaties (Special Rapporteur Waldock)' (1963), 1963(II) YbILC 36 38, para. 3.

292 *Supra*, Chapter I B).

293 ILC, 'Fifth Report on Succession of States in Respect of State Responsibility (Special Rapporteur Šturma)' (n 43) para. 89. Its outcome will supposedly be crafted in the form of draft articles of an international convention, ILC, 'First Report on Succession of States in Respect of State Responsibility (Special Rapporteur Šturma)' (n 43) para. 28. But see also the critical voices referred to in ILC, 'Third Report on Succession of States in Respect of State Responsibility (Special Rapporteur Šturma)' (n 43) para. 11.

lized into customary law.[294] While this "failure" might, at least, partly be blamed on the conventions' contents, *inter-alia* their strong focus on the interests of so called "newly independent states",[295] their lack of appeal may also be owed to the perceived inappropriateness of tackling the issue of succession by (general) conventional means instead of *ad-hoc* agreements.[296] In fact, the law of state succession was largely developed on a case-by-case basis. Solutions to the pressing needs of newly formed states or splintered societies, often after violent conflicts, were mostly the outcome of a bargain and met by concluding agreements tailored to a conflict's particularities. Therefore, it is also doctrinally challenging to derive general rules from

294 Herdegen (n 255) § 29 para. 2; Anthony Aust, *Modern Treaty Law and Practice* (3rd ed. CUP 2013) 321; Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 474 "less the result of codification of existing norms than of the creative development of international law". For the VCSST Gerhard Hafner and Gregor Novak, 'State Succession in Respect of Treaties' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 396 399; cf. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 70 "there is no agreement about the authoritative status of the 1978 Convention"; in more detail Andreas Zimmermann, *Staatennachfolge in völkerrechtliche Verträge: Zugleich ein Beitrag zu den Möglichkeiten und Grenzen völkerrechtlicher Kodifikation* (Springer 2000) 860–861.

295 Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 508–509; Andreas Zimmermann and James G Devaney, 'State Succession in Matters Other than Treaties (2019)' in: *MPEPIL* (n 2) para. 4; Verdross and Simma (n 23) 609, § 974, 621, § 997; Aust *Modern Treaty Law and Practice* (n 294) 321; Arnauld *Völkerrecht* (n 255) § 2 para. 108; Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 473; cf. Detlev F Vagts, 'State Succession: The Codifiers' View' (1992-1993), 33(2) Va J Int'l L 275 283, 288; Oeter, 'German Unification and State Succession' (n 283), 353, 379; cf. Daniel P O'Connell, 'Reflections on the State Succession Convention' (1979), 39 ZaöRV 725 725; Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 354, para. 106; Patrick Dumberry, 'State Succession to Bilateral Treaties: A Few Observations on the Incoherent and Unjustifiable Solution Adopted for Secession and Dissolution of States under the 1978 Vienna Convention' (2015), 28(1) LJIL 13 13–30; Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 158; Hasani (n 2), 115, 116.

296 Cf. Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 151; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 539; famously, and comprehensively criticizing the VCSST O'Connell, 'Reflections on the State Succession Convention' (n 295), 726 "state succession is a subject altogether unsuited to the process of codification".

ad-hoc solutions driven by the need to compromise.[297] Additionally, one of the particularities of the international law on succession is that it partly intends to govern relations of states that do not yet exist, which leads to evident problems related to any binding force for new states. This dilemma is openly acknowledged by Art. 7 para. 1 VCSST, which stipulates that "the Convention applies only in respect of a succession of States which has occurred after the entry into force of the Convention except as may be otherwise agreed". A parallel provision is found in Art. 4 para. 1 VCSSPAD.

The often casual and sometimes indiscriminate use of terminology when referring to succession has exacerbated the existing doctrinal confusion, which was also not conducive to rules evolving. With this in mind, it seems all the more important to clearly define the term of state succession in order to establish a common basis for and the outer limits of the following analysis. How succession scenarios are defined has an impact on the factual situations collected as evidence and on the conclusions drawn from them. Whether a state is defined as a successor or a continuator or whether a case is handled as a secession or dissolution will have a determinative influence on the outcome of the research. Therefore, this chapter is dedicated to setting the general framework of state succession as a field of international law.

B) Basic Requirements of State Succession

I) State Succession as a Set of Factual Events, not a Legal Effect

The very notion of succession can be misleading as it implies something it is, at the same time, supposed to prove, i.e. the taking-over of rights and responsibilities.[298] In the 19th century, a succession analogy with private law concepts was still widespread, equating the state with an individual

297 Cf. Shaw, 'State Succession Revisited' (n 259), 35, 40; Jan Klabbers and Martti Koskenniemi, 'Succession in Respect of State Property, Archives and Debts, and Nationality' in 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) 118 142. On the intricacies of deducting general rules from treaties *infra*, Chapter V B) II) 3) b).

298 Also Shaw, 'State Succession Revisited' (n 259), 35–36, 41.

heir succeeding into all rights and duties of the deceased.[299] But, with the end of the personal identification of the state through a monarch or emperor and the reception of the idea of a *contrat sociale*,[300] this perception changed – the taking over of another state's duties had to be reconciled with society's interest; the continuity of international legal duties became an option instead of a given.[301] Due to this change in perception, a distinction developed between state succession as a certain set of events ("state A becomes independent of state B") and the legal ramifications flowing from it ("state A has to accept as binding obligations undertaken by state B"). Succession therefore refers to a *factual* situation of territorial change and does not necessarily mean that a successor state commits to its predecessor's rights and responsibilities.[302] This commitment, conversely, is the

299 See Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 147–148.

300 Jean-Jacques Rousseau, *Du Contrat Social: Ou, Principes du Droit Politique* (l'Imprimérie de la Société typographique 1791).

301 Craven *Decolonization of International Law* (n 17) 29-34. On the difference between succession by private individuals and by abstract entities Delbrück and Wolfrum (n 266) 158, para. I.1.

302 Also ILC, Commentary on Art. 2 of the Draft Articles on Succession of States in Respect of Treaties, in ILC, 'Report on the Work of its Twenty-Sixth Session' (1974), 1974(II(1)) YbILC 157 175, para. 3; taken up in ILC, Commentary on Art. 2 lit. a Draft Articles on Succession of States in Respect of State Responsibility, in ILC, 'Report on the Work of its Seventy-First Session (2019)' (2019) UN Doc. A/74/10 309, para. 2; O'Connell *The Law of State Succession* (n 2) 3; Jennings and Watts (n 27) § 61; cp. also ILC, 'First Report on Succession of States and Governments in Respect of Treaties (Special Rapporteur Waldock)' (1968), 1968(II) YbILC 87 91, paras. 3-4; ILC, 'Second Report on Succession in Respect of Treaties (Special Rapporteur Waldock)' (1969), 1969(II) YbILC 45 51, para. 3; apparently differently Christian J Tams, 'Ways Out of the Marshland. Investment Lawyers and the Law of State Succession' in Rainer Hofmann, Stephan W Schill and Christian J Tams (eds), *Investment Arbitration as a Motor of General International Law* (Edward Elgar forthcoming (available at SSRN: https://ssrn.com/abstract=3086281)) 6 "State succession means both the process(es) through which changes in sovereignty and competence take place and the legal consequences occurring therefrom."; Ulrich Fastenrath, 'Das Recht der Staatensukzession' (24. Tagung der Deutschen Gesellschaft für Völkerrecht, Leipzig, April 1995) 9; Reinisch and Hafner (n 2) 91; Hernández, 'Territorial Change, Effects of (2010)' (n 166) para. 2 "in the case of State succession, a general regime of succession is said to apply, whereby any new State must maintain a certain continuity with the legal situation on the ground and with the previously existing situation".

legal consequence to which the rules on state succession are supposed to find an answer.[303] In the words of *Crawford:*

> "It is important to note that the phrase 'state succession' is employed to *describe* an area, a source of problems: it does not connote any overriding principle, or even a presumption, that a transmission or succession of legal rights and duties occurs in a given case."[304]

Therefore, even if many of the VCSST and VCSSPAD provisions do not reflect customary international law, their common definition that "'succession of States' means the replacement of one State by another in the responsibility for the international relations of territory"[305] has found wide agreement[306] and/or coincides largely with most other definitions of state succession.[307] It will therefore serve as the starting point for the current analysis.

303 Delbrück and Wolfrum (n 266) 158, footnote 4.

304 Crawford *Brownlie's Principles of Public International Law* (n 3) 409 [italics in original].

305 Art. 2 para. 1, lit. b VCSST (n 20); Art. 2 para. 1 lit. a VCSSPAD (n 22); cf. also Art. 2 lit. a ILC, 'Draft Articles on Nationality of Natural Persons in Relation to the Succession of States' (1999), 1999(II(2)) YbILC and Art. 2 lit. a Draft Articles on Succession of States in Respect of State Responsibility in ILC, 'Report on the Work of its Seventy-First Session (2019)' (n 302) 306, para. 117.

306 E.g. Badinter Commission, 'Opinion No. 1' (1992), 31(6) ILM 1494 1495, para. 1(e); ILA, 'Resolution No 3/2008: Conclusions of the Committee on Aspects of the Law on State Succession' (2008) para. 1 <https://www.ila-hq.org/en_GB/documents/conference-resolution-english-rio-de-janeiro-2008-3>; Shaw *International Law* (n 266) 959; Wladyslaw Czaplinski, 'Quelques Aspects de la Réunification de l'Allemagne' (1990), 36 AFDI 89 96; Herdegen (n 255) § 29 para. 1 "suitable"; Andreas Zimmermann and James G Devaney, 'State Succession in Treaties (2019)' in: *MPEPIL* (n 2) para. 1; Zimmermann and Devaney, 'State Succession in Matters Other than Treaties (2019)' (n 295) para. 1; Verdross and Simma (n 23) 607/608, § 972; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 396, 400; Dieter Papenfuß, 'The Fate of the International Treaties of the GDR Within the Framework of German Unification' (1998), 3(92) AJIL 469 470.

307 Cf. O'Connell *The Law of State Succession* (n 2) 3 "[t]ransfer of territory from on national community to another […] one state ceases to rule in a territory, while another takes its place […] the factual situation which arises when one State is substituted for another in sovereignty over a given territory"; similarly Herdegen (n 255) § 29 para. 1; cp. also Crawford *Brownlie's Principles of Public International Law* (n 3) 409, who adds a lawfulness requirement; for such requirement see also *infra*, Chapter II B) IV).

II) Replacement of One State by Another State – Continuity and Succession

One of the essential differentiations in the international law on state succession is that between state continuity and succession.[308] The two categories are, with respect to the same territory, mutually exclusive;[309] if the personality of the state remains the same, i.e. if it continues, there is no room for state succession. Thus, before any discussion on state succession, it must first be ascertained if the circumstances, however revolutionary they have been, left the state intact as an individual entity.[310] Additionally, cases commonly seen as representing continuity, rather than succession, have to be accorded another significance with respect to the maintenance of private rights because the argument for the national legal order being maintained is far easier to make. The status of a continuator state is regularly employed, e.g., for the case of Russia after the dissolution of the Soviet Union,[311] but was denied to the (by then) Federal Republic of Yugoslavia (FRY, later Serbia and Montenegro) with respect to the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY)[312].

There are mainly two theories for the determination of state continuity. According to the first theory, a state continues to exist if the basic constitu-

308 James Crawford, *The Creation of States in International Law* (2nd ed. OUP 2006) 667/668; Marek (n 61) 1 "The problem of the identity and continuity of a State is the problem of its very existence"; Shaw, 'State Succession Revisited' (n 259), 44; Andreas Zimmermann, 'Continuity of States (2006)' in: *MPEPIL* (n 2) para. 8; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 512/513; Ineta Ziemele, 'States, Extinction of (2007)' in: *MPEPIL* (n 2) para. 8; Crawford *Brownlie's Principles of Public International Law* (n 3) 412; Stern, 'La Succession d'États' (n 283), 39; Papenfuß (n 306), 470. Critical on the distiction Matthew Craven, 'The Problem of State Succession and the Identity of States under International Law' (1998), 9(1) EJIL 142 153 "In practice, however, it has become very clear that such distinctions raise more questions than they answer" and Ian Brownlie, *Principles of Public International Law* (4th ed. Clarendon 1996) 82–85 "make a difficult subject more confused".

309 O'Connell *The Law of State Succession* (n 2) 3; Marek (n 61) 9; Crawford *Brownlie's Principles of Public International Law* (n 3) 412/413; Stern, 'La Succession d'États' (n 283), 39–47; but differently Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 161 and Hasani (n 2), 115–116.

310 Marek (n 61) 10.

311 See in more detail *infra*, Chapter IV B) III) 1).

312 See in more detail *infra*, Chapter IV B) IV) 1).

tive attributes of a state, i.e. a defined territory, a people, and state power, persist.[313] Additionally, there must be a certain determination of "sameness".

> "That is to say, a State is the 'same' if it involves what may be regarded as the same independent territorial and governmental unit at relevant times. What matters is principally the historical continuity of the community the State embodies […] A State may be said to continue as such so long as an identified polity exists with respect to a significant part of a given territory and people."[314]

Hence, while recognition by third states is considered as merely declaratory for statehood,[315] it is of particular relevance in determining a state's continuity or non-continuity[316]. The appeal of this theory lies in its reference to actual state practice and hence the acceptance of the *realpolitik* element underlying the recognition of new states. This acceptance makes the approach flexible but, at the same time, considerably open to political considerations rather than legal ones since recognition is arguably still at the discretion of each individual state.[317] The outcome of any recognition process can be considered unpredictable.

313 Crawford *The Creation of States* (n 308) 671. This definition leans on the "three-elements-theory" by Jellinek (n 284) 394–434; see also Art. 1 Convention on Rights and Duties of Man (26 December 1933) LNTS 165 19 (Montevideo Convention).

314 Crawford *The Creation of States* (n 308) 669, 671.

315 Arnauld *Völkerrecht* (n 255) para. 97; Stern, 'La Succession d'États' (n 283), 52; cf. Jochen A Frowein, 'Recognition (2010)' in: *MPEPIL* (n 2) para. 10; Juan F Escudero Espinosa, 'The Principle of Non-Recognition of States Arising from Serious Breaches of Peremptory Norms of International Law' (2022), 21(1) Chinese JIL 79 84–93; Crawford, 'State (2011)' (n 286) para. 44.

316 Crawford *The Creation of States* (n 308) 671; cf. Shaw, 'State Succession Revisited' (n 259), 38, 45; Christian J Tams, 'State Succession to Investment Treaties: Mapping the Issues' (2016), 31(2) ICSID Review 314 319.

317 Daniel Thürer and Thomas Burri, 'Secession (2009)' in: *MPEPIL* (n 2) paras. 40, 41; Stern, 'La Succession d'États' (n 283), 54; cf. Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 507. Yet, because of the evident real-life consequences of recognition, its completely discretionary basis is sometimes doubted, cf. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 99-100; Stern, 'La Succession d'États' (n 283), 54 "autolimitation". Additionally, an exception exists in cases of emergence of a state from breaches of a peremptory norm of international law, cf. Escudero Espinosa (n 315) and *infra*, section IV).

A second theory views a state as identical to the former entity if it carries the same rights and obligations with it.[318] This approach at first glance seems far more objective since it is not dependent on political value judgments. Moreover, the attitude of a state will be guided more by real consequences than by pure theoretical status. "Universal succession",[319] which under this theory would be logically impossible,[320] will almost never be claimed except in cases of assertion of continuity. However, distinguishing the categories of continuity and succession according to their consequences presupposes something it is meant to explain. It will not be possible to describe an international obligation as "the same" without attributing it to a certain entity.[321] Furthermore, not all international rights and obligations are susceptible to succession.[322] Finally, the second theory cannot accommodate some common perceptions of some actual cases, such as the

318 Marek (n 61) 5–14; Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 120; Zemanek (n 38), 189 "a problem of state responsibility"; cf. Zimmermann, 'Continuity of States (2006)' (n 308) para. 1; critical Crawford *The Creation of States* (n 308) 670–671.

319 The term of "universal succession" is one example where the indiscriminate use of vocabulary might not only lead to confusion but to real differences in legal characterization. It is mostly used to describe the taking over of all rights and obligations of the predecessor by the successor state, see e.g. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 121; Crawford *Brownlie's Principles of Public International Law* (n 3) 409. Others use the term to describe the (universal) territorial scope of change in responsibility, see e.g. Jennings and Watts (n 27) 209; Shaw, 'State Succession Revisited' (n 259), 39. Critical on the use of the term Marek (n 61) 10, footnote 3.

320 ibid 10–13. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 121 considers universal succession and continuity as two interpretations of the same factual situation; also Crawford *Brownlie's Principles of Public International Law* (n 3) 409.

321 Crawford *The Creation of States* (n 308) 670 "The rights are better referred to the entity than the entity to the rights"; cf. Marek (n 61) 10 "in the case of identity there is one subject of international law; in the case of succession there are at least two"; similar Stern, 'La Succession d'États' (n 283), 40–41.

322 E.g. according to majority opinion, rights to membership in an international organization do not pass to the successor state, cf. e.g. Crawford *Brownlie's Principles of Public International Law* (n 3) 428; Delbrück and Wolfrum (n 266) 168; cf. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 114; for cases of division of states Zimmermann and Devaney, 'State Succession in Treaties (2019)' (n 306) paras. 21-22.

"resurrection" of the Baltic states.[323] These points do not mean that the critique with respect to the first approach is not cogent. But the vague and sometimes rather subjective criteria of "sameness" are essentially due to the definition's contingency on the malleable definition of statehood under public international law, something state succession cannot overcome.

In general, the continuity of states is presumed, even when fundamental territorial, personal, or political upheavals have taken place.[324] Thus, as a rule, there is no state succession when only *internal*, even dramatic, changes occur, as long as the state's *external* personality is not touched.[325] Generally, changes in the governmental power of a state, such as a *coup d'état* or military occupation are *not* considered instances of state succession.[326] The

323 Marek (n 61) 6; Crawford *The Creation of States* (n 308) 669/670, 689/690 with further examples. For further information on the case of the Baltic states see *infra*, Chapter IV) B) III) 2).

324 ibid 700–701, 714; Antonello Tancredi, 'Dismemberment of States (2007)' in: *MPEPIL* (n 2) para. 9; Arnauld *Völkerrecht* (n 255) para. 73; Ziemele, 'States, Extinction of (2007)' (n 308) paras. 2, 3 "Extinction of a State is clearly an exception in international law"; Koskenniemi and Lehto (n 255), 183 "la pratique préfère nettement la continuation à l'extinction".

325 Crawford *The Creation of States* (n 308) 679 with examples of the Russian, China's and the Arabic Revolution; Oscar Schachter, 'State Succession: The Once and Future Law' (1992-1993), 33 Va J Int'l L 253 254; Delbrück and Wolfrum (n 266) 160, para. 2.c) with reference to the example of China; Lauterpacht *Private Law Sources and Analogies* (n 61) 129–130; J. C Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* (2nd ed. C.H. Beck 1872) 50/51; August Bulmerincq, *Praxis, Theorie und Codification des Völkerrechts* (Duncker & Humblot 1874) 8 „Selbst Dynastien sind geschwunden, der Staat ist geblieben." („Even dynasties vanished, the state remained." [own translation from German]).

326 Cf. e.g. Verdross and Simma (n 23) 606-607, Heinrich B Oppenheim, *System des Völkerrechts* (2nd ed. U. Kröner 1866) 116–117; ILA, 'Resolution No 3/2008' (n 306) para. 3; Robert Y Jennings, 'General Course on Principles of International Law' (1967), 121 RdC 323 438; Jennings and Watts (n 27) § 57; Stern, 'La Succession d'États' (n 283), 40; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 513; Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 159; Ziemele, 'States, Extinction of (2007)' (n 308) para. 3; Vagts (n 295), 281/282; Verdross and Simma (n 23) 606-607, paras. 969-971; Crawford *The Creation of States* (n 308) 678-679, 688, 701 (but critical with respect to the term "failed states" ibid 720–723). The ILC started the work on succession with the topic of "Succession of States and Governments". Even if in 1963 in ILC, 'Report on the Work of its Fifteenth Session' (1963), 1963(II) YbILC 187 224, para. 57 it decided to limit the study "only to the extent necessary to supplement the study on State succession", succession of governments was still included in the 1968 ILC, 'First Report on Succession of States and Governments in Respect of Treaties (Special Rapporteur Waldock)' (n 302),

change of a state's name alone does not have any relevance for the state's identity.[327] Further, the change of size of a state's territory, and hence the number of people living in it, does not generally influence a state's personality.[328] Yet, again in practice, defining what constitute "internal" or "external" factors is often not easy, especially whether a constitutional change remains within the domestic sphere or might also have an impact on a state's personality.[329] Thus, the categories of continuity and succession are not as clear-cut and free of political agendas as their definitions might suggest. In such politically sensitive and internally often disruptive situations as those evoked by state succession, the final outcome will almost always not follow strict legal rules but will be the product of political bargaining.

III) Change of Responsibility for the International Relations

Additionally, there must be a change of "responsibility for the international relations of a territory". Here, "responsibility" is not to be understood in the

90. The topic of succession of governments was only eliminated in the following reports. But see also the comments of some states during the discussion of the draft articles on Succession of States in Respect of Treaties in the UNGA Sixth Committee arguing for a succession category of "social revolution", summarized in ILC, 'First Report on Succession of States in Respect of Treaties (Special Rapporteur Vallat)' (1974), 1974(II(1)) YbILC 1 14-16, paras. 50-57. Lauterpacht *Private Law Sources and Analogies* (n 61) 130 also alluded to the fact that non-significance of changes in government is essentially a legal premise, not a natural given; similar Schachter (n 325), 254–255. A recent author including governmental changes in the definition of succession is Tai-Heng Cheng, *State Succession and Commercial Obligations* (Transnational Publishers 2006) 38-53.

327 Crawford *The Creation of States* (n 308) 680, footnote 54; ILA, 'Resolution No 3/2008' (n 306) para. 3; Stern, 'La Succession d'États' (n 283), 40.

328 Crawford *The Creation of States* (n 308) 673, 678; ILA, 'Resolution No 3/2008' (n 306) para. 3; cf. Zimmermann, 'Continuity of States (2006)' (n 308) 13–14; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 513; Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 159; Jennings and Watts (n 27) § 57; Stern, 'La Succession d'États' (n 283), 40; Vagts (n 295), 282.

329 Cf. Schachter (n 325), 254/255; see also Crawford *The Creation of States* (n 308) 673 "Even if the persistence of the constitutional system is not a strict prerequisite, the presumption of continuity is especially strong when the constitutional system of a state, despite the territorial change, remains the same". E.g., even if the dissolution of Czechoslovakia is generally considered a case of state succession, *infra*, Chapter IV) B) V) 1), Tomuschat, 'Die Vertreibung der Sudetendeutschen' (n 266), 49/50 considers it a (mere) "constitutional act" .

sense of the secondary rules of state responsibility but in the special context of succession.[330] The ILC commentary to Art. 2 VCSST

> "considered that the expression 'in the responsibility for the international relations of territory' is preferable to other expressions such as 'in the sovereignty in respect of territory' […], because it is a formula commonly used in State practice and more appropriate to cover in a neutral manner any specific case independently of the particular status of the territory in question".[331]

But conversely to what the reference to "common usage" might pretend, the meaning of "responsibility for the international relations of a territory" cannot be derived from common sense, from internal reference to a definition in the VCSST, or from external international law; it can only be detected by analyzing the drafting history of the VCSST.[332] Especially the term's relationship with the term of sovereignty was a manifest bone of contention within the ILC. *Sir Humphrey Waldock*, the first rapporteur on the issue of succession in respect of treaties, originally proposed the wording "possession of the competence to conclude treaties with respect to a given territory"[333] because the term "sovereignty" was perceived as too narrow and not "capable of covering such special cases as 'mandates', trusteeships and protected States".[334] Yet, several commission members insisted on the significance of the reference to sovereignty in order to exclude scenarios of

330 ILC, 'Draft Articles on Succession of States in Respect of Treaties with Commentaries' (1974), 1974(II(1)) YbILC 174 175/176, para. 4. Art. 39 VCSST (n 20) explicitly excluded this topic from its ambit. It is now dealt with under the heading of "State Succession to International Responsibility", cf. *supra*, footnote 43.

331 ILC, 'Draft Articles on Succession of States in Respect of Treaties with Commentaries' (n 330), 175/176, para. 4. Art. 2(a) VCSSPAD (n 22) consciously copied this provision and its underlying assumptions, see ILC, 'Draft Articles on Succession of States in Respect of State Property, Archives and Debts With Commentaries' (1981), 1981(II(2)) YbILC 20 21/22, paras. 3-4.

332 Cf. Lorenzo Gradoni, 'Art. 2' in Giovanni Distefano, Gloria Gaggioli and Aymeric Hêche (eds), *La Convention de Vienne de 1978 sur la Succession d'États en Matière de Traités: Commentaire Article par Article et Études Thématiques* (Bruylant 2016) 87 92, para. 6 and in detail on the drafting history of Article 2, ibid 100-107, paras. 23-32.

333 ILC, 'First Report on Succession of States and Governments in Respect of Treaties (Special Rapporteur Waldock)' (n 302), 90; ILC, 'Second Report on Succession in Respect of Treaties (Special Rapporteur Waldock)' (n 302), 50, 51, paras. 2-3.

334 ibid 51, para. 4.

military occupation from the definition.[335] The more inclusive proposal by *Waldock*, defining succession as "the replacement of one State by another in the sovereignty of territory *or* in the competence to conclude treaties with respect to territory",[336] was again opposed by some members of the commission, mainly due to the unclear relationship between the two terms.[337] This "impasse"[338] was only solved by the drafting committee suggesting the above formula, which is found in the final convention.[339] Hence, the notion of sovereignty was mainly rejected in relation to its application in cases of dependent territories. The inclusion of decolonization scenarios into the topic of succession, however, was predetermined by the description of the ILC's mandate.[340] In light of Art. 2 lit. b) VCSST's drafting history, the term "responsibility for the international relations of a territory" therefore includes sovereignty, but *beyond* that encompasses changes in states not completely or only partly sovereign,[341] or situations in which the actual exercise of responsibility over a territory does not neatly coincide with the

335 Cf. ILC, 'Report on the Work of its Twentieth Session' (1968), 1968(II) YbILC 191 217, para. 47.

336 ILC, 'Second Report on Succession in Respect of Treaties (Special Rapporteur Waldock)' (n 302), 50 [emphasis added].

337 Cf. especially comments by Kearney, in ILC, 'Summary Records of the 1068th Meeting' (1970), 1970(I) YbILC 138 141, para. 34; Castañeda, ibid 157, para. 10; Thiam, ibid 162, para. 70; Bartoš; ibid 163, paras. 3, 4; Tabibi, ibid 164, para. 17. Summarily on the discussion ILC, 'Report on the Work of its Twenty-Second Session' (1970), 1970(II) YbILC 271 303, paras. 50, 51.

338 Gradoni, 'Art. 2' (n 332) 103, para. 27.

339 ibid 106/107, paras. 31, 32. For an instructive summary of the genesis of the definition cf. ILC, 'First Report on Succession of States in Respect of Treaties (Special Rapporteur Vallat)' (n 326), 26-27, paras. 107-110. ibid 27, para. 110 "the expression 'responsibility for the international relations of' met the wishes of those who objected to the use of the term 'sovereignty' and was sufficiently wide and flexible to satisfy those who thought that the expression 'capacity to conclude treaties' was inadequate." On the colonial connotations of the expression Barbara Miltner, 'Territory and Its Relationship to Treaties' in Dino Kritsiotis and Michael J Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2018) 468 473 describing the expression as a "euphemism" which "downplayed the connection to colonialism"`.

340 UNGA, 'Report of the International Law Commission on the Work of its Fourteenth Session' (20 November 1962) UN Doc. A/RES/1765 (XVII) para. 3 lit.c) had instructed the ILC to "[c]ontinue its work on the succession of States and Governments [...] with appropriate reference to the views of States which have achieved independence since the Second World War".

341 Gradoni, 'Art. 2' (n 332) 109, para. 35.

legal status of sovereignty.[342] Such a reading aligns as well with the opinion of the majority of writers on the issue linking state succession to a change in sovereignty.[343]

IV) Lawfulness of Succession

A further, intensely debated,[344] issue is the question of whether state succession can only be brought about by lawful means, i.e. whether its definition is premised on conformity with international law.[345] The most relevant

342 Examples are according to Miltner, 'Territory and Its Relationship to Treaties' (n 339) 481 territories under lease, overseas military bases, trust and non-self governing territories, condominia where a state, still responsible for the international relations of the territory at least for a certain amount of time does not exercise effective sovereignty. But see Jennings (n 326), 440 who excluded time-limited transmissions of the right to use the land, such as leases, from the category of successions.

343 O'Connell *The Law of State Succession* (n 2) 3; Jennings (n 326), 437; Crawford *Brownlie's Principles of Public International Law* (n 3) 409; cf. Herdegen (n 255) § 29 para. 1; Kirsten Schmalenbach, 'International Organizations or Institutions, Succession (2017)' in: *MPEPIL* (n 2) para. 1; Hasani (n 2), 114, 115; Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 314/315. Differently, referring to the rise or fall in the number of states worldwide Arnauld *Völkerrecht* (n 255) para. 104. Explicitly on the relationship to Art. 2 (b) VCSST Gradoni, 'Art. 2' (n 332) 101, para. 23, footnote 51 and Gloria Gaggioli, 'Art. 6' in: *La Convention de Vienne sur la Succession d'États en Matière de Traités - Commentaire* (n 332) 181 207, para. 38 "Mis à part ces cas spéciaux, c'est bien de transfert de souveraineté sur un territoire dont il s'agit. En définitive, la 'responsabilité des relations internationales' est une prérogative souveraine."

344 The issue lately came up in the deliberations of the IDI as well as the ILC with respect to the topic of state succession in matters of state responsibility, see IDI, 'Deliberations, 14th Commission, First Plenary Session (2008): State Succession in Matters of State Responsibility' (2015), 76(Annex 3) YbIDI 607 and ILC, 'Seventieth Session, Provisional Summary Record of the 3432nd Meeting: Succession of States in Respect of State Responsibility' (18 July 2018) UN Doc. A/CN.4/SR.3432.

345 In favour of such requirement Crawford *Brownlie's Principles of Public International Law* (n 3) 409. Cf. also the comments by Kohen (Special Rapporteur) IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 626, 627; Koroma ibid 636; Tomka, ibid 676; without discussion Richard Happ and Sebastian Wuschka, 'Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories' (2016), 33(3) JInt'l Arb 245 253, footnote 48; citing Art. 6 VCSST Odysseas G Repousis and James Fry, 'Armed Conflict and State Succession in Investor-State Arbitration' (2015-2016), 22 ColumJEurL 421 446; cf. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 96, 97; for Art. 15 VCSST Attila Tanzi and Lucrezia Iapichino, 'Art. 15' in: *La*

examples are belligerent occupations, i.e. "situation[s] where the forces of one or more States exercise effective control over a territory of another State without the latter State's volition"[346] and the following annexation of the territory without the consent of the other state. Art. 6 VCSST and Art. 3 VCSSPAD unambiguously limit the respective conventions' scope to consequences of an internationally lawful succession.[347] This limitation, however, does not necessarily mean that the international law on state succession in general was not applicable to territorial changes in violation of international law.[348] The customary status of Art. 6 VCSST is unsettled.[349] Moreover, Art. 40 VCSST only stipulates that the convention "shall not prejudge any question that may arise in regard to a treaty from the military occupation of a territory."[350] Annexations or conquest had, for a long time, been a frequent and generally accepted mode of territorial acquisition.[351] Today, because of the generally agreed peremptory status of the prohibition of the use of force under Art. 2 para. 4 UN Charter (UNC),[352] territorial

Convention de Vienne sur la Succession d'États en Matière de Traités - Commentaire (n 332) 554-555, paras. 25-27.

346 Eyal Benvenisti, 'Occupation, Belligerent (2009)' in: *MPEPIL* (n 2) para. 1; cf. also Art. 42 Regulations Concerning the Laws and Customs of War on Land. Annex to Convention (IV) respecting the Laws and Customs of War on Land (18 October 1907) in: Bevans, Treaties and Other International Agreements of the USA, Vol. I (Department of State Publication 1907) 643.

347 As can be taken from the ILC's deliberation, there was consensus that illegal actions should not fall under the term of succession, cf. Gaggioli, 'Art. 6' (n 343) 184, 186, paras. 4, 6. The mentioned discussion intending to exclude military occupations from the VCSST's ambit, *supra*, footnote 335, is further evidence of this conviction.

348 Daniel Costelloe, 'Treaty Succession in Annexed Territory' (2016), 65(2) ICLQ 343 350; the ILC, 'Draft Articles on Succession of States in Respect of Treaties with Commentaries' (n 330), Commentary to Art. 6 VCSST, 181, para. 1 assumed that "those articles are to apply to facts occurring and situations established in conformity with international law. Accordingly, it does not as a rule state that their application is so limited."

349 Gaggioli, 'Art. 6' (n 343) 196, para. 22. On the drafting history of this provision ibid 184-195, paras. 4–15.

350 The VCSSPAD (n 22) does not contain a similar provision.

351 Rainer Hofmann, 'Annexation (2013)' in: *MPEPIL* (n 2) paras. 4, 5; for conquest and *debellatio* Kohen and Hébié, 'Territory, Acquisition (2021)' (n 286) para. 51; cf. also *Island of Palmas Case* (n 36) 839.

352 Jochen A Frowein, 'Ius Cogens (2013)' in: *MPEPIL* (n 2) para. 8; Hofmann, 'Annexation (2013)' (n 351) 38; ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001), 2001(II/2) YbILC 30 112/113, para. 4.

changes in violation of that norm are considered as null and void.[353] Thus, illegal shifts with respect to the factual power over a territory do not constitute cases of state succession[354] since they cannot lead to the change of "responsibility for the international relations of a territory" in the sense elaborated on. This argument is in line with the above-mentioned generally held view that a belligerent occupation will not lead to a change in the external personality of the state.[355]

That assumption, however, is still challenged.[356] The main argument behind the challenge is that a power acquiring control over a territory by unlawful, often forceful, means shall not be put into a better position than

353 Kohen and Hébié, 'Territory, Acquisition (2021)' (n 286) para. 51; Hofmann, 'Annexation (2013)' (n 351) para. 28; UNGA, 'Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations' (24 October 1970) UN Doc. A/RES/25/2625 (XXV) "No territorial acquisition resulting from the threat or use of force shall be recognized as legal."

354 ILC, 'Draft Articles on Succession of States in Respect of State Responsibility' [2019] Report on the Work of its Seventy-First Session (2019), UN Doc A/74/10 305, Commentary to Art. 5, 308; ILC, 'Second Report on Succession of States in Respect of State Responsibility (Special Rapporteur Šturma)' (6 April 2018) UN Doc. A/CN.4/719 paras. 36, 39; Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 96, 97; Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 320; Costelloe (n 348), 346.

355 Benvenisti, 'Occupation, Belligerent (2009)' (n 346) para. 1. Art. 39, 40 VCSST (n 20) explicitly negate the convention's applicability in cases of outbreak of hostilities and military occupation.

356 Cf. e.g. several statements by members of the IDI during the discussion on state succession in matters of state responsibility: Frowein, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 525/526, 635; Arsanjani, ibid 626; Benvenisti, ibid.; Tomuschat, ibid 626/627; Wolfrum, ibid 675/676; Pellet, ibid 676. Also USA, 'Observations on the Draft Articles on Succession of States in Respect of Treaties', 1974(II(1)) YbILC 328; Gaggioli, 'Art. 6' (n 343) 219, paras. 55-56; Odysseas G Repousis, 'Why Russian Investment Treaties Could Apply to Crimea and What Would This Mean for the Ongoing Russo–Ukrainian Territorial Conflict' (2016), 32(3) Arbitr Int 459 464; Ziereis (n 58) 34, 41, 46; Patrick Dumberry, 'Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russian under the Ukraine–Russia BIT' (2018), 9(3) JIDS 506 514 "Those rules which are considered as reflecting customary international law will continue to apply" [footnote omitted] (but excluding the moving treaty frontiers rule ibid 515). For an analogous application Ago, ILC, 'Summary Record of the Twenty-Second Session, 1071st Meeting: Succession of States and Governments in Respect of Treaties' (1970), 1970(I) YbILC 168, para. 60 and Ronen *Transition from Illegal Regimes* (n 14) 251, footnote 12.

a state taking over lawfully.[357] Fundamental rules such as the inviolability of international borders, encapsulated in Art. 11 VCSST, should continue to apply[358] and individuals should not be deprived of protection.[359] Moreover, some commentators point to the existence, and sometimes long persistence, of situations brought about by unlawful means,[360] which would need to be regulated in the interest of legal security and effectiveness.[361] Hence, the occupant should at least take on obligations towards the individuals.[362] Often, proponents of this view refer to the ICJ's *South West Africa* case, where the court elaborated:

> "In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory."[363]

357 Kazazi, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 675; Reinisch, ILC, 'Seventieth Session, Provisional Summary Record of the 3432nd Meeting' (n 344) 8; Grossman-Guiloff, ibid 7; but also response by Šturma (Special Rapporteur), ibid 13–14; see also statement by the agent of Belarus in the UNGA Sixth Committee, 'Summary Record of the Twenty-Nineth Meeting: Report of the International Law Commission on the Work of its Seventieth Session' (10 December 2018) UN Doc. A/C.6/73/SR.29 13, para. 81.

358 USA (n 356), 328; cf. Gaggioli, 'Art. 6' (n 343) 220, 225, paras. 58, 68–69.

359 Benvenisti, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 626; Costelloe (n 348), 363 speaks of a "legal vacuum"; see also Happ and Wuschka (n 345), 255 who nevertheless do not support the application of succession principles to occupation scenarios.

360 Frowein, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 625/626; Costelloe (n 348), 347/348.

361 Tomuschat, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 627.

362 Costelloe (n 348), 376-378; Rao, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 674; joint "explanatory statement" by Abi-Saab, Arsanjani, Bastid-Burdeau, Infante Caffi, Kazazi, Lee, Müllerson, Nolte, Rao, Reisman, Treves and Wolfrum, ibid 683/684; USA (n 356), 328.

363 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* 21 June 1971, Advisory Opinion, ICJ Rep 1971 16 para. 125 (ICJ); *The Peter Pázmány University v. The State of Czechoslovakia,* 15 December 1933, Appeal from a Judgment of

Admittedly, it is often tough to determine a situation as unlawful in a world lacking a centralized authority.[364] Nevertheless, to include situations born out of severe violations of international law into the category of state succession is doctrinally confusing and practically futile if not dangerous for two reasons. First, this strand of argument mixes up the term of succession as a factual situation with that of succession as a legal consequence. Because this strand wants some obligations to survive, it labels the situation as a succession (or succession-like). The alleged rule that a state as a lawful successor to another state will be bound by certain obligations and therefore "disadvantaged" is often merely an allegation not proved by any state practice in many cases.[365] The view uses a legal scenery that is merely rhetorical (the succession into obligations) as justification for a rule that is contra-intuitive (an aggressor being a successor).

Second, as already mentioned, succession involves a system heavily contingent on other rules of international law, among them the essential rules on sovereignty and statehood. To include unlawful situations into its definition would partly decouple it from that basis. Moreover, state succession means the *permanent* transfer of responsibility for the international relations of a territory. Applying rules of state succession to situations outlawed by the international community implies accepting their permanence.[366] This acceptance runs counter to the general obligation not to recognize a situation entailed by the violation of peremptory norms as legal,[367] and to

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the Hungaro-Czechoslovak Mixed Arbitral Tribunal, Ser A/B No 61 208 (PCIJ). The ECtHR reflected on this position in *Loizidou v. Turkey,* Appl. No.15318/89, 18 December 1996, Decision on the Merits, ECHR 1996-VI para. 45 (ECtHR [GC]) and applied it in *Cyprus v. Turkey,* Appl. No. 25781/94, 10 May 2021, Decision on the Merits, ECHR 2001-IV 1 paras. 89-98 (ECtHR [GC]).

364 Which led Meron, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 635 to conclude that such legality prerequisite should not be applied; similarly Reisman, ibid 677; cf. also Gaggioli, 'Art. 6' (n 343) 183, para. 2.

365 Cf. ILC, 'Draft Articles on Succession of States in Respect of State Responsibility' (n 354), Commentary to Art. 5, 309 "[the requirement of legality] does not provide any advantage to a State violating international law. To the contrary, it does not give any legal effect to unlawful territorial situations."

366 See also Ronen *Transition from Illegal Regimes* (n 14) 160 "State succession is a forward-looking doctrine, premised on the validity of actions of the previous regime, and concerned with the maintenance of this validity under the new legal order. In contrast, transition from an illegal regime is premised on the invalidity of the actions of the previous regime."

367 Cf. ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 352), Commentary on Art. 41, 114, para. 5 "The obligation

the legal maxim of *ex inuiria ius non oritur*.[368] In fact, the aggressor state could also avail itself of some of the privileges of being a successor.[369] In many cases, transferring only obligations but not rights becomes a difficult undertaking as the two categories are not always easy to differentiate: Clauses such as Art. 11 and 12 VCSST are not drafted in the language of rights and obligations but contain systematic decisions.[370]

Furthermore, not applying rules of state succession to illegal situations would not leave the inhabitants of the territory without protection. The conduct of hostilities on a territory generally has no effect on the applicability of international treaties.[371] Apt and universally applicable customary

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[…] also prohibits acts which would imply such recognition." See on the general obligation of non-recognition for many UNGA, 'Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations' (n 353); Hofmann, 'Annexation (2013)' (n 351) paras. 1, 4, 14–21, 34, 38; Escudero Espinosa (n 315). This duty, however, does not apply to the occupied state, that can freely decide about the fate of the domestic legal order, cf. Ronen *Transition from Illegal Regimes* (n 14) 160. See with respect to violations of the right of self-determination and humanitarian law *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* 9 July 2004, Advisory Opinion, ICJ Rep 2004 136 200, para. 159 (ICJ). See also the international community's reaction to Russia's annexation of Crimea in 2014, e.g. UNGA, 'Resolution on the Territorial Integrity of Ukraine' (27 March 2014) UN Doc. A/RES/68/262.

368 Similarly ILC, 'Draft Articles on Succession of States in Respect of State Responsibility' (n 354), Commentary to Art. 5, 309; Gaggioli, 'Art. 6' (n 343) 223, para. 64; for Art. 15 VCSST Dumberry, 'Requiem for Crimea' (n 356), 515.

369 Cf. Comment by Lehto, ILC, 'Seventieth Session, Provisional Summary Record of the 3435th Meeting: Succession of States in Respect of State Responsibility' (24 July 2018) UN Doc. A/CN.4/SR.3435 7. Such advantages might consist in assuming assets and property of the former state.

370 Cf. ILC, 'First Report on Succession of States in Respect of Treaties (Special Rapporteur Vallat)' (n 326), 35, para. 176; Gaggioli, 'Art. 6' (n 343) 186, para. 7.

371 Cf. ILC, 'Draft Articles on the Effects of Armed Conflicts on Treaties with Commentaries' (2011), 2011(II(2)) YbILC 108 Commentary on Art. 3, 111-112. The rule of the inviolability of international borders encapsulated in Art. 11 VCSST also applies outside situations of state succession, *see* Art. 2 UN Charter; Jean-Paul Pancracio, 'Art. 11' in: *La Convention de Vienne sur la Succession d'États en Matière de Traités - Commentaire* (n 332) 373 para. 59; *Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali),* 22 December 1986, ICJ Rep 1986 554 para. 24 (ICJ); Vagts (n 295), 289; Stern, 'La Succession d'États' (n 283), 308; Crawford *Brownlie's Principles of Public International Law* (n 3) 424 (sceptical towards the idea of localized treaties in general); Shaw, 'State Succession Revisited' (n 259), 63; for Art. 11 VCSST Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 399; Rein Müllerson, 'New Developments in the Former USSR and Yugoslavia' (1992-1993), 33

rules under international humanitarian law cover such situations,[372] and human rights law still applies, partly also extra-territorially.[373] Occupation is thus often more a problem of attribution than one of a lack of legal rules.[374] Many authors conflate the argument for extending the territorial applicability of the occupant's treaty obligations with the argument for a succession of the occupant into the genuine sovereign's obligations.[375]

In the cited passage from the ICJ's *South-West Africa* decision,[376] the court pronounced on the permissibility of recognizing certain acts of the illegal occupant by third states. It did not deal with an obligation of the occupant. In the same vein, international institutions and states have taken a pragmatic approach to the rights of people under occupation and often recognized their civil status and accorded them pertaining rights.[377] This "provisional *de facto* recognition"[378] is different to classifying the situation as a succession. It merely acknowledges the *fact* of effective control over the territory by the occupant but does not condone a change of sovereignty over the territory. And such *de-facto* recognition as approved by the ICJ in *South West Africa* is a qualification of the rule of non-recognition,[379] not its rejection. The (potentially) still existing legal gaps in protection as compared to the situation before any occupation, such as the inability of individuals to appeal to an international court or tribunal, are a consequence of the exercise of illegal power over the territory. In this respect, the

Va J Int'l L 299 313, footnote 53; Samuel K N Blay, 'Territorial Integrity and Political Independence (2010)' in: *MPEPIL* (n 2) paras. 5-7.

372 Cf. Hofmann, 'Annexation (2013)' (n 351) para. 28; Benvenisti, 'Occupation, Belligerent (2009)' (n 346) paras. 12-31; also John Quigley, 'Mass Displacement and the Individual Right of Return' (1992), 68 BYbIL 65 70–71. See Art. 43 Annex to Hague Convention (IV) (n 346).

373 *ICJ Wall Opinion* (n 367) 177-181, paras. 102-113; Benvenisti, 'Occupation, Belligerent (2009)' (n 346) paras. 13-16; Costelloe (n 348), 359–360.

374 Cf. examples from ECtHR jurisprudence in ibid 367–369, 372/373; Marko Milanović and Tatjana Papić, 'The Applicability of the ECHR in Contested Territories' (2018), 67(04) ICLQ 779.

375 See e.g. Costelloe (n 348), 375-376 who speaks about succession into the *annexing state's* international obligations. However, in this case no question of taking over of another subject's obligations but rather of the extension of the occupant's *own* obligations arises.

376 *ICJ South West Africa (Advisory Opinion)* (n 363) para. 125.

377 Cf. Hofmann, 'Annexation (2013)' (n 351) para. 29.

378 ibid para. 30 [emphasis added].

379 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (n 352), Commentary to Art. 41, 115, para. 10.

practical benefits of succession are relatively flimsy, assuming the occupier would repudiate them.

In summary, changes in territory brought about by forcible means infringing *jus cogens* norms such as Art. 2 para. 4 UNC should not be considered as cases of state succession.[380] This argument is supported by states' recent endorsement[381] of the draft Article 5 in the ILC's second report on the issue of succession of states in respect of state responsibility[382], which copies the wording of Art. 6 VCSST. In line with this endorsement, international tribunals having to deal with the potential application of treaties protecting individual rights in occupied territories have been cautious to apply rules outside the treaty context in order to solve a dispute and shied away from drawing analogies to succession.[383] While this view avoids (unnecessary) doctrinal inconsistencies and politically as well as legally undesirable results, it underscores the force of the basic norms of international law[384] and contributes to the unity of the international legal order.[385] Therefore, in the following analysis, cases of forcible occupation of a territory, such as the illegal annexation of Crimea,[386] will not come under

380 Cf. Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 96.

381 Cf. statements by Sweden (speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)), UNGA Sixth Committee, 'Summary Record of the Twenty-Eighth Meeting: Report of the ILC on the Work of its Seventieth Session' (30 October 2018) UN Doc. A/C.6/73/SR.28 para. 55, Austria, ibid para. 63; Japan, ibid para. 86; Czechia, ibid para. 100; Slovakia, ibid para. 110; Korea, UNGA Sixth Committee, 'Summary Record of the Thiertieth Meeting: Report of the ILC on the Work of its Seventieth Session' (6 December 2018) UN Doc. A/C.6/73/SR.30 para. 29; Estonia, ibid para. 37; Malaysia, ibid para. 76.

382 ILC, 'Second Report on Succession of States in Respect of State Responsibility (Special Rapporteur Šturma)' (n 354) para. 41.

383 According to the few publicly available information on investment litigation concerning Crimea (see footnotes 131-134, 158 in Dumberry, 'Requiem for Crimea' (n 356)), tribunals did not assume the take over of Ukrainian obligations by Russia but based their jurisdiction on provisions of particular treaties and e.g. interpreted the scope of the treaties' legal terms such as "territory". Supporting such approach Happ and Wuschka (n 345), 264.

384 Cf. Kohen, IDI, 'Deliberations, 14th Commission, First Plenary Session (2008)' (n 344), 626, 627, 636, 678; Tomka, ibid 676.

385 See on the responsibility of actors in international law to develop a coherent system of international law Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009), 20(2) EJIL 265 289–290.

386 Christian Walter, 'Postscript: Self-Determination, Secession, and the Crimean Crisis 2014' in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (OUP 2014) 293 especially

scrutiny. The field of humanitarian law (*ius in bello*) will be consciously excluded from the ambit of this study.

C) Categories of State Succession

Even if delimited in line with these aforesaid requirements, the common definitions of succession in Art. 2 para. 1 lit. b) VCSST and Art. 2 para. 1 lit. a) VCSSPAD still cover diverse situations. Driven by a natural inclination towards systematization, international doctrine has invented several categories of different types of succession. These categories are routinely used in legal literature and their common understanding silently assumed. Yet, neither do they represent officially agreed standards nor is their use uniform, and modes of succession may, in reality, overlap to a significant extent. Even the VCSST and the VCSSPAD (Vienna Conventions) differ in their terminology.[387] To avoid political and potentially legal implications, states are often more than reluctant to precisely label a certain situation.[388] While the application of these categories thus always has to be taken with a grain of salt,[389] they do help in grouping different succession scenarios and therefore in understanding their relationship and relevance more easily.

310; Christian Marxsen, 'The Crimea Crisis: An International Law Perspective' (2014), 74 HJIL 367 380–391.

387 Cf. e.g. the VCSST (n 20) that only speaks of "separation of parts", Art. 34, 35, and the VCSSPAD (n 22) that distinguishes between "separation of parts", Art. 17, and "dissolution", Art. 18.

388 Especially for secessions Thürer and Burri, 'Secession (2009)' (n 317) para. 38.

389 Critical on the value of such categories Crawford *Brownlie's Principles of Public International Law* (n 3) 411–412; cautious also Jennings and Watts (n 27) § 60; Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 146 "that we speak at all of 'annexation', 'cession', 'dismemberment', 'secession', or the like, is not because such categories are set in stone, nor indeed because they are terms of art, but because we accept them as useful and necessary descriptive categories. That they are either useful or necessary, however, is a reflection of the particular theory of succession adopted."

I) Dismemberment (or Dissolution) and Separation

"The dismemberment of a State takes place when its territory becomes the territory of two or more new States. Consequently, the predecessor State ceases to exist and the newly formed States are regarded as its successors."[390] Recent prominent examples constitute the dissolution of the former Yugoslavia and of Czechoslovakia. Separation describes the *consensual* dissociation of a territory from a state[391] while secession is understood as "the *unilateral* withdrawal from a State of a constituent part"[392]. In both cases (separation and secession), different to dismemberment, the mother state continues to exist. The category of secession is controversial, especially concerning the prerequisite of unilateralism.[393] In reality, such a distinction is often hard to prove, and diplomatic practice is not without ambiguities.[394] It is thus not used as an independent category in this book.

The VCSST only knows the category of "separation of parts of a state" and basically does not differentiate between a situation when a state disintegrates completely or one when a "rump state" remains in place, cf. Art. 34, 36-38. Only Art. 35 VCSST is concerned with the latter case. The VCSSPAD explicitly distinguishes between the "separation of parts of a state", Art. 17,

390 Tancredi, 'Dismemberment of States (2007)' (n 324) para. 1 [references omitted]; also Zemanek (n 38), 210.

391 Thürer and Burri, 'Secession (2009)' (n 317) paras. 1, 4 (with certain reservations).

392 ibid para. 1 who, however, like Kevin Grimmeiß, *Sezession und Reaktion* (Mohr Siebeck 2019) 8-9 with reference to *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* 22 July 2010, Advisory Opinion, Dissenting Opinion Judge Koroma, ICJ Rep 2010 467 477, para. 23 (ICJ), do not consider the emergence of a new state as a prerequisite for secession but accept that the seceding territory may become part of another state; arguably also Milena Sterio, *Secession in International Law: A New Framework* (Edward Elgar 2018) 29. Against such possibility Crawford *The Creation of States* (n 308) 375; Georg Nolte, 'Secession and External Intervention' in Marcelo G Kohen (ed), *Secession: International Law Perspectives* (CUP 2006) 65 65 and arguably Aleksandar Pavković and Peter Radan, 'Introduction: What Is Secession?' in Aleksandar Pavković and Peter Radan (eds), *The Ashgate Research Companion to Secession* (Ashgate 2011).

393 See Grimmeiß (n 392) 11–17, defining secession as the separation of part of a state as a consequence of an active decision of the separating part; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 520, 524 and Arnauld *Völkerrecht* (n 255) § 2 para. 104, defining separation as the opposite of complete dissolution regardless of its consensual nature. The prerequisite of the use of force is controversial, *pro* e.g. Crawford *The Creation of States* (n 308) 375 with reference to Marek (n 61) 62; *contra* Grimmeiß (n 392) 17–18.

394 Cf. ibid 11–14.

30, 40, and "dissolution", Art. 18, 31, 41. For reason of clarity and alignment with the terminology of the Vienna Conventions, the term "separation" will be used here to encompass both, consensual and unilateral, separations of a part of territory from a state.[395] Such separations have taken place in Eritrea, Montenegro, South Sudan, and (arguably) the Kosovo, though the latter's quality as a state is still in dispute.

II) Incorporation and Merger (Uniting)

Contrary to those forms of disintegration, leading to an increase in the number of states, there are also cases of state succession effectively leading to fewer states: incorporations and mergers. With an incorporation (or absorption[396]) a formally independent sovereign state is completely integrated into another existing state, i.e. loses its personality while the other keeps its personality.[397] The most prominent example constitutes the uniting of the two German states in 1990. Cases in which neither of the two or more uniting states continues and in which a completely new state comes into existence, are called mergers,[398] e.g. the case of the unified Yemen. The Vienna Conventions do not differentiate between the scenarios of integration and merger and call both scenarios "uniting of states".[399]

395 In this way also 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) 406; Arnauld *Völkerrecht* (n 255) § 2 para. 104.

396 Term used e.g. by Vagts (n 295), 285-286.

397 Cf. Zemanek (n 38), 211; Oliver Dörr, *Die Inkorporation als Tatbestand der Staatensukzession* (Duncker & Humblot 1995) 39.

398 Crawford *Brownlie's Principles of Public International Law* (n 3) 409; Zimmermann and Devaney, 'State Succession in Matters Other than Treaties (2019)' (n 295) para. 1; differently e.g. Papenfuß (n 37), 470 who calls this situation a "fusion" and uses "merger" as a category encompassing "fusions" and "incorporations".

399 Cf. Art. 31-33 VCSST (n 20) and Art. 16, 29, 39 VCSSPAD (n 22); but see also Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 521–522 who purport that the case of a voluntary incorporation was not anticipated by the VCSST.

III) Cessions

The common Vienna Conventions' definition of cessions encompasses changes in the responsibility for a territory no matter whether a new state emerges and/or another state vanishes in consequence of the succession, i.e. irrespective of a change in the number of states worldwide. Mere transfers of parts of territory from one state to another are hence included in the definition. Such transfers are regularly effected by cession of territory, i.e. the "consensual […] transfer of territorial sovereignty over a certain part of a territory by one state to another".[400] Cessions of territory that were not consensual but imposed upon one state by another (e.g., the ones after the First and Second World War) have not recently taken place and can therefore be excluded from the present analysis.

Cessions show the particularity that, while a change of sovereignty over a certain territory takes place, this change leads to no "external" changes of the personality of the states involved. Hence, these territorial transfers come closer to a case of continuity than to one of succession. They are guided by one of the few customary[401] rules of the law on succession embodied in Art. 15 VCSST, known as the "moving treaty frontiers rule". As the name suggests, transfers of territory are treated as changes in the demarcation of borders,[402] which does not resemble a succession scenario,

400 Dörr *Inkorporation* (n 397) 178 [own translation from German]. For a comprehensive definition of incorporation ibid 39, 40, 44-45, 178–180, 185-189. Importantly, "incorporation" of a territory into a state in this situation only relates to a part of a territory not having the, even partial, status of an independent subject of international law. It does not mean the incorporation of an independent state into another state; cf. Oliver Dörr, 'Cession (2019)' in: *MPEPIL* (n 2) para. 2.

401 *Sanum Investments Ltd. v, the Government of the Lao People's Democratic Republic, Award on Jurisdiction,* Case No. 2013-13, 13 December 2013 62-63, paras. 220-224 (PCA) and the sources cited there; Tanzi and Iapichino, 'Art. 15' (n 345) 546/547, para. 6; Costelloe (n 348), 343/344; Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 337 "at least with respect to cessions"; Delbrück and Wolfrum (n 266) 162–163; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 520, 521; Dörr, 'Cession (2019)' (n 400) para. 20. For an rule outside the Vienna Conventions cf. Jennings and Watts (n 27) § 65; Happ and Wuschka (n 345), 257; Strupp (n 2) 84/85.

402 In the same vein, Art. 14 VCSSPAD (n 22), with the regular caveat of mutual agreement, sets out that all immovable property and movable property of the transferred territory "connected with the activity of the predecessor State" will become property of the "successor" (cessionary). Again, the legal rule aligns with the new demarcation of borders. Art. 37 para. 2 VCSSPAD, in contrast, provides for an "equitable" partition of state debts.

but rather the extension of a state's legal regime.[403] The ILC also remarked on this circumstance,[404] but chose to include cessions for relatively practical reasons:

> "[T]he cases covered by the rule do involve a 'succession of States' in the sense that this concept is used in the present draft articles, namely a replacement of one State by another in the responsibility for the international relations of territory. Moreover, the rule is well established in State practice and is commonly included by writers among the cases of succession of States." [405]

While most authors endorse the inclusion of cessions into the category of succession (often by simply referring to above-mentioned definition in the Vienna Conventions without further discussion),[406] others exclude them,[407] and some consider cession as a "special" case[408] of succession. Today, cessions are considered the type of succession with "greatest practical relevance".[409] As consensual cessions are routinely based on individual agreement between the states concerned, they touch much less on sovereignty concerns than do other succession scenarios. States' attitudes towards individual rights in cases of cessions can provide valuable evidence for the content and existence of a rule of acquired rights and are therefore included in the analysis. The Vienna Conventions were basically drafted

403 Also Jennings and Watts (n 27) § 65 "there is no succession by the successor state to the treaty rights and obligations formerly applying to the territory, but rather a substitution of treaty regimes".

404 ILC, 'Draft Articles on Succession of States in Respect of Treaties with Commentaries' (n 330), Commentary on Art. 14, 208, para. 3, "The rule, since it envisages a simple substitution of one treaty regime for another, may appear *prima facie* not to involve any succession of States in respect of treaties." [italics in original].

405 ibid.

406 Jennings (n 326), 439-440 by emphasizing that a change in the number of states is no precondition for state succession; without discussion Herdegen (n 255) § 29 para. 1; Crawford *Brownlie's Principles of Public International Law* (n 3) 409; Vagts (n 295), 286; Dörr, 'Cession (2019)' (n 400) para. 1; but see, more subtle, Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 512.

407 Arnauld *Völkerrecht* (n 255) § 2 para. 104; arguably impicitly also Aust *Modern Treaty Law and Practice* (n 294) 320, who requires a change in the number of states for succession to take place.

408 Zemanek (n 38), 190; Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 337 without further explanation of what this "particular regime" would look like.

409 Dörr, 'Cession (2019)' (n 400) para. 1.

through the eyes of states and exclusively concern *international* treaties and *state* property and debts, i.e. the external relations of states vis-à-vis states.[410] For the inhabitants of the transferred territory, the "moving treaty frontiers rule" leads to discontinuity and not continuity, though.[411] It seems doubtful whether an analogous application of the principle with respect to the predecessor's domestic legal order is an appropriate solution. Even if evidence for the maintenance of individual rights can be taken from cessions, the inherent limits of the inference of general rules from this exceptional type of succession must be borne in mind.

IV) Decolonization

Controversial remains whether decolonization, i.e. the "process that signifies the attainment of independence of colonial territories, mandates, trusteeship territories, non-self-governing territories, and the remnants",[412] can be described as a genuine case of succession. This controversy arises because, at the time of independence, colonized territories were often not considered to be under the sovereignty of the colonial state or completely included into the latter's territory.[413] *Jennings* describes this situation as being "more akin to succession of governments than to succession of States" hence alluding to the fact that the continuing personality of the colonized state should not be challenged.[414] Some authors have tried to differentiate: While, e.g., under a protectorate, the personality of a state is more said

410 Art. 6 VCSSPAD (n 22) explicitly excludes state debts towards private creditors from its ambit. Furthermore, it has been noted that the principle of "equitable partition" of debts, no matter its customary status, is remarkably indefinite when it comes to the mode of distribution, cf. Carsten Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (2002), 96(2) AJIL 379 390.

411 Stern, 'La Succession d'États' (n 283), 135; Koskenniemi, 'Report of the Director of Studies of the English-speaking Section of the Centre' (n 284) 96 "reference to agreement and equity smacks of a pious wish or a diplomatic technique for glossing over a practical difficulty."

412 Rahmatullah Khan, 'Decolonization (2011)' in: *MPEPIL* (n 2) para. 1.

413 Cf. Thürer and Burri, 'Secession (2009)' (n 317) paras. 26-27; Crawford *The Creation of States* (n 308) 613-615; comment of Castañeda, ILC, 'Summary Record of the Twenty-Second Session, 1071st Meeting' (n 356), 157, para. 10.

414 Jennings (n 326), 448.

to continue,[415] this continuation would not be the case for mandates[416]. Decolonizations should, at least, plainly fall under the wide definition of the Vienna Conventions, which devote several of their provisions to so-called "newly independent states"[417] and in Art. 2 para. 1 lit. f) VCSST and Art. 2 para. 1 lit. e) of the VCSSPAD define them as "successor State[s] the territory of which immediately before the date of the succession of States [were] a dependent territory for the international relations of which the predecessor State was responsible". This inclusion into the Vienna Conventions has been continuously criticized for having spilt so much ink on an alleged remnant of the past.[418] Due to the ambit of this book, covering state succession as a practical phenomenon only from 1990 onwards,[419] decolonization is of limited significance here[420] and will therefore not be dealt with in detail. However, e.g., the independence of Eritrea and Sudan as well as the transfers of Hong Kong and Macau have historical roots in colonial times, which leads to particular consequences that are elaborated on in the following chapters.

V) Pacific Occupation

As set out in detail above, occupations, having been frequent and accepted ways of acquisition of territory in former times, today are not considered as a form of state succession since their violation of *jus cogens* norms prevents

415 Protectorates may take a variety of forms. Whether the protected state persists may therefore be subject to various considerations, cf. Crawford *The Creation of States* (n 308) 286–303. For protectorates as forms of a "partial succession" cf. Jennings and Watts (n 27) §§ 58, 60; Zemanek (n 38), 199–200, 203.

416 ibid 207-208. Crawford *The Creation of States* (n 308) 571-572, 574 accords mandates a "special" status.

417 Art. 16-30 VCSST (n 20), Art. 15, 28, 38 VCSSPAD (n 22).

418 Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 508–509; Verdross and Simma (n 23) 609, §974, 621, §997; Aust *Modern Treaty Law and Practice* (n 294) 321; Arnauld *Völkerrecht* (n 255) § 2 para. 108; Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 473. Cf. Vagts (n 295), 283, 288; Oeter, 'German Unification and State Succession' (n 283), 353, 379.

419 In more detail on the reasons for this limitation, *infra*, Chapter VI A).

420 Cf. James Crawford, 'Remarks' (1992), 86 ASIL Proceedings 15 17 "if the notion of a 'dependent territory' is limited, as seems to have been intended, to territories under Chapters XI and XII of the UN Charter, then arguably the only territories that fall within that category, amongst the recent crop of new states, are the Baltic states."

a change in sovereignty over the territory. However, there are cases of consensual occupation of a state's territory by another state or international organizations, where, by freely achieved agreement, "the former grants the latter, and the latter assumes, powers and responsibilities to maintain public order over a part of its territory and its population"[421]. *Benvenisti* lists as examples of such "pacific occupation" "treaties establishing military bases exclusively controlled by a foreign State" or "leases of territory for the exclusive use of another State and its nationals".[422] Here, an analogical application of succession rules is not precluded from the outset as these cases do not violate international law and show obvious similarities with such of cession of territory. Analogous to the argument, that the legal sovereign has "to ensure effective and continued application of provisions of [its own] human rights treaties by the occupant"[423], such obligations might also be assumed for rights acquired under the domestic legal order. Both could be regulated by the necessary occupation agreement.[424] Nevertheless, as mentioned, occupations are characterized by their temporary nature.[425] This difference distinguishes them significantly from all succession situations referred to above. Rules governing the factual exercise of power over a foreign territory were invented to regulate situations *until* the lawful sovereign would reenter the stage and take back control. Their object and purpose are thus different from state succession rules, which pursue regulating a *permanent* situation. An analogous application, therefore, has to be dismissed. Nevertheless, there are cases, such as the Kosovo, where succession was *preceded* by a "pacific" form of occupation, which had a considerable influence on the law in the territory and will, *therefore*, be covered by this analysis.

421 Eyal Benvenisti, 'Occupation, Pacific (2009)' in: *MPEPIL* (n2) para. 4.
422 ibid.
423 ibid para. 8. E.g., the UN mission in Kosovo was asked to report on the human rights situation there, see Christine M Chinkin, 'Human Rights' in: *Kritsiotis/Bowman Modern Law of Treaties* (n 339) 509 534.
424 Benvenisti, 'Occupation, Pacific (2009)' (n 421) 8.
425 ibid para. 2. Cf. Benvenisti, 'Occupation, Belligerent (2009)' (n 346) para. 1; Michael N Schmitt, 'Debellatio (2009)' in: *MPEPIL* (n 2) paras. 11-13.

D) Conclusions

State succession means the replacement of one state by another in the responsibility for the international relations of territory and hence refers to the change of a factual *status quo*. The categorization of a situation as one of state succession does not automatically connote a transferal of rights and duties to the successor state. For the cases under scrutiny here, the phrase "responsibility for the international relations of territory" can, for the most part, be equated with sovereignty over the territory. The change in sovereignty over a territory must not have come about through a violation of *jus cogens* norms such as Art. 2 para. 4 UNC. Any other view would unnecessarily separate the field of state succession from general international law and violate the duty of non-recognition of situations emanating from a violation of peremptory norms. Cases of succession have to be distinguished from cases of continuity of a state's personality. Under international law, a general presumption of continuity of states exists unless manifest changes affect the external personality of a state. Yet, the emergence or demise of a state is no prerequisite for succession, mere transfers of parts of territory (cessions) are also included but potentially deserve special treatment.

The types of succession discussed in the following are thus cases of dissolution, separation, cession, merger and incorporation of states. The analysis is based on case studies related to state practice on acquired rights in Yemen, Germany, the Soviet Union, the former Yugoslavia, Czechoslovakia, Ethiopia and Eritrea, Walvis Bay, Hong Kong, Macau, and Sudan and hence includes one example for each type of succession. However, before a detailed analysis of relevant state practice in Chapter IV, Chapter III looks at the reasons for the continued significance of the doctrine of acquired rights in today's international legal order.

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

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

A) Preliminary Remarks

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1) General Observations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2) The Relevance of Acquired Rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1) Individuals as Subjects of International Law

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

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

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

472 See Dunn (n 439), 18.

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

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

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

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

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

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

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

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

479 Hafner (n 444), 401.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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495 ibid para. 153.

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

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

498 ibid 408.

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

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

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

502 Parlett (n 439), 78.

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

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

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

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

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

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

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

506 VCLT (n 291).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

520 ibid paras. 93-114.

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

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

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

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

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

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

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

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

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

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

I) Preliminary Remarks

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II) Human Rights and Acquired Rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

547 ibid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1) The Controversial Status of the Human Right of Property

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

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

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

a) A Human Right of Property under International Instruments

aa) Universal Instruments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

bb) Regional Instruments

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

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

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

cc) Interim Conclusion

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

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

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

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

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

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

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

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

b) A Human Right of Property and Investment Law

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

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

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

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

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

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

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

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

c) A Human Right of Property and Domestic Instruments

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

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

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

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

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

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

594 Sprankling (n 561), 488.

595 ibid 466.

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

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

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

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

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

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

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

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

d) Interim Conclusions

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

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

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

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

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

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

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

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

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

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

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

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

2) (Non-)Succession to Human Rights Treaties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a) Reliance on Rules Outside the Specific Treaty

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

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

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

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

627 ibid 641.

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

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

630 ibid 649.

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

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

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

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

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

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

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

641 Cf. Art. 34-37 VCLT.

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

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

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

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

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

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

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

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

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

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

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

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

b) The Argument of "Objective Regime"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c) Practice of Human Rights Organs

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

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

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

663 Critical about the role of UN treaty bodies in this respect Pergantis (n 283) 326–329.
664 Human Rights Committee, 'General Comment No. 26 (61)' (n 648) para. 4; cf. Human Rights Committee, 'Annual Report to the U.N. General Assembly' (21 September 1994) UN Doc. A/49/40 vol. 1 paras. 48, 49.
665 Cf. ibid.
666 Kälin and Künzli (n 441) 14, 214; Hofmann, 'The Protection of Individuals under Public International Law' (n 436) 54, para. 19; Ed Bates, 'Avoiding Legal Obligations Created by Human Rights Treaties' (2008), 57 ICLQ 751 755; Riedel (n 563), 378.
667 *Bijelić v. Montenegro and Serbia,* Appl. No. 11890/05, 28 April 2009 para. 59 (ECtHR).
668 ibid para. 69.
669 Venice Commission, 'Amicus Curiae Brief in the case of Bijelić against Montenegro and Serbia (Application N°11890/05): Opinion No. 495/2008' (20 October 2008) CDL-AD(2008)021 para. 24 but also para. 36.

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

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

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

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

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

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

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

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

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

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

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

677 ibid para. 31.

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

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

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

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

680 Rasulov (n 617), 157.

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

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

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

d) State Practice

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

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

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

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

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

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

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

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

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

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

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

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

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

693 Cf. Rasulov (n 617), 156.

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

695 Pergantis (n 283) 213.

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

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

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

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

700 ibid para. 18.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

aa) Preliminary Remarks

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

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

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

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

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

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

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

bb) Termination Pursuant to Art. 54 and 56 VCLT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

cc) Termination by Consensus

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

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

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

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

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

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

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

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

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

dd) Third-Party Rights

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

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

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

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

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

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

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

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

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

756 ibid para. 48.

757 ibid para. 64.

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

ee) Interim Conclusions

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

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

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

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

761 ibid paras. 71, 173.

762 ibid paras. 109, 164, 170.

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

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

aa) General Remarks

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

bb) Executed and Executory Rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

cc) Judicial Claims as Executed Rights

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

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

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

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

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

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

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

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

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

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

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

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

dd) Interim Conclusions

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

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

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

g) Interim Conclusions

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

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

3) The Argument of Self-Determination

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

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

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

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

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

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

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

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

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

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

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

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

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

4) The Implementation Gap

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

a) International Treaties

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

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

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

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

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

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

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

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

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

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

805 Sino-British Joint Declaration (n 709).

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

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

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

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

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

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

b) Customary Law

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

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

812 ibid 562, 576.

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

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

c) Political Resistance to Human Rights

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

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

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

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

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

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

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

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

d) Interim Conclusions

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

III) Investor Rights and Acquired Rights

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

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

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

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

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

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

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

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

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

828 ibid 123–124.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b) The Vagueness of Protection of Individual Property Rights

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

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

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

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

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

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

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

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

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

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

aa) State Practice

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

846 Dolzer and Schreuer (n 537) 98.

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

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

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

850 Dolzer and Schreuer (n 537) 1.

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

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

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

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

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

855 Salacuse (n 455) 59.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

bb) Investment Treaties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c) Interim Conclusion

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

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

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

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

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

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

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

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

2) (Non-)Succession to Investment Treaties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

910 ibid 294.

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

a) State Practice

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

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

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

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

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

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

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

aa) Yemen

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

bb) Soviet Union

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

933 ibid 157-158, paras. 6.30–6.33.

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

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

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

cc) Yugoslavia

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

959 ibid 161-162, para. 6.41.

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

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

dd) Czechoslovakia

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

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

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

ee) Ethiopia

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

ff) Hong Kong, Macau, Walvis Bay

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

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

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

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

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

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

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

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

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

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

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

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

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

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

gg) South Sudan

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

hh) The ICSID Convention

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b) Interim Conclusions

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

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

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

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

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

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

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

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

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

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

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

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

1002 Cf. Bagchi (n 875).

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

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

a) The (Too) Traditional Doctrinal Approach

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1015 E.g. by Wittich, 'Art. 70' (n 2) paras. 13, 30-32: see also Roberts, 'Triangular Treaties' (n 752), 404 "Survival clauses may be understood as provisions on the vesting of investors' rights."

1016 Ascensio, 'Art. 70' (n 435) para. 22; Voon, Mitchell and Munro (n 733), 470; *contra* Gatzsche (n 999) 172.

1017 ibid 139-141, 147/148, paras. 210- 211, 225; similarly Roberts, 'Triangular Treaties' (n 752), 383.

1018 Kim, 'Investment Law and the Individual' (n 831).

1019 Gatzsche (n 999) 174, para. 266; differently Klein (n 530) 258. The holding in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* 1 October 2018, ICJ Rep 2018 507 para. 162 (ICJ) that "references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation" only related to the state of Bolivia.

1020 Roberts, 'Triangular Treaties' (n 752), 411 "In the absence of express clauses or specific representations […] investors should expect that the balance of benefits and burdens they receive from investment treaties may change over time. Investors cannot argue that, in investing, they had a legitimate expectation that the investment treaty would continue to cover their investment, at least for the period of

estoppel, would be difficult to apply in the state-individual relationship.[1021] The possibility of constructing investor rights under an investment agreement as third party rights governed by Art. 34, 36-38 VCLT is regularly mentioned[1022] but mostly discarded for reasons similar to those related to human rights treaties.[1023] Art. 70 para. 1 lit. b) VCLT is again rejected as not being applicable to individual rights.[1024] Sunset clauses are said not to apply to consensual termination of treaties, but only unilateral ones.[1025]

It is striking, but consistent with that approach, that the argument of acquired rights is also dealt with relatively superficially either by pointing to the principle's vagueness[1026] or by begging the question and maintaining that the right under scrutiny was simply not acquired under the investment treaty[1027]. Instead of asking whether generally applicable underlying principles might exist, the issue of legitimate expectations of the individual

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the survival clause"; cf. also Klein (n 530) 258 doubting the existence of legitimate expectations on the side of the investor.

1021 Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010), 104(2) AJIL 179 214; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 253.

1022 But see Martins Paparinskis, 'Analogies and Other Regimes of International Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 73 81/82 et seqq.; Voon, Mitchell and Munro (n 733), 696-670; Gattini (n 750), 157–158.

1023 Voon, Mitchell and Munro (n 733), 470; Gattini (n 750), 157–158; Reinisch and Mansour Fallah (n 999), 115.

1024 Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 251; Reinisch and Mansour Fallah (n 999), 116. Admittedly, its nature as a default rule severely limits its relevance in cases of consensual termination, see Voon, Mitchell and Munro (n 733), 467; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 251.

1025 Nowrot, 'Kommentar: Völkerrechtlicher Umgang mit ambivalenten Regressionsphänomenen im internationalen Investitionsrecht' (n 831) 117; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 256–257; Gatzsche (n 999) 147-148, paras. 224, 225; cf. Roberts, 'Triangular Treaties' (n 752), 411; leaning towards this opinion Reinisch and Mansour Fallah (n 999), 112; *contra Magyar Farming Company Ltd. Kintyre KFT, and Inícia ZRT v. Hungary,* ICSID Case No. ARB/17/27, Award of 13 November 2019 para. 224. Sunset clauses often do not explicitly differentiate between consensual and unilateral terminations of a treaty, cf. Voon, Mitchell and Munro (n 733), 466; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 255.

1026 Reinisch and Mansour Fallah (n 999), 116; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 253; cf. Voon, Mitchell and Munro (n 733), 470–471.

1027 Gatzsche (n 999) 172–174.

investor is rejected swiftly, even in the case of sunset clauses, which are supposed to motivate the investor to invest because of this security. The individual dimension of investment treaties thus remains underexplored. Construed in this way, investment treaties are mere law between states treating individuals as objects whose rights are dependent upon the whim of states. Such an approach seems even less convincing considering that

> "[t]he avowed purpose of most investment protection treaties is the promotion of economic cooperation in the cause of development. The *legal security* created by the treaties is designed to contribute to a favourable investment climate which is expected to facilitate private investments."[1028]

aa) The Comparison to Human Rights Law

In light of the detailed and sophisticated argumentation and diverse state practice on the persistence of legal positions concerning termination of human rights treaties, it is astonishing how easily parallel argumentation with respect to investment agreements is often discarded. By way of an *a maiore ad minus* inference, the "fact" that "even" human rights treaties would not survive a change in sovereignty is used as an argument to buttress non-survival of investor rights.[1029] Yet, the (negative) analogy with respect to the termination of human rights treaties is not only methodically questionable but does not recognize some of the particularities of the topic. A reference to the mentioned opinion of the UN Secretary General from 1997 with respect to North Korea is not enough to assume that states could unfetteredly withdraw from global human rights instruments not containing a termination clause if all parties to the treaty agreed. Other examples are often not considered at all, with arguments resting on the ambiguities of the now more than 25-year-old example that, as mentioned, offers neither evidence for sufficiently wide state practice nor solid *opinio juris*.

Admittedly, as long as no universal investment treaty exists or as long as the multilateralization of BITs has not developed, no argument of "law

1028 Christoph Schreuer and Ursula Kriebaum, 'From Individual to Community Interests in International Investment Law' in: *Fastenrath/Geiger et al. From Bilateralism to Community Interest* (n 647) 1079 1081 [footnote omitted, emphasis added].

1029 See e.g. Klein (n 530) 257–258; Binder, 'A Treaty Law Perspective on Intra-EU BITs' (n 752), 980–981; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 246 with footnote 82

making treaties" or "treaties building an objective régime" parallel to human rights systems ought to be made. Human rights treaties are more suitable to such arguments than investment treaties, which protect the individual foreign investor and not the individual human being. As long as most of the (bilateral) investment treaties do not aspire to universality, the case for their non-derogability is considerably weaker from the beginning.[1030] Nevertheless, the claim that "[i]nternational investment law is founded on reciprocity and consent, whereas international human rights law is founded on universality"[1031] is oversimplistic in both directions. Human rights treaties have also been shown to be subject to the reciprocity principle, and neither can some rights, especially the human right of property, be considered as containing a firm universally applicable ambit. The usual argument of a "lesser normative quality" of investor rights as compared to human rights, which are purported to be "inherent in the notion of a human being",[1032] in fact compares apples to oranges by referring to a natural law or customary source of human rights. However, this argument cannot be upheld for human rights under treaties in general. The separability of both fields is illusory, which is amply evidenced by the huge overlap of the branches in the field of property protection. In sum, while it is true that human rights *can* represent a more profound type of individual right, this truth does not mean that investors' rights, in their field of application, cannot enjoy some protection against immediate denunciation not foreseen in a treaty. The alleged consequence that "[t]he characterization of human rights should […] not play a significant role in determining the nature and revocability

1030 For some, treaties of a commercial character or trade agreements, due to their temporary character, may even fall under Art. 56 para. 1 lit. b) VCLT, i.e. are supposed to be derogable irrespective of the explicit or implied will of the state parties, cf. Villiger (n 731) Art. 56, para. 4; Aust, 'Treaties, Termination (2006)' (n 738) para. 20; hesitant about including trade matters in this category Christakis, 'Art. 56' (n 739) paras. 57-59.

1031 Voon, Mitchell and Munro (n 733), 458 [footnote omitted]; similarly Roberts, 'Triangular Treaties' (n 752), 406.

1032 E.g. ibid 368 "if investors are to have any rights under international law, they will be the rights that states have granted to them through instruments like investment treaties. This situation arguably differs from the human rights sphere where there are arguments that individuals enjoy certain rights by virtue of being human". This assertion neglects, however, that the existence of human rights under treaties is also dependent on the treaty parties' will. Cf. also Binder, 'A Treaty Law Perspective on Intra-EU BITs' (n 752), 980.

of investor rights"[1033] is therefore often based on wrong assumptions and pre-empts the analogy at a crucial point.

bb) The Inconsistent Argumentation

Additionally, but surprisingly in light of the insistence on consent as the primary principle, large parts of academia also accept a limit to the freedom to terminate individual positions under investment treaties with respect to "executed rights," also named "exercised rights".[1034] Rights are deemed to be "executed" when the investor has initiated a claim under the investment agreement with respect to them.[1035] This treatment sounds reminiscent of the distinction between "executed" and "executory" rights made under Art. 70 para. 1 lit. b) VCLT. Under consideration of a marked and primary emphasis on states as "masters of the treaty", it seems surprising to exclude such rights from termination, all the more so since the ability of the individual to initiate such claims is bound to state consent as well. Such an approach insinuates that state consent cannot be the only factor in the equation. It bespeaks of a certain uncomfortableness with the aforementioned result of unfettered power to terminate individual positions. Furthermore, the reasoning behind this differentiation is unclear. Some authors bring up the principles of estoppel, good faith, or abuse of process,[1036] all principles that, under a traditional reading of international law, would only be applicable between states.[1037] However, others use alternative justifi-

1033 Voon, Mitchell and Munro (n 733), 458.

1034 ibid 453, 457, 464-465, 472; Gattini (n 750), 157–158 linking these rights to acquired rights; Gatzsche (n 999) 172, 177, paras. 263, 271; cf. Binder, 'A Treaty Law Perspective on Intra-EU BITs' (n 752), 981 "arbitration crystallizes once accepted by the investor through the initiation of a claim, i.e. at the latest with the institution of the arbitration proceedings"; *contra* Roberts, 'Triangular Treaties' (n 752), 411–412; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10).

1035 Gatzsche (n 999) 172, para. 263; Reinisch and Mansour Fallah (n 999), 108; Voon, Mitchell and Munro (n 733), 453; following them Särkänne (n 1009), 260–261. Differently, considering the moment the investor has made an investment as crucial; Reuter, 'Taking Investors' Rights Seriously' (n 832), 389.

1036 Voon, Mitchell and Munro (n 733), 464, 451; following them Särkänne (n 1009), 261; see also Reuter, 'Taking Investors' Rights Seriously' (n 832), 407–408.

1037 Therefore critical Gattini (n 750), 158. But this critique in principle also applies to the principle of *perpetuatio jurisdictionis* which is proposed at ibid 157–158.

cations for this exception, such as procedural fairness[1038] or the frustration of expectations of the investor,[1039] which focus more on the individual's position. While the moment of bringing a claim is generally agreed on, scholarly commentary is vague as to the relevance of earlier points in time. This silence is arguably the consequence of a missing theoretical underpinning of such an exception.

An influential opinion[1040] accords investors a non-derogable position once the investor has accepted a state's "offer to arbitrate" contained in an investment treaty, an investment contract, or even national legislation. This acceptance can be expressed by raising a claim before an international tribunal but can also be "perfected" before. This according of rights comes very close to genuine international rights of the individual investor as a third party in the sense of Art. 34-38 VCLT. Of special interest in this respect is also Art. 72 of the ICSID Convention, which rules that a notice of denunciation according to Art. 71 shall not

> "affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary."

This (exceptional) provision is far-reaching first, by explicitly encompassing "nationals" of the contracting states, i.e. individuals, second, by not subjecting this rule to deviating agreement by states, and finally, by forbidding withdrawal of the right to arbitrate irrespective of whether it was exercised

1038 Gatzsche (n 999) 173, para. 264; Binder, 'A Treaty Law Perspective on Intra-EU BITs' (n 752), 981–982 ("retroactive extinguishment of exercised rights" or "would invite abuse"), who, however, in footnote 60 mentions that consent can be "perfected" independently of the initiation of an arbitration.

1039 Voon, Mitchell and Munro (n 733), 464 "That State has represented through its offer to arbitrate in an IIA that it is willing to be made accountable to investors for contraventions of the IIA […] An investor that has initiated a claim under the IIA has relied on that representation by bringing the claim. A retroactive termination effectively prejudices that reliance to the detriment of the investor."

1040 Christoph Schreuer, 'Consent to Arbitration' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2012) 855–856; Binder, 'A Treaty Law Perspective on Intra-EU BITs' (n 752), 982; for the ICSID Convention Schreuer and others (n 988) Art. 72 para. 7.

or not before withdrawal.[1041] It therefore goes beyond the generally agreed scope of "executed rights".

b) State Practice

Not unexpectedly, state practice seems to favor the possibility of consensual termination of BITs with immediate effect. There are numerous examples of parties agreeing to terminate their investment agreements and revoke or even contradict the incorporated survival clauses.[1042]

A well-known and recent case is the "Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union" (Termination Agreement)[1043] signed in May 2020. The agreement was concluded after the Court of Justice of the EU (CJEU) in 2018 ruled in the *Achmea* case that arbitration clauses contained in investment agreements between EU member states violate EU law.[1044] In a declaration from

1041 According to ibid Art. 72, para. 2 "Art. 72 is an expression of the rule, contained in Art. 25(1), that consent, once given, cannot be withdrawn unilaterally […] The rights and obligations arising from consent to ICSID's jurisdiction are preserved and insulated from later legal developments". On the dispute whether consent can only be "perfected" until the withdrawing state announces its denunciation or also within the following six-month-period until the denunciation takes effect, cp. Lucas Bastin and Aimee-Jane Lee, 'Venoklim Holding B. V. v. Bolivarian Republic of Venezuela' (2015), 109(4) AJIL 858; Schreuer and others (n 988) Art. 72, paras. 6-10; Emmanuel Gaillard and Yas Banifatemi, 'The Denunciation of the ICSID Convention' (2007), 237(122) NYLJ.

1042 See examples in Voon, Mitchell and Munro (n 733), 467; Nowrot, 'Termination and Renegotiation of International Investment Agreements' (n 10) 248.

1043 Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (29 May 2020) OJ L169 1 (2020). See on the implications of this agreement Johannes Tropper, 'The Treaty to End All Investment Treaties' *Völkerrechtsblog* (12 May 2020) <https://voelkerrechtsblog.org/the-treaty-to-end-all-investment-treaties/> and John I Blanck, 'European Union Member States Sign Treaty to Terminate Intra-EU Bilateral Investment Treaties' (2020), 24(18) ASIL Insights <https://www.asil.org/insights/volume/24/issue/18/european-union-member-states-sign-treaty-terminate-intra-eu-bilateral>.

1044 *Slovak Republic v Achmea BV,* C-284/16, 6 March 2018, Reference For a Preliminary Ruling para. 60 (CJEU [GC]); critical Claus D Classen, 'Autonomie des Unionsrechts als Festungsring? Comment on the CJEU's Achmea Judgment' [2018] Europarecht 361. In September 2021 the ECJ followed up on that jurisprudence by deciding that under the *Achmea* case law also the arbitration clause under the Energy Charter Treaty (n 883) was not applicable between EU member states, *République de Moldavie v Komstroy LLC,* C-741/19, 2 September 2021, Reference

January 2019, all EU member states concluded that "[i]n light of the *Achmea* judgment" they "will terminate all bilateral investment treaties concluded between them"[1045] In the Termination Agreement (only) 23[1046] EU member states put theory into practice and agreed to terminate all BITs and pertaining sunset clauses, which are defined as "any provision in a Bilateral Investment Treaty which extends the protection of investments made prior to the date of termination of that Treaty for a further period of time", Art. 1 para. 7, listed in Annex A, as well as sunset clauses of already terminated agreements, listed in Annex B, Art. 2 and 3 of the Agreement. Importantly, according to Art. 4 para. 1 of the agreement, arbitration clauses were to be considered as inapplicable not only from the date of coming into force of the agreement but "as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union". While this provision should not have an influence on already *concluded* proceedings, Art. 6 para. 1,[1047] no new arbitration proceedings were to be

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For a Preliminary Ruling (CJEU [GC]); and in October 2021 decided that this also held true for (tacit) bilateral arbitration agreements between states and investors with identical content to invalid arbitration clauses *Polish Republic v. PL Holdings Sàrl,* C-109/20, 26 October 2021, Reference For a Preliminary Ruling (CJEU [GC]).

1045 Common Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Achmea Judgment and on Investment Protection (15 January 2019) https://commission.europa.eu/system/files/2019-01/190117-bilateral-investment-treaties_en.pdf, 4 no. 5 [italics in original]. On the declaration Johannes Tropper, 'Alea iacta est?: Post-Achmea Investment Arbitration in Light of Recent Declarations by EU-Member States' *Völkerrechtsblog* (24 January 2019) <https://voelkerrechtsblog.org/de/alea-iacta-est/>. The member states also, somehow contradictory, in their Common Declaration considered "all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States […] contrary to Union law and thus inapplicable".

1046 No signatories were Austria, Finland, Sweden and Ireland. The UK had already left the EU. Furthermore, the European Commission by the end of 2021 opened infringement proceedings against Austria, Sweden, Belgium, Luxembourg Portugal, Romania and Italy for not having terminated all their intra-EU BITs and/or not having ratified the Termination Agreement, *see* European Commission, 'December Infringements Package: Key Decisions' (2021) <https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201>. On the special status of the UK's BITs with EU states after its withdrawal from the EU Mark McCloskey, 'Safe Haven for Investors in (and Through) the UK Post-Brexit?' (2021), 25(3) ASIL Insights <https://www.asil.org/insights/volume/25/issue/3/safe-haven-investors-and-through-uk-post-brexit>.

1047 That are narrowly defined in Art. 1 para. 4 as "any Arbitration Proceedings which ended with a settlement agreement or with a final award issued prior to 6 March 2018 where: (a) the award was duly executed prior to 6 March 2018, even where a

initiated on the basis of the listed arbitration clauses after 6 March 2018, i.e. the date of the *Achmea* judgment, Art. 1 para. 6 in combination with Art. 5. States were to inform an investment tribunal of this consequence, and they should neither recognize nor enforce awards on the basis of such arbitral proceedings, Art. 7. Thus, and contrary to the just presented opinion of the majority of commentators, even already commenced arbitration proceedings were to be affected.[1048] Arguably, the EU states not signing the Termination Agreement refrained from doing so exactly because of this retroactive applicability, which they did not include into their (individual) agreements terminating their BITs.[1049]

Since intra-EU arbitrations between 2008 and 2018 accounted for approximately 20 % of all international investor-state dispute settlement cases,[1050] the Termination Agreement is definitely remarkable. It could, indeed, be construed as a marked conviction by 23 states that the consensual termination of investment agreements immediately taking away substantive and procedural positions of individual investors is in line with international law and also extends to protection accorded by sunset clauses. However, any interpretation of these events should not neglect that the states signing the Termination Agreement did so because they felt compelled to terminate their BITs due to the *Achmea* judgment.[1051] Additionally, not all signatories have ratified the treaty.[1052] Formally, the legal order of the EU has to be separated from the international legal order, and EU member states might, at least theoretically, be bound by two contradicting rules.[1053] In addition, the state parties to the agreement were eager to underline that investors

related claim for legal costs has not been executed or enforced, and no challenge, review, set-aside, annulment, enforcement, revision or other similar proceedings in relation to such final award was pending on 6 March 2018, or (b) the award was set aside or annulled before the date of entry into force of this Agreement".

1048 Decidedly critical on that solution from the viewpoint of "acquired rights" Särkänne (n 1009), 261–263.

1049 ibid 280–281.

1050 UNCTAD, 'Fact Sheet on Intra-European Union Investor-State Arbitration Cases' [2018] IIA Issues Notes, 1, 3 <https://unctad.org/en/PublicationsLibrary/diaepcb2018d7_en.pdf>.

1051 Cf. Common Declaration (n 1044) 1, 2.

1052 See European Commission, 'December Infringements Package: Key Decisions' (n 1045).

1053 Särkänne (n 1009), 255–256, 265. The tribunal in *Eskosol S.P.A. in Liquidazione v. Italian Republic,* ICSID Case No. ARB/15/50, 7 May 2019, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection Based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes paras. 167 - 186

from member states, if acting within the scope of application of Union Law, enjoy the protection granted by the fundamental freedoms, the EU Rights Charter, "and by the general principles of Union law, which include in particular the principles of non-discrimination, proportionality, legal certainty and the protection of legitimate expectations"[1054]. The substantive protection for the investors thus might not be much less after the termination,[1055] but at least the procedural right to appeal to an independent investment tribunal is abrogated.

c) Jurisprudence

Arbitral tribunals have continuously held that a mere subsequent agreement by the parties to a BIT cannot divest an arbitral tribunal of its jurisdiction once seized by an investor.[1056] The ICSID tribunal in *Eskosol S.P.A. v. Italy* in 2019 explicitly relied on the principle of acquired rights to flesh out its argument:

> "[I]t would be inconsistent with general notions of acquired rights under international law to permit States effectively to non-suit an investor part-way through a *pending case*, simply by issuing a joint document purporting to interpret longstanding treaty text so as to undermine the tribunal's jurisdiction to proceed."[1057]

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seized with intra-EU arbitral proceedings after *Achmea*, found itself not bound by the CJEU's ruling and did not decline jurisdiction in this case.

1054 Common Declaration (n 1044) 2 with reference to *Robert Pfleger et al.* C-390/12, 30 April 2014, Reference For a Preliminary Ruling paras. 30-37 (CJEU).

1055 But cf. *EUREKO B.V. v. The Slovak Republic,* PCA Case No. 2008-13, 26 October 2010, Award on Jurisdiction, Arbitrability and Suspension para. 245 "protections afforded to investors by the BIT are, at least potentially, broader than those available under EU law". As well doubting the identical scope of EU law Schreuer, 'The Future of International Investment Law' (n 836) 1908, para. 17.

1056 For ICSID arbitrations *Magyar Farming* (n 1024) paras. 213-214, 224 and *Marfin Investment Group Holdings S.A. Alexandros Bakatselos and others v. Republic of Cyprus,* ICSID Case No. ARB/13/27, Award of 26 July 2018 para. 593 "The Tribunal considers that the principle of legal certainty entitles investors to legitimately rely upon a State's written consent to arbitrate disputes as long as that consent has not been withdrawn through the proper procedures included in the underlying treaty."

1057 *Eskosol S.P.A.* (n 1052) para. 226 [emphasis added]; endorsed by *Addiko Bank AG v. Republic of Croatia,* ICSID Case No. ARB/17/37, 12 June 2020, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis para. 290.

The tribunal further justified this finding with the prohibition of retroactive withdrawal of consent to arbitration,[1058] which would run counter to individual notions of legal certainty and legitimate expectations of the investor.[1059] In *Magyar Farming Company*, the tribunal explicitly opposed the opinion that sunset clauses were, by default, only applicable to unilateral terminations and found that

> "[t]he BIT is an international treaty that confers rights on private parties. While the Contracting States remain the masters of their treaty, their control is limited by the general principles of legal certainty and *res inter alios acta, aliis nec nocet nec prodest*."[1060]

Even if not determinatively deciding about the fate of the 2020 Termination Agreement, these findings place a marked emphasis on the position of the individual investor under the treaty, a position that is said to become protected by the principle of legal certainty.

What has to be underlined is that, according to the tribunal, the protection of this certainty no longer flows from the BIT itself, which is terminated and therefore cannot produce any legal consequences, but from the "general principle" of legal certainty. The tribunal in *Magyar Farming Company* even applied the *res inter alios acta* principle (without referring to the VCLT), thereby denying an unfettered power of states to change the legal status of individuals under international law by inter-state agreements. Even if these proceedings were conducted under ICSID rules, and therefore especially according to Art. 25 and 72 ICSID Convention, these basic findings can possibly be transposed to another context.[1061]

The arbitral tribunal in *Eastern Sugar* referred to Art. 70 VCLT to justify the upholding of its jurisdiction in an investor-state arbitration after an investment agreement had been unilaterally terminated,[1062] and hence (albeit without further discussion) extended the provision's scope beyond the traditional inter-state application. The tribunal in *Spoldzielnia Pracy*

1058 *Eskosol S.P.A.* (n 1052) paras. 199, 226.
1059 ibid para. 198.
1060 *Magyar Farming* (n 1024) para. 222 [footnote omitted, italics in original].
1061 Cf. Binder, 'A Treaty Law Perspective on Intra-EU BITs' (n 752), 982.
1062 *Eastern Sugar B.V. v. The Czech Republic,* SCC Case No. 088/2004, Partial Award of 27 March 2007 paras. 176-177.

Muszynianka v. Slovak Republic, a decision rendered after the Termination Agreement was concluded, did not feel bound by *Achmea*.[1063]

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> A subsequent termination of the BIT, even through the Termination Agreement, was considered as influencing neither the jurisdiction nor the material law of the dispute, which both had to be ascertained according to the law in force at the time the dispute arose.[1064]

These decisions cannot provide any evidence on how far this protection extends to rights having "crystallized" *before* a claim was raised in front of a tribunal. Additionally, it appears as if there has not yet been a tribunal dealing with a suit brought under the provisions of a consensually abrogated sunset clause.[1065] Furthermore, the argument of non-relevance of EU law for investment tribunals may not be applicable to arbitrations with a seat in one of the EU member states.[1066] That several national courts have denied

1063 *Spoldzielnia Pracy Muszynianka v. Slovak Republic,* Case No. 2017-08, Award of 7 October 2020 paras. 215-217 (PCA). A subsequent termination of the BIT, even through the Termination Agreement, was considered as influencing neither the jurisdiction nor the material law of the dispute, which both had to be ascertained according to the law in force at the time the dispute arose ibid. paras. 260-265. Because it relied on those very general rules of international law, the tribunal did not address the claimant's argument of vested rights. The tribunal also saw no conflict between EU law and the BIT ibid paras. 240-259; cf. also *Addiko Bank AG* (n 1056) paras. 267, 270, 295.

1064 *Spoldzielnia Pracy Muszynianka* (n 1062) paras. 260-265. Because it relied on those very general rules of international law, the tribunal did not address the claimant's argument of vested rights.

1065 Tropper, 'The Treaty to End All Investment Treaties' (n 1042), who favors jurisdiction over such claims "over disputes involving investments made prior to the consensual termination of a sunset clause because a sudden withdrawal of the rights guaranteed to already established investments contravenes legal security and legal certainty – principles which are arguably the raison d'être of investment treaties"; see also *Eastern Sugar B.V.* (n 1061) para. 175 "The Arbitral Tribunal can only reject the Czech Republic's argument that the implied termination of the BIT through accession also terminated the continuing effect expressly guaranteed by [the sunset clause] of the BIT."

1066 See recently *Green Power Partners K/S and SCE Solar Don Benito APS v The Kingdom of Spain,* SCC Arbitration V (2016/135), Award of 16 June 2022 being the first investor-State tribunal upholding the intra-EU objection and comment by Martin Gronemann, 'Is the Tide Turning for Intra-EU Investment Disputes?' *verfassungsblog* (29 June 2022) <https://verfassungsblog.de/trumping-international-investment-law/>.

the admissibility of arbitrations based on intra-EU BITs[1067] is, of course, still relevant for the actual ability of investors to enforce their awards.[1068] The last word in this discussion has not been uttered.

However, these tribunal argumentations clearly express the conviction that, under investment agreements, individual investors can acquire their own rights and positions, which can no longer be taken away without restrictions. This conviction seems to creep into international scholarship.

> "Although investors cannot expect and must not be protected eternally, a certain kind of protection for a defined period of time has to prevail - an investment will often have been undertaken because of such a guaranteed protection for a certain period of time and such protection is the very object and purpose of a survival clause. The investor's willingness to invest is not only grounded in his reliance towards the host state, but in his implicit belief towards his home State that the latter will vouch for the protection granted by the IIA [...]. The increasing evolvement of individual rights and mechanisms of enforcement for individuals in international law further suggests that a circumcision of investors' rights would not be accurate. Rather, it bespeaks an overall progressive development which may possibly find its sequel here."[1069]

4) Interim Conclusions

Even more than with respect to the position under human rights law, the law on the protection of foreign investment, in principle, offers only limited protection to individuals in cases of state succession, on the substantive and especially on the procedural level. As has been shown, there is currently no rule of automatic succession to treaties of the predecessor state irrespective of the successor state's will, and investment treaties do not constitute an exception to this rule. However, comparable to human rights under treaties, in almost all cases of the mentioned secession scenarios, continuity of investment relations was the goal pursued and finally achieved, albeit on a

1067 *Incompatibility of an Arbitration Clause Contained in a Bilateral Investment Treaty with Union Law,* 26 SchH 2/20, 11 February 2021 (Higher Regional Court Frankfurt am Main) confirmed by *Invalidity of an Arbitration Agreement Under an Investment Treaty Between EU Member States,* I ZB 16/21, Decision of 17 November 2021 (German Federal Court of Justice [BGH]).

1068 Särkänne (n 1009), 269–278; Aceris Law LLC (n 1065).

1069 Kim, 'Investment Law and the Individual' (n 831) 1600, para. 66.

consensual basis. When it comes to the termination of investment treaties, academia tends to support a state-centric approach with states as "masters of the treaty" being free to abrogate treaty clauses and pertaining individual rights. Not surprisingly, state practice has followed this line. Yet, attempts to retroactively transform or curtail individual positions under investment treaties have not gone unchallenged. Tribunals have repeatedly underlined the importance of individual positions and the limits of their abrogation, relying on notions such as legitimate expectations, legal security, and good faith.

However, it seems dubious whether these arguments could also be held against a potential successor state. The more the general perception moves away from the state-centric approach to a more individualistic argumentation, the more easily such transposition could take place. While some steps in this direction are discernible, a complete overhaul of the concept does not seem to have taken place, yet. Thus, investment law has not emancipated itself from its origin in the law on the protection of aliens. Nevertheless, developments in recent jurisprudence and academia may lead in that direction.

D) Conclusions – A Place for Acquired Rights

The traditional doctrine of acquired rights purports to protect individual domestic rights in cases of state succession. This chapter has traced recent developments in two fields of international law most suited to protecting individual rights outside war situations: human rights law and the law on the protection of foreign investment. This review was done especially with an eye to their relationship with and influence on the doctrine of acquired rights. In fact, both fields have been recurrent reference points for authors discussing today's application of the acquired rights doctrine. In both areas, in the last decades, individuals have been accorded own rights, in some cases also the right to enforce them on the international plane, an ability that, as has been shown, still constitutes the exception rather than the rule in an international system based on the will of states. This development has to be seen as a major improvement of an individual's position under international law. Furthermore, it is now generally accepted that such international guarantees can influence an individual's domestic position. Having been treated as a fact by the PCIJ, domestic law today is reviewed by international courts for its congruence with international

law. For example, domestic property law is no longer within the state's *domaine réservé* but subject to international regulation. When sketching its legal environment, a new state will today find itself confronted with these regulations.

The new level of individual rights protections provided by human rights law and investment law has led some authors to conclude that the theory of acquired rights is obsolete; the fields of human rights and investment protection are seen as subsequent developments of the acquired rights doctrine. The doctrine is depicted as an expression of the traditional theory on the protection of aliens and the pertaining system of diplomatic protection, which have been eclipsed by these new developments. However, conversely, the doctrine of acquired rights has been used as an argument by authors discussing the succession into human rights or investment treaties. Especially with respect to human rights treaties, proponents of a rule of "automatic succession" have, occasionally, advanced a purported "acquired rights analogy" as supporting such a rule. From that perspective, although not spelled out explicitly, the doctrine of acquired rights was considered as a principle independent of and able to inform other (sub-)fields of international law. It was also conceived as open to evolution, in particular as applicable to individual rights acquired on the *international*, rather than the domestic, plane. Apart from the still lamentable lack of inquiry into the legal basis of the doctrine, the latter view embraces a more dynamic and interconnected picture of international law.

The analysis in this chapter thus had to work in two directions. First, by historically tracing the evolution of the individual's role in international law, the traditional doctrine of acquired rights could be positioned within this evolution. Second, in a further step, the relationship between the traditional doctrine and new evolutions was sketched. As the original doctrine of acquired rights was mainly concerned with property rights or generally "rights of an assessable monetary value," the analysis particularly inquired in how far property rights are guaranteed by human rights law or investment law when sovereignty changes.

The traditional doctrine of acquired rights, as conceived in the 1950s to 1960s, mostly constituted a particular expression of the theory of an international minimum standard for aliens, the general standard of protection for individuals at that time, applied to the special situation of state succession. Due to the particularities of state succession, the requirement of foreign nationality was mitigated, even if not completely renounced. Although, in principle, only protecting foreigners, the doctrine guaranteed

individuals a certain *status quo* a new state had to accept – even if it was an individual's new state of nationality. This guarantee was a remarkable deviation from the then existing theory of the *domaine réservé* of every state as towards the treatment of its nationals. The doctrine, therefore, can be seen as an – at least theoretical – predecessor of the idea of human rights.

The analysis has shown that the first assumption of a complete substitution of the theory of acquired rights by human rights and investment protection law cannot be upheld in all aspects. Even if these evolutions cover large fields of the protection formerly thought to be guaranteed by the doctrine of acquired rights, substantial gaps are visible, in particular in cases of state succession, and there is still room for more rules. In their customary expression, both human rights law and the law on protection of foreign investment present a relatively diffuse state of the protection of property. In general, no global standard of property protection independent of domestic law has emerged. In fact, the protection of individual property has proven to be one of the most controversial and almost non-agreeable topics in international relations. At the most, regional consensus may have emerged. Customary international law does not protect nationals of a state from expropriation without compensation in all cases.[1070] Investment law in particular only protects foreigners making a trans-border investment, not nationals of the state. The status of stateless persons remains unsettled. Therefore, crucially, as the granting of nationality is still almost exclusively a state's sovereign prerogative,[1071] the protection of property of a state's nationals or stateless persons in cases of state succession is in a state of limbo. While the ambit of human rights law is conceptionally universal, although practically tied to regional enforcement mechanisms, investment law is still built on a network of bilateral and sometimes plurilateral, regional, or "sectoral" treaties. Even if the multitude of, mostly bilateral, investment treaties

1070 Kämmerer, 'Der Schutz des Eigentums im Völkerrecht' (n 236) 132-133; Kriebaum, 'Nationality and the Protection of Property under the European Convention on Human Rights' (n 590) 656/657; *Von Maltzan and others v. Germany,* Appl. Nos. 71916/01, 71917/01 and 10260/02, 2 March 2005, ECHR 2005-V 395 para. 80 (ECtHR [GC]); *Jahn and others v. Germany,* Appl. Nos. 46720/99, 72203/01 and 72552/01, 30 June 2005, Judgment on the Merits, ECHR 2005-VI 55 paras. 94-95 (ECtHR [GC]).

1071 Dörr, 'Nationality (2019)' (n 499) paras. 4, 7, 9; cf. Castrén (n 8), 486; Rainer Hofmann, 'Denaturalization and Forced Exile (2020)' in: *MPEPIL* (n 2) para. 17; cp. Göcke, 'Stateless Persons (2013)' (n 449) para. 19.

and pertaining jurisprudence has led to some substantive principles,[1072] the determination of customary protection standards beyond the minimum standard is, at best, vague, in particular for expropriation issues. Effective property protection is therefore, to a large extent, tied to being acclaimed in specific treaties.

With respect to treaties, despite decade-long fierce and prolonged discussion, there is still no rule of customary international law providing for automatic succession into human rights or investment treaties, i.e. succession into these treaties irrespective of a state's will or at least as a default rule. Majority position, supported by a non-uniform and often equivocal state practice, still maintains that states are the masters of their treaty, and consent remains the governing principle. To inquire more profoundly into the individual's position under human rights or investment treaties, the analysis also considered the consequences of withdrawal or denunciation of both types of treaties. Despite the notable differences between the termination of a treaty by a willful act of a state and the change of sovereignty over a territory, the central question from the perspective of the individual in both cases is similar: Can rights once acquired under a treaty be taken away or do they stick with the individual? For both systems under scrutiny, in principle, the withdrawal from or termination of a treaty, not only according to its provisions but as well by consensus of all the states parties to the treaty, has been found to be lawful and to terminate the respective treaty rights with immediate effect. Individuals are routinely denied the status of a party to the treaty able to invoke Art. 34-38 VCLT and, at most, are seen in the role of a third-party beneficiary. This situation is in fact reflective of the still derivative position of the individual under international law.

Within these confines, the rule contained in Art. 70 para. 1 lit. b) VCLT plays a crucial role. It stipulates that the termination of a treaty while releasing "the parties from any obligation further to perform the treaty" does "not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination." It therefore provides for some rights acquired under the treaty to be maintained irrespective of the original treaty basis being terminated and in general for non-retroactivity of the effects of the termination. Even if, according to its plain wording, only applicable to states parties, the argument that Art. 70 VCLT encapsulates a general international rule of reason also applicable to

1072 Schill *The Multilateralization of International Investment Law* (n 840): McLachlan, Shore and Weiniger (n 823).

individual rights has gained weight in the international discourse, especially when the elevated role of the individual in the system of international law is considered. This independent basis in international law could argue for the rights' persistence also in cases of state succession and therefore provide a promising basis for the entrenchment of a doctrine of acquired rights in international law.

What has to be recognized, however, is that that rule provides for non-retroactivity, not for eternal rights. It therefore most probably only protects "executed rights", i.e. status rights acknowledged by state act, typically, e.g., property or pension rights, or factual situations established through exercising rights acquired under the treaty. Moreover, Art. 70 VCLT, and probably also its customary expression, stand under the caveat of deviating state agreement. It can therefore only, but at least, work as a default rule in case of non-regulation in the treaty itself. In this respect, it is true that, according to traditional opinion, acquired rights have not been immune to change; property rights could always be abrogated by a new sovereign. At no point in time has the right of property been protected as a right to keep the "substance" of the property. It is generally only protected as to its value, and expropriation is a lawful option for every state. But, as mentioned earlier, the successor had to accept the existence of the right, and thus that the right had to be abrogated explicitly and that, in general, a compensation for the taking had to be paid. As *O'Connell* explained, the theory of acquired rights was *not* about having the *same* right, it was about having a legitimate interest in rectifying a *situation* of *inequity*. Furthermore, the traditional doctrine did not refer to any other rights than those having a "monetary value" and hence being open to compensation. The crux with extending the scope of the doctrine to other rights thus lies less in the faculty of abrogation than in the intrinsic nature of the protected right. Because they lead to a continuous state obligation, most human rights under treaty, are not suited to being protected after termination of the treaty.

To restate, in practice, the fields of human rights protection and investment protection do cover large parts of the protection originally thought to be conveyed by the theory of acquired rights. This fact has to be acknowledged, especially with an eye to the factual continuity of most of human rights or investment protection treaties after modern instances of state succession. However, neither human rights law nor the law on the protection of foreign investment would compensate completely for a – potentially updated – theory of acquired rights upholding individual property rights vested by domestic law in cases of state succession. This statement does not

purport at this stage either that the doctrine of acquired rights has ever constituted binding and solid international law or that it does today. Yet, to declare it outright obsolete without even inquiring into its modern material content would not do justice to its original scope or to its development potential and therefore would unduly pre-empt the analysis to follow.

An analysis of the modern content of the doctrine of acquired rights becomes especially virulent as, moreover, instead of replacing the doctrine, the fields of human rights and investment law can be seen as invigorating, rejuvenating, and expanding it.[1073] The doctrine of acquired rights, conceptionally, is not a mere defunct predecessor of individual rights protection by human rights or investment law, nor can it be seen as a specific sub-section of both. In fact, the three fields may overlap. Ultimately, the final goal of the doctrine of acquired rights is to maintain individual rights in cases of state succession. In what way such persistence is brought about is another, secondary question. Thus, I do not share the view that the (future) emergence of a rule of automatic succession would lead to the inapplicability of the theory of acquired rights.[1074] Quite the contrary, the emergence of a rule in that direction would tend to support the doctrine. Examples outside the succession context, such as denunciation clauses limiting states' possibilities to end treaty commitments containing individual rights, can also be seen as an expression of the acquired rights doctrine. In the same vein, "survival clauses" are not a substitute for acquired rights, but rather a specific application case of the theory within the field of investment law, reinforcing its *raison d'être*. The significance and independent value of the doctrine become clear in cases in which these clauses are deviated from. If the theory of acquired rights was, in fact, superseded, the abrogation of survival clauses would be subject to no limits. Such moments, when treaty rights do not survive because of a succession or because they are abrogated, are exactly the moments when the underlying principle might come into play. Especially in light of a certain backlash against the human rights and investment treaty system as well as against international institutions adjudicating them, the theory of acquired rights may well become the means of choice to cope with such conflicts.

1073 See also Ronen *Transition from Illegal Regimes* (n 14) 252 "With the development of a right to property under international law, and the growing governmental involvement in economic activity, the doctrine appears to have become definitive and widely applicable, including with respect to grants of land by the state."

1074 But in this way Wittich, 'Art. 70' (n 2) para. 30; cf. also Voon, Mitchell and Munro (n 733), 470.

Indeed, what has also become clear from the analysis above is that, while the focus with respect to the ownership of rights still definitely rests on the sovereign state, the international legal order by no means completely denies the value of individual positions. Despite the mentioned controversies and ambiguities in states' behavior, there is an all the more significant tendency in international practice, relentlessly acknowledged by scholars and international tribunals, to uphold specific individual positions. Even if most examples in this direction are relatively inconclusive, they show that states are guided by concerns about individual rights as well. Even if those examples do not resemble a "virtually uniform" consistent pattern, state practice in cases of state succession shows a remarkable trend to continuity with respect to how to treat human rights and investment treaties. In particular, most of the new states have *opted* for continuity. That almost none of them did so explicitly under the assumption they were bound to do this should neither be surprising nor decisive.

We can witness a further tendency by international courts and tribunals to uphold provisions protecting individual rights under investment or human rights treaties (and therefore often their own jurisdiction) before a change of sovereignty. In line with states' behavior, the courts and tribunals have been reluctant to endorse a rule of automatic succession, which seems understandable given the delicate relationship between their *competence de competence* and the fundamental dependence of their jurisdiction on the consent of the states involved. When it came to questions of state succession, most arbitral tribunals have upheld their jurisdiction based on findings of tacit consent or implicit novation of a specific treaty.[1075] Yet, the factual outcome of most of these cases is the upholding of individual positions even after succession.

Additionally, a customary rule seems to have emerged – developed in inter-state cases – that, at least once an international authority is seized with a dispute, *later* amendments or changes to an underlying treaty may not impact that procedure. Whether such a "vested right" can exist at an earlier

1075 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections* (n 71) paras. 105-117. Cf. on this issue in general, but with special focus on investment agreements Dumberry *Guide to State Succession in International Investment Law* (n 14) paras. 4.01-4.45. See also on the possibilities to evade having to judge on automatic succession Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 332–334. Cf. for the third party rule outside succession scenarios Simma, 'From Bilateralism to Community Interest in International Law' (n 279), 367, para. 121.

point in time remains uncertain. According to the traditional doctrine, acquired rights merely had to be *enforceably* granted under the domestic law of a state, their enforcement by judicial means was not necessary. It is as well at this point where the doctrine may have a wider scope than the protection of human or investor rights and therefore can influence them. However, at the moment, this issue remains unsettled, too.

Chapter IV: State Practice on Acquired Rights

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

A) Preliminary Remarks

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

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

1076 Jennings (n 326), 446.

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

This limitation does not mean that all precedents before 1990 are completely irrelevant today or that a definite gap disconnected the cases. On the contrary, and as has been underlined several times, the "classic" definition of the doctrine of acquired rights from the 1950s and 1960s is routinely invoked in relevant discussions and remains an important point of departure and comparison. Yet, as has also been clarified, that reference is often too inflexible, does not consider sufficiently the game-changing evolution of the surrounding legal landscape and thereby "freezes" the doctrine in time.

1077 *Supra*, Chapter II C) IV).

1078 Thus, e.g. the unification of Syria and Egypt in 1958-1961 will not be covered. Also the "unification" of North and South Vietnam in July 1976 is outside the scope of this work.

1079 Sterio (n 392) 72–77 even considers Eritrea and East Timor as "historically remote" instances of secession.

While, for a holistic picture of the doctrine of acquired rights, familiarity with PCIJ cases such as *German Settlers* is useful, today they should not be relied on without any historical or political re-assessment. Additionally, what is also excluded in principle from this analysis are all cases of illegal occupation or annexations, such as the illegal annexation of Crimea,[1080] as no genuine change of sovereignty has taken place there.[1081] For example, the independence of East Timor in 2002 can be systemized as a case of decolonization but also one of illegal occupation by Indonesia.[1082] The same holds true for the independence of Namibia - the termination of its illegal occupation by South Africa was, simultaneously, the final point of a decolonization process.[1083]

These basic decisions should not obscure the fact that such distinctions are and can never be clear-cut. All cases under analysis have emanated from and were shaped by their specific history and political environment, often shifting and sometimes only finally assessed years later. Even amongst those cases generally held to constitute cases of state succession, some examples are considered controversial. The controversy is a natural consequence of the extremely wide succession definition in the Vienna Conventions and the ambiguous status of statehood. Hence, in this chapter, the cases of the Baltic states and the Kosovo are discussed, even though they can partly be understood as cases involving illegal occupations; and a caveat is also called for with Eritrea, which additionally includes a decolonization factor. The succession cases in Hong Kong and Macau, commonly referred to as cases of cessions of territory, can also be seen as the last steps in a long process of decolonization. However, those cases were, overall, considered to be closer to genuine succession scenarios and are thus included in this analysis.

1080 On the annexation of Crimea Walter, 'Postscript' (n 386) especially 310; Marxsen (n 386), 380–391.

1081 See *supra*, Chapter II B) IV). Mere de-facto regimes are also not included, cf. Sterio (n 392) 78–92.

1082 See in more detail Carsten Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis' (2001), 5(1) Max Planck Yrbk UN L 105 110–115.

1083 See, in comparison especially with East Timor, ibid 121. However, some of the consequences of Namibia's independence from South Africa for its domestic legal order will be explained when talking about the transfer of the territory of Walvis Bay.

Furthermore, what makes succession cases taking place after 1990 even more special[1084] is that the earliest ones largely coincided with one of the major international political developments of the last century - the fall of the iron curtain between East- and West-Bloc states and the ensuing triumph of the idea of a free market economy. That development entailed profound changes in the economic systems and property orders of former socialist states. For the cases discussed here, it is of particular relevance for Yemen, Germany, the SU, the SFRY, and Czechoslovakia. In those cases, change induced by the political "defrosting" of the conflict is not always easy to separate from the direct consequences of succession. Moreover, some of the states under analysis were also subject to military conflict, war, sieges, and ethnic cleansing, sometimes leading to occupation of or international involvement in the territory. Those states' attitude towards their former legal order sometimes is more connected to the military conflict than to the succession aspect of the scenario. For example, the "Dayton-Peace Accords",[1085] concluded to end the conflict on the territory of Bosnia-Herzegovina, contained various stipulations relating to the restitution of property to refugees. Another example - years after Eritrea separated from Ethiopia, violent conflict erupted between both countries in the course of which some laws enacted shortly after independence were enforced for the first time. There, as well, distinguishing in how far a certain behavior had its roots in the laws of war or was more a consequence of succession is not easy.

Hence, since none of the cases exists outside their historical and political contexts and to set a common point of departure, their background will be explained in each case in a short introduction justifying its inclusion in the analysis and at the same time mentioning potential caveats of comparability. Within the confines of this work, it is not possible to analyze the private law of each of the successor states in detail. To a certain extent, this analysis can only give an overview of some of the most important developments in each of the successor states. Additionally, there are huge differences between the cases in the amount of available and readily accessible material. While some ministries have translated their most important documents, such as the constitution or relevant by-laws, into English or

1084 See Degan (n 2), 142 who considers successions taking place after 1990 as having a distinct character.

1085 General Framework Agreement for Peace in Bosnia and Herzegovina (14 December 1995) UN Doc. A/50/790-S/1995/999, in more detail *infra*, Chapter IV) B) IV) e).

French, in some jurisdictions, finding reliable information on the domestic law and its application was difficult. Nevertheless, what can be discerned in this work are "broad strokes", the general attitude towards a predecessor's legal system, especially with respect to individual rights.

To scrutinize the attitude towards individual rights after a change in sovereignty, the following analysis asks two main question blocks. First, was the former private legal order continued in general? How was this done - in a sweeping fashion or only as an exception? Implicitly? Explicitly? In what kind of law was such continuity stipulated? What was the default option? Did the continuity of international obligations impact the domestic law of the respective state? Second, were there stipulations that particularly protected individual rights after a change? Here, from the panoply of potential areas, two subjects will be discussed:

– (domestic) private property protection, encompassing the definition of (immovable and/or movable) property, modes of protection, and rights in relation to such property (usufruct, lease etc.); in some cases also questions of restitution of formerly expropriated assets, and
– pension claims of private individuals.

While the question of property legislation is basically confined to the sphere traditionally considered as private law, pension claims of individuals are a *sui-generis* type of rights as, in most social welfare states, such pension claims are attributed to an individual but, as part of a system of social protection, born by the society. Both areas have regularly been associated with the notion of acquired rights and are of pivotal importance to individuals since they constitute the economic basis on which most other freedoms can be exercised. A focus will be put on what is encompassed by the specific definition of protected "property" under national law and prerequisites for protection. Of particular importance is the significance of nationality for the protection of rights. The significance arises because the link to nationality qualified the doctrine of acquired rights as a sub-theory of the law on the protection of foreigners.

Finally, the case of the UK's withdrawal from the EU in 2020 will be dealt with from the perspective of acquired rights. Even if that situation did not constitute a case of state succession in the traditional sense, it still shows remarkable similarities. Since the withdrawal took place recently and sparked highly emotional discussions about the fate of a range of individual rights conveyed by the EU legal order, it is of interest to see in how far

the continuous invocation of acquired rights in the process of negotiating a withdrawal agreement has come to fruition.

Crucially, in the search for such examples and in order to collect a holistic and comprehensive sample of state policies, no importance will be attached to the literal use of the term "acquired rights" or "vested rights". Instead, account will be taken of all instances in which individual rights acquired under a domestic legal order were upheld after a change in sovereignty. In that respect, even if this book submits to the view that there is no automatic succession to treaties,[1086] international treaty obligations will also be reviewed, as will in how far those obligations have been incorporated into national law and therefore protect rights under it.

B) Case Studies

I) The Unification of Yemen (1990)

1) General Background

As foreseen in the Agreement on the Establishment of the Republic of Yemen (Unity Treaty),[1087] the unification of Yemen in May 1990 was brought about by a *merger* between the state of the Yemen Arab Republic (YAR or North Yemen) and the state of the People's Democratic Republic of Yemen (PDRY or South Yemen) in order to form the new state of the Republic of Yemen (RoY).[1088]

1086 *Supra*, Chapter III) C) II) 2) g).

1087 Art. 1 of the Agreement on the Establishment of the Republic of Yemen (22 April 1990) 30(4) (1991) ILM 822 (YAR/PDRY) "there shall be established between the State of the Yemen Arab Republic and the State of the People's Democratic Republic of Yemen (both parts of the Yemeni Homeland) a full and complete union, based on a merger, in which the international personality of each of them shall be integrated in a single international person called 'the Republic of Yemen.' The Republic of Yemen shall have one legislative, executive and judicial power."

1088 Crawford *The Creation of States* (n 308) 705; Arnauld *Völkerrecht* (n 255) § 2 para. 104; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 519/520; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 403, 406, 412-413; Goy, 'La Réunification du Yémen' (n 615), 261; Mohammed A Al-Saqqaf, 'La constitution du Yémen réunifié' in Rémy Leveau, Franck Mermier and Udo Steinbach (eds), *Le Yémen Contemporain* (Éd. Karthala 1999) 161 163.

The YAR had been part of the Ottoman Empire until its end in 1918.[1089] The PDRY had been a British protectorate and became independent in 1967.[1090] The merger of the two states in 1990 entailed the challenge of reconciling two economic systems, a free-market economy in the YAR and a socialist, centrally organized system in the PDRY.[1091] Yet, "the North's capitalist orientation and the South's socialism represented tendencies or goals, for both were really 'mixed' economies."[1092] In both states, a private business sector had emerged.[1093] Despite significant ideological differences and only a short history as one state, both sides adhered to the idea of Yemeni unity.[1094] While the PDRY's authorities were prepared to adapt to a more "western" free market system, "[m]ore 'socialist heritage' has been retained in Yemen than in Germany."[1095] Even if the PDRY was economical-

1089 On the history of North Yemen before unification Faten Plassmann, 'Yemen (2015)' in: *MPEPIL* (n 2); Robert D Burrowes, 'Prelude to Unification: The Yemen Arab Republic, 1962-1990' (1991), 23(4) Int J Middle East Stud 23 (1991), 483-506 483.

1090 Helen Lackner, 'Land Tenure, Social Structure and the State in the Southern Governorates in the Mid-1990s' in Kamil Mahdi, Anna Würth and Helen Lackner (eds), *Yemen into the Twenty-First Century: Continuity and Change* (Garnet Publishing 2007) 197 199–200; Goy, 'La Réunification du Yémen' (n 615), 252. On South Yemen's history before unification Fred Halliday, 'Yemen's Unfinished Revolution: Socialism in the South' (1979), 81 MERIP Reports 3.

1091 Nada Choueiri and others, *Yemen in the 1990s: From Unification to Economic Reform* (IMF 2002) 3, 26; Nassib G Ziadé, 'Introductory Note to the Agreement on the Establishment of the Republic of Yemen' (1991), 30 ILM 820 821; Olivier M Ribbelink, 'On the Uniting of States in Respect of Treaties' (1995), 26 NYbIL 139 153. Al-Saqqaf, 'La constitution du Yémen réunifié' (n 1087) 163 underlines that there existed no "liberal and democratic experience" for both Yemeniti states while the FRG had constituted such an example for the GDR.

1092 Sheila Carapico, 'The Economic Dimension of Yemeni Unity' (1993), 184 Middle East Report 12.

1093 ibid 9–10 "The South, with its colonial legacy, entered the 1960s with many more capitalist enterprises than North Yemen."

1094 Cf. Burrowes (n 1088), 489; Charles Dunbar, 'The Unification of Yemen: Process, Politics, and Prospects' (1992), 46(3) Middle East Journal 456 473–474; Goy, 'La Réunification du Yémen' (n 615), 249-250; Halliday (n 1089), 4; Lackner, 'Land Tenure, Social Structure and the State in the Southern Governorates in the Mid-1990s' (n 1089) 216–217; Choueiri and others (n 1090) 3. The constitutions of YAR and PDRY both adhered to unity, Al-Saqqaf, 'La constitution du Yémen réunifié' (n 1087) 162 footnote 4. On the reasons for the failure of the various previous initiatives for unity Gerd Nonneman, 'The Yemen Republic: From Unification and Liberalization to Civil War and Beyond' in Haifaa A Jawad (ed), *The Middle East in the New World Order* (2nd ed. Macmillan 1997) 61 62.

1095 Carapico (n 1091), 14. See e.g. Art. 6 paras. 2 and 4 of the constitution "The national economy stands on the following principles: [...] The construction of a

ly weaker[1096] than the YAR and considered to be economically not viable in the long run,[1097] until their merger, both states remained relatively poor countries for which unification promised economic advantages.[1098] The discovery of oil reserves in the border area[1099] had necessitated common regulation and cooperation even before formal unity.[1100] Important concession contracts for the exploration of oil had been concluded by the YAR and the PDRY together even before 1990, and unification does not seem to have impacted their validity or content.[1101] Unification efforts were ushered in by the establishment of a demilitarized zone along their border and the border's opening in 1988 for the free flow of persons and goods.[1102] Beyond that, even before unity, common legislation concerning public service, household questions, or questions of diplomatic representation had been introduced.[1103] The new common constitution[1104] was approved

developed public sector capable of owning major means of production […] All such relations and energies shall be directed towards ensuring the creation of an efficient national economy […] ensuring the creation of socialist relations derived from the Arab Islamic heritage and the circumstances of Yemeni society" and Art. 7 of the constitution "Natural resources including all their derivatives and sources of energy being under or above ground, in territorial waters, the continental shelf and the exclusive economic zone are the property of the State which ensures their exploitation for the public interest."

1096 Kamil Mahdi, Anna Würth and Helen Lackner, 'Introduction' in: *Mahdi et al. Yemen into the Twenty-First Century* (n 1089) xvii xvii; Ribbelink (n 1090), 153. Cf. for a brief comparison Choueiri and others (n 1090) 3.

1097 Cf. Nonneman, 'The Yemen Republic' (n 1093) 64; Dunbar (n 1093), 464–466.

1098 Carapico (n 1091), 10; cf. Yves Gazzo, 'The Specifics of the Yemeni Economy' in: *Leveau/Mermier et al. Le Yémen Contemporain* (n 1087) 319 320–326.

1099 On the history of oil exploration until unity Horst Kopp, 'Oil and Gas in Yemen: Development and Importance of a Key Sector Within the Economic System' in: *Leveau/Mermier et al. Le Yémen Contemporain* (n 1087) 365 365–367.

1100 Cf. Nonneman, 'The Yemen Republic' (n 1093) 65, 67; Burrowes (n 1088), 490–491; Carapico (n 1091), 13–14; Goy, 'La Réunification du Yémen' (n 615), 260; Choueiri and others (n 1090) 3. On the importance of the exploration of oil for the unification process also Abou B Al-Saqqaf, 'The Yemen Unity: Crisis in Integration' in: *Leveau/Mermier et al. Le Yémen Contemporain* (n 1087) 141 154–155.

1101 Choueiri and others (n 6) 5. At least two concession contracts were re-negotiated by the central government in 1995-1996, cf. Choueiri and others (n 1090) 5; also Kopp, 'Oil and Gas in Yemen' (n 1098) 367–368.

1102 Cf. Nonneman, 'The Yemen Republic' (n 1093) 68; Dunbar (n 1093), 459; Goy, 'La Réunification du Yémen' (n 615), 260; Choueiri and others (n 1090) 3.

1103 Goy, 'La Réunification du Yémen' (n 615), 263.

1104 Constitution (1990/1991) 7 (1992) ALQ 70 (Yemen).

by the two parliaments on 21 May 1990 and one year later espoused by public referendum.[1105] In Art. 6 para. 3, it provided for the protection of private property "which is not to be interfered with except for the sake of the public interest and for a fair compensation in accordance with the law". Interestingly though, that article was included in Part I, subsection "Economic foundations of the State" of the constitution, and not in Part II "Basic Rights and Duties of Citizens", which casts doubts on its conception as an individual right rather than as a political principle.

2) Continuity of the Legal Framework

The relatively consensual and equal[1106] transition process is mirrored in the regulation of the take-over of international and domestic legal instruments. The RoY took on all treaties of both predecessor states,[1107] at least as foreseen by the rule encapsulated in Art. 31 VCSST, i.e. with respect to the territory of the respective state.[1108] With regards to domestic law, Art. 10 of the Unification Treaty provided for the abrogation of the former two constitutions. For statutory law, Art. 130 of the 1990 Constitution stipulated that

> "[t]he provisions of the laws and decrees in force in each of the two parts of Yemen shall remain valid in the Part in which they were in

1105 Nageeb Shamiri, 'Yemen Country Survey' (1994), 1 Yrbk Islam Mid East L 369 376; Al-Saqqaf, 'La constitution du Yémen réunifié' (n 1087) 162; Art. 3 of the Unity Treaty (n 1086) set up a 30-month interim period in which the state legislatures of both states would be merged. The new state provided for almost equal power of the former ruling powers from both states, see Mahdi, Würth and Lackner, 'Introduction' (n 1095) xvii. The common constitution was amended in 1994.

1106 Goy, 'La Réunification du Yémen' (n 615), 263 "Elles considèrent qu'il y a réunion de deux États en un État nouveau et non annexion d'un Etat par l'autre, et donc une certaine succession aux deux États et non une extension du droit de l'État annexant à l'État annexé."; also Carapico (n 1091), 10.

1107 See YAR/PDRY, 'Letter to the UN Secretary General' (1990) <https://treaties.un.org/pages/HistoricalInfo.aspx?clang=_en#Yemen>. According to accounts by *Al-Zwaini The Rule of Law in Yemen* (n 801) 47 this taking over happened partly "unwilfully".

1108 Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 523; Andreas Zimmermann, 'State Succession in Respect of Treaties' in: *Klabbers/Koskenniemi et al. State Practice Regarding State Succession* (n 297) 80 114; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 412–413. Arguing for effect for the whole territory Ribbelink (n 1090), 165.

force on issue until they are amended in accordance with the rules and procedures provided for in this Constitution."[1109]

Hence, at first glance, legal continuity was the principle underlying Yemeni unification.

3) Restitution of Nationalized Land Holdings

That principle was especially applied to the question of restituting land nationalized under socialist rule. As in most states undergoing transition from a socialist to a capitalist economy, after unification one of the main issues in the PDRY became the (re-)distribution of land and tenure. Large parts of rural land were expropriated by law in the 1970s to 1980s in the territory.[1110] Shortly before unification, the PDRY had transformed the communally owned property and usufruct rights into ownership and issued certificates to those in actual possession of the property.[1111] A law provided that the former owners of the land expropriated in socialist times had to be compensated by the new owners for their loss, and they were accorded new land and compensation by the government.[1112] In accordance with the principle decision encapsulated in Art. 130 of the Constitution, those laws survived the merger and afterwards were not repealed by the unified state of Yemen.[1113] Thus, in principle, the nationalization of land was not reversed.

Yet, conversely, *in practice* many land holdings were subjected to a restitution scheme by ministerial decree and the beneficiaries of the land reform

1109 It has to be mentioned that seemingly the 1981 draft constitution which in large parts became the constitution of the unified Yemen in 1990 had contained a similar Art. 134 (which is still referred to by some authors, e.g. Ziadé (n 1090), 820/821) making the survival of laws subject to their conformity with the constitution. But this article arguably has not become the law in Yemen.

1110 Thomas Pritzkat, 'Land Distribution after Unification and its Consequences for Urban Development in Hadhramawt' in: *Mahdi et al. Yemen into the Twenty-First Century* (n 1089) 347 348; Lackner, 'Land Tenure, Social Structure and the State in the Southern Governorates in the Mid-1990s' (n 1089) 200–202; Carapico (n 1091), 10, 11 speaks of the re-distribution of about 2/3 of South Yemen's cultivated land and that "Public ventures controlled 60 to 70% of the value of industry in the South".

1111 Pritzkat, 'Land Distribution after Unification and its Consequences for Urban Development in Hadhramawt' (n 1109) 348.

1112 ibid.

1113 ibid 348–349.

had to give back the land granted.[1114] While compensation was owed in these cases as well, it was not always paid.[1115] The enforcement of that restitution scheme was not based on formal parliamentary law, was carried out on a case-by-case basis, and proved to be uneven depending on the tribal or administrative power on the ground or the political affiliation of the owner.[1116]

> "Confronted with often complex ownership structures, and finding the issues involved too highly politicised, the Yemeni government has apparently been unable to settle the ensuing 'land question' on a general and definitive level. Rather, it has preferred to deal with each claim for restitution or indemnification individually on an ad hoc basis, leaving the entire matter in an exceedingly ambiguous state."[1117]

Be that as it may, the rights of both the former owners and any new owners to property of land were in principle respected and, at least, compensation was due.

4) Interim Conclusions

On the face of the Yemeni merger, continuity of the national legal order was chosen. Yet, such continuity meant upholding two different legal systems along territorial lines in a unified state with one people. Obviously, that state of affairs was not tenable for too long. A closer look at the actual events surrounding unification indeed reveals the disparity between formal commitment and actual enforcement of rights and the speediness of change after change. As an example, the upholding of two, very different, legal frameworks with respect to family law and status law in the RoY shortly

1114 Lackner, 'Land Tenure, Social Structure and the State in the Southern Governorates in the Mid-1990s' (n 1089) 202-211; Pritzkat, 'Land Distribution after Unification and its Consequences for Urban Development in Hadhramawt' (n 1109) 348-349, for the Hadhramawt province 351–353.

1115 Lackner, 'Land Tenure, Social Structure and the State in the Southern Governorates in the Mid-1990s' (n 1089) 203.

1116 Cf. ibid 202–203; Choueiri and others (n 1090) 40; Pritzkat, 'Land Distribution after Unification and its Consequences for Urban Development in Hadhramawt' (n 1109) 349–352; on bribery ibid 353, 356-357.

1117 ibid 349.

after unity led to awkward consequences.[1118] When a unified law was proposed in 1992, it meant for a lot of women living in the Southern part of Yemen, which, in line with its political philosophy, had endorsed a liberal reading of Islamic law with respect to women's rights, that their living conditions as compared to the situation before in fact deteriorated,[1119] mainly due to the strong influence of Sharia principles on all areas of the law.[1120] Furthermore, tribal structures and societal strata still played an eminent role in Yemen, also with respect to law-making and adjudication besides and within the state's judicial system.[1121] From our narrow perspective, it should not be overseen that

> "[c]onsidering that almost 80 percent of Yemenis are not within reach of the official courts, or for other reasons adhere to tribal customary rules or informally administered Islamic norms, state law is not the supreme law in Yemen, neither effectively, nor in the perception of most Yemenis."[1122]

The potential joy and advantages of unification were soon swallowed up by the outbreak of the Gulf War and Yemen's unfortunate role in it, followed by the next civil war beginning in 1994.[1123] Still existing tribal structures and power gambles have again and again led to hostilities and new wars and a humanitarian catastrophe in Yemen.[1124] Those hostilities have evolved so far that some Southerners are now calling for independence from the North.[1125]

1118 Anna Würth, 'Stalled Reform: Family Law in Post-Unification Yemen' (2003), 10(1) IL& S 12 16–17. On the situation before unity ibid 12–16.

1119 Cf. *Al-Zwaini The Rule of Law in Yemen* (n 801) 42–43, 87-92. For a specific overview of the new regulations Würth (n 1117), 19–22.

1120 The new constitution from 1990 had in Art. 3 declared Shari'a law to be the "principal source for legislation". For an overview of the Sharia influence on the law Shamiri (n 1104); *Al-Zwaini The Rule of Law in Yemen* (n 801) 38–47, 53-54.

1121 ibid 50–55, 59-60; cf. Würth (n 1117), 22–25. For the YAR Burrowes (n 1088), 484; Gazzo, 'The Specifics of the Yemeni Economy' (n 1097) 326–327.

1122 *Al-Zwaini The Rule of Law in Yemen* (n 801) 15.

1123 For a pessimistic account of Yemen's unity Al-Saqqaf, 'The Yemen Unity' (n 1099) 154–159.

1124 See for a recent account Kali Robinson, 'Yemen's Tragedy: War, Stalemate, and Suffering: Yemen's Internal Divisions and a Saudi-led Military Intervention Have Spawned an Intractable Political, Military, and Humanitarian Crisis.' (1 May 2023) <https://www.cfr.org/backgrounder/yemen-crisis>.

1125 Iain Walker, 'Yemen: The Resurgent Secessionism in the South' in: *Pavković/ Radan Secession Research Companion* (n 392).

II) The Unification of Germany (1990)

1) General Background

On 3 October 1990, the Federal Republic of Germany (FRG or colloquial "West Germany") and the German Democratic Republic (GDR or colloquial "East Germany") united, as was agreed in their bilateral Unification Treaty (UT)[1126] from August that year.

The two states had emerged after the Second World War from the several occupation zones of the defeated German Reich. The victorious allied powers of the SU, UK, USA, and France had completely occupied the territory of Germany, a country that, in turn, had lost all its state power. While the UK, USA, and France built the Western occupation zone, which became the FRG, the Eastern part, the later GDR, remained under Soviet rule. When the FRG on 23 May 1949 and the GDR on 7 October 1949 proclaimed their foundations, the political division of Germany became manifest and, from 1961 onwards, was solidified by a wall between the two zones. The GDR, part of the "East Bloc" and hence closely associated with and under the lead of the SU as well as a member of the Treaty of Warsaw[1127], implemented a socialist ideology and planning economy. The FRG was included into the western European and transatlantic network, especially the North Atlantic Treaty Organization (NATO),[1128] and structured its state according to principles of a free-market economy and liberal democracy. That separation was to last for more than 40 years and, over time, was so consolidated that most states recognized the GDR as an

1126 Treaty on the Establishment of German Unity (31 August 1990), 30 ILM 463 (FRG/GDR). The treaty provided in Art. 1 for the accession of the five recently (re-)built "Länder" of the GDR and East-Berlin to the FRG. For an overview Gerhard Wegen, 'Introductory Note on the Treaty on the Establishment of German Unity' (1991), 30 ILM 457; for a detailed discussion Bruno Schmidt-Bleibtreu, 'Der Einigungsvertrag in seiner rechtlichen Gestaltung und Umsetzung' in Klaus Stern and Bruno Schmidt-Bleibtreu (eds), *Verträge und Rechtsakte zur Deutschen Einheit: Band 2 Einigungsvertrag und Wahlvertrag* (C.H. Beck 1990) 57.

1127 Treaty of Friendship, Co-operation and Mutual Assistance (14 May 1955) UNTS 219 3.

1128 Protocol to the North Atlantic Treaty on the Accession of the Federal Republic of Germany (23 October 1954) UNTS 243 308 and Accession by The Federal Republic of Germany to the North Atlantic Treaty (6 May 1955) UNTS 243 313.

independent state.[1129] In 1973, both states became members of the UN.[1130] The FRG, however, never fully recognized the GDR as a foreign state but considered it to be part of the "whole of Germany" ("Deutschland als Ganzes", "Gesamtdeutschland") and was constitutionally indebted to the goal of German unification.[1131] That "whole of Germany" again was the continuator, not the successor, state of the German Reich, which had never ceased to exist.[1132] The accession of the GDR to the FRG took place in 1990 after a phase of intense international upheavals and the demise of the political power of the East Bloc. The fall of the Berlin Wall in November 1989 marked the beginning of the end of the GDR and of the SU. Moreover, it heralded the end of the Cold War and was seen as a breaking point in European history. The unification of the two German states came with the lifting of the administration by the four occupying powers and all sovereign rights were transferred back to the unified Germany according to Art. 7 of the "Two-plus-Four-Treaty" from 12 September 1990.[1133]

The (re-)unification of the two German states is generally considered a case of an incorporation or absorption of one state, the GDR, into the

1129 Rudolf (n 872), 2/3; Hafner and Kornfeind (n 27), 9/10; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 411; Oeter, 'German Unification and State Succession' (n 283), 351.

1130 See https://www.un.org/en/about-us/growth-in-un-membership.

1131 Preamble of the GG until 1990, see *Grundlagenvertrag,* 2 BvF 1/73, 31 July 1973, BVerfGE 36 1 17, 22-24 (German Federal Constitutional Court [BVerfG]). Mansel (n 615), 442 picturing German unification as „abortion of the GDR's seccession attempt"; in this direction also Jochen A Frowein, 'Germany Reunited' (1991), 51 ZaöRV 333 347 who speaks of the GDR as "another state" but at the same time of the foundation of the GDR as a "non-effective secession"; cf. Oeter, 'German Unification and State Succession' (n 283), 350–351.

1132 *BVerfG Grundlagenvertrag* (n 1130) 16; Legislative Explanatory Memorandum on the Treaty of German Unity (31 August 1990) BT-Drs. 11/7760 (1990) (FRG), 358; also Rudolf (n 872), 4; Jochen A Frowein, 'The Reunification of Germany' (1992), 86(1) AJIL 152 157; Christian Jasper, 'Art. 123' in Michael Sachs (ed), *Grundgesetz* (9th ed. C.H. Beck 2021) para. 1. On the different views on this topic Czaplinski (n 306), 89–90; Ingo von Münch, 'Deutschland: gestern - heute - morgen: Verfassungsrechtliche und völkerrechtliche Probleme der deutschen Teilung und Vereinigung', 1991(14) NJW 865 865-868.

1133 Treaty on the Final Settlement with Respect to Germany (12 September 1990) UNTS 1696 124 = ZaöRV 1991, 494 = 29 ILM (1990) 1186.

FRG[1134] and not as a merger,[1135] as no new state came into being. The FRG continued with respect to its territory and, at the same time, was a successor with respect to the territory of the GDR, which perished as a state.[1136] That perception was mirrored in (the old version of) Art. 23 of the constitution of the FRG, the *Grundgesetz* (GG),[1137] which became obsolete and was completely re-drafted in 1990.

The declared goal of the unification process was the accession of the GDR to the FRG and hence the establishment of a unified sole state with a common legal system.[1138] As in the case of Yemen, the unification required the reconciliation of two legal systems built upon different ideological and economical foundations. Contrary to the case of Yemen, however, the reconciliation was not sought through the preservation and later assimilation of both legal systems but by extension of the FRG's legal system to the ac-

1134 Dörr *Inkorporation* (n 397) 399–404; Crawford *The Creation of States* (n 308) 673–675; ILA, 'Aspects of the Law of State Succession' (n 616) 8, 27; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 519, 522; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 397, 403; Hafner and Kornfeind (n 27), 1; Thomas Giegerich, 'Art. 123 (August 2012)' in Roman Herzog and others (eds), *Dürig/Herzog/Scholz: Grundgesetz Kommentar* (C.H. Beck 2022 (lose leaf)) para. 56; Oeter, 'German Unification and State Succession' (n 283), 351–352; Arnauld *Völkerrecht* (n 255) § 2 para. 104; Herdegen (n 255) § 29 para. 6; Jennings and Watts (n 27) "absorption".

1135 Shaw, 'State Succession Revisited' (n 259), 54–56; Hailbronner (n 612), 34.

1136 Jeremy Hill and Michael Wood, 'Germany, Reunification of (1990) (2022)' in: *MPEPIL* (n 2) paras. 1, 15; Hafner and Kornfeind (n 27), 10; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 411; Oeter, 'German Unification and State Succession' (n 283), 352; cf. also Frowein, 'The Reunification of Germany' (n 1131), 157. On the intricacies of this model Craven, 'The Problem of State Succession and the Identity of States under International Law' (n 255), 144–145. Notification to the UNSG (3 October 1990) https://treaties.un.org/pages/historicalinfo.aspx#Germany (FRG) "Through the accession of the German Democratic Republic to the Federal Republic of Germany with effect from 3 October 1990, the two German States have united to form one sovereign State, which as a single Member of the United Nations remains bound by the provisions of the Charter in accordance with the solemn declaration of 12 June 1973. As from the date of unification, the Federal Republic of Germany will act in the United Nations under the designation 'Germany'".

1137 Grundgesetz (23 May 1949) BGBl I 1949 1 (FRG); for an English translation cf. https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0832.

1138 Cf. Explanatory Memorandum UT (n 1131) 356. For an elaborated view on the term "unified law" and earlier instances of unifying different legal systems in German history Rolf Grawert, 'Rechtseinheit in Deutschland' (1991), 30(2) Der Staat 209 especially 209-222.

ceded territory. Preceding formal unity, in May 1990, the GDR and the FRG had concluded the Treaty Establishing a Monetary, Economic and Social Union (TMU).[1139] That treaty was a first step towards unity and already incorporated important repercussions for the every-day life of Germans, especially those in the eastern part: It introduced the rule of the "social market economy" and provided for adapting the GDR pension and other social welfare schemes to those of the FRG. Even at that point, economic, trade, and corporate law had been unified in large parts.[1140] The UT and its annexes, which after unification became statutory law,[1141] contained more detailed rules.[1142]

2) International Treaties

Pursuant to Art. 11 UT, the FRG's international treaties, including treaties establishing membership in an international organization, were in general deemed to remain in force after unification and were applicable to the whole territory of the unified Germany. Exceptions were listed in Annex I to the UT and encompass treaties of a special "political nature" such as treaties with the three occupying powers or treaties concerning the deployment of foreign troops and arms on German soil, especially the status of forces' agreements with NATO partners. Conversely, according to Art. 12 UT, treaties concluded by the GDR were to be "discussed" ("erörtert") with the treaty partners to ascertain their continued validity, adaption, or extinction, para. 1. The unified Germany hence reserved its freedom to decide on the succession into the GDR's international treaty obligations, cf. para. 2. Treaties were intentionally left in a state of limbo until a final

1139 Treaty Establishing a Monetary, Economic and Social Union (18 May 1990) BGBl 1990 II 537 (FRG/GDR) = 29 ILM (1990) 1120; for a general overview Gerhard Wegen and Christopher L Crosswhite, 'Introductory Note on the Treaty Establishing a Monetary, Economic and Social Union' (1990), 29(5) AJIL 1108.

1140 Georg Brunner, 'Was bleibt übrig vom DDR-Recht nach der Wiedervereinigung?' [1991] JuS 353, 355; Reinhard Nissel, 'Fortgeltendes DDR–Recht nach dem Einigungsvertrag', 1990(9) DtZ 330 333.

1141 Art. 45 para. 2 UT (n 1125); Grawert (n 1137), 222; Klaus Stern, 'Die Wiederherstellung der staatlichen Einheit' in: *Stern/Schmidt-Bleibtreu Verträge und Rechtsakte zur Deutschen Einheit* (n 1125) 1 39; for the TMU (n 1138) cf. Art. 40 para. 1 UT (n 1125) and Münch (n 1131), 868.

1142 The UT (n 1125) contains only 45 articles, but its annexes and protocols span over more than 300 pages of the Official Gazette.

decision was to be made; they were not extinguished automatically.[1143] Eventually, most of the treaties of the former GDR[1144] were discontinued,[1145] including treaties with a humanitarian goal,[1146] and localized treaties[1147]. With only few exceptions,[1148] that procedure seems to have been accepted

1143 Cf. Explanatory Memorandum UT (n 1131) 362; Oeter, 'German Unification and State Succession' (n 283), 360–362 links this decision to the principle of *rebus sic stantibus*; differently Münch (n 1131), 868.

1144 Ulrich Drobnig, 'Das Schicksal der Staatsverträge der DDR nach dem Einigungsvertrag' [1991] DtZ 76, 76/77 speaks of around 6000 treaties; Papenfuß (n 306), 484 speaks of a data file of around 2600 treaties the GDR authorities had compiled for consultation.

1145 Cf. BGBl. Fundstellennachweis B (2021) 1063-1068 „Termination of international Treaties with Third States" and "Treaties with the former GDR" listing several treaties which came to an end when the GDR vanished. Cf. also Zimmermann, 'State Succession in Respect of Treaties' (n 1107) 88; Hill and Wood, 'Germany, Reunification of (1990) (2022)' (n 1135) para. 68; the ILA, 'Aspects of the Law of State Succession' (n 616) 10 speaks of 2044 treaties which lapsed by the date of unification; Papenfuß (n 306), 485 "more than 80 percent"; ibid 479 also mentions "only two multilateral agreements" of the GDR the FRG acceded to. The FRG e.g. succeeded by exchange of notes to the GDR's compensation agreements with several states, cf. *Lump Sum Compensation Agreement GDR-Austria,* 2 BvR 194/05, 8 November 2006, BVerfGK 9 412 (German Federal Constitutional Court [BVerfG]) with headnote by Reimold, 'Headnote on Ms S and ors, Decision on a constitutional complaint, 2 BvR 194/05' (n 996). Speaking of the "highly politicized character" of "nearly every" GDR treaty Oeter, 'German Unification and State Succession' (n 283), 360.

1146 Oeter, 'German Unification and State Succession' (n 56), 365 considers the loss of some individual rights as negligeable compared to the formation of a uniform legal system.

1147 ILA, 'Aspects of the Law of State Succession' (n 616) 10; cf. also Czaplinski (n 306), 100–101 with respect to the Polish border; apparently differently Papenfuß (n 306), 486; Hill and Wood, 'Germany, Reunification of (1990) (2022)' (n 1135) 68. On the Polish border and the "Treaty of Görlitz" also Frowein, 'Germany Reunited' (n 1130), 338–343; Oeter, 'German Unification and State Succession' (n 283), 365; Hailbronner (n 612), 26–27.

1148 The Netherlands reportedly did not accept the expiry of bilateral treaties with the GDR and referred to Art. 31 VCSST, see Ribbelink (n 1090), 161; ILA, 'Aspects of the Law of State Succession' (n 616) 10. On the solution cf. Protocol inzake de gevolgen van de Duitse eenwording voor de bilaterale verdragsrelaties, met bijlagen (25 January 1994) Tranctatenblad (NL) (1994) No. 81 (Netherlands/FRG); Protocol tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland inzake de gevolgen van de Duitse eenwording voor de bilaterale verdragsrelaties, met bijlagen, Bonn, 25.01.1994 Tranctatenblad (NL) (1994) No. 81. On the view of the European Commission see Frowein, 'The Reunification of Germany' (n 1131), 159; Oeter, 'German Unification and State Succession' (n 283), 372.

by the international community, especially the treaty partners of the former GDR.[1149]

As a consequence, many authors consider the rule encapsulated in Art. 15 VCSST, the moving treaty frontiers rule, to be applicable to the case.[1150] The acceptance is significant since the VCSST only provides for the rule in cases of transfer of "part of the territory", while Art. 31 VCSST is applicable to the "uniting of states"[1151]. It is, however, difficult to determine conclusively whether the FRG in general discarded the rule encapsulated by Art. 31 (1) VCSST or, alternatively, opted for an individual approach as foreseen by Art. 31 (1) lit. a VCSST ("unless [...] the successor State and the other State party or States Parties otherwise agree").[1152]

Art. 12 para. 1 UT refers to the protection of legitimate expectations ("Vertrauensschutz"), the interests of treaty partners, existing treaty commitments of the FRG, principles of a free, democratic order, and the rule of law ("rechtsstaatlich"). With a view to acquired rights, in particular the term "legitimate expectations"[1153] could function as a vehicle to include private interests into the treaty. But it is not evident that the listed requirements

1149 Cf. Papenfuß (n 306), 476; Aust *Modern Treaty Law and Practice* (n 294) 326.

1150 Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 338; Frowein, 'The Reunification of Germany' (n 1131), footnote 32.

1151 Therefore interpreting „uniting" only as "merger" Mansel (n 615), 441; Ulrich Magnus, 'Deutsche Rechtseinheit im Zivilrecht - die Übergangsregelungen' [1992] JuS 456, 459; differently Czaplinski (n 306), 99; Papenfuß (n 306), 470 who holds that Art. 31 VCSST "assumes"also in cases of incorporation that "two separate legal territories remain in existence"; Frowein, 'The Reunification of Germany' (n 1131), 158 who only views the consequence of Art. 31 VCSST as "inappropriate" in cases of incorporation; in the same way Hailbronner (n 612), 36–37.

1152 The fact that the Explanatory Memorandum UT (n 1131) 362 only mentions the "moving treaty frontiers" rule with respect to the FRG's treaties (Art. 11 UT), but explicitly stated that the GDR's treaties would not "generally extinguish" in the course of accession (Art. 12 UT), would rather militate for the second, more flexible approach. Reportedly, the GDR had favored the application of Art. 31 VCSST, see Papenfuß (n 306), 477. Several authors (Stern, 'Die Wiederherstellung der staatlichen Einheit' (n 1140) 52; Oeter, 'German Unification and State Succession' (n 283), 359–362) refer to the *clausula rebus sic stantibus*, codified in Art. 62 VCLT (n 291); cp. also ILA, 'Aspects of the Law of State Succession' (n 616) 8, 10.

1153 Art. 29 UT (n 1125) even provided for the protection of legitimate expectations with respect to trade treaty relations with states of the (Eastern) Council for Mutual Economic Assistance (COMECON). In comparison to Art. 12 UT, Art. 29 para. 1 UT speaks of "developing" and "intensifying" the trade relationships. To achieve this goal, even interim rules providing for exceptions were taken into consideration, Art. 29 para. 2 UT. Yet, the economic and political decay of the Soviet Bloc also entailed the demise of the COMECON which was officially terminated

functioned as real constraints on the FRG's leeway for consultations.[1154] Interestingly, in relation to that point and as an exception to Art. 12 UT, the FRG deliberately chose to make use of the tool under Art. 3 UT and to declare, by way of federal decree, that several GDR treaties with other states on social security would continue to *apply*.[1155] However, that continued application was soon limited to the end of 1992 or of 1995.[1156] The continuation was, therefore, more an interim application than a genuine continuation of a treaty relationship.[1157] German social courts explicitly

in 1991. Therefore, the promise given in the UT was not tested. On this situation see also Papenfuß (n 306), 479–480.

1154 ILA, 'Aspects of the Law of State Succession' (n 616) 10 doubts the existence of criteria; also Oeter, 'German Unification and State Succession' (n 283), 377 "it is doubtful whether the principle of "Vertrauensschutz" really is a legal duty arising under the laws of succession or the principles of *rebus sic stantibus*" [italics in original]; differently Drobnig (n 1143), 79–80. Cf. also Papenfuß (n 306), 480 who mentions that "As part of the protection of confidence principle for the benefit of individuals, even after October 3, 1990, the Federal Republic of Germany continued to finance all scholarships and vocational training that the GDR had previously promised to finance under international treaties. In addition, all certificates, diplomas, degrees and academic grades obtained under GDR agreements on equivalence were recognized by united Germany on the understanding that they did not automatically entitle holders to access to jobs in the Federal Republic."

1155 Verordnung über die vorübergehende weitere Anwendung verschiedener völkerrechtlicher Verträge der Deutschen Demokratischen Republik im Bereich der sozialen Sicherheit (3 April 1991) BGBl. 1991 II 614 (FRG) (concerning e.g. Bulgaria, the CSFR, Hungary, Poland, Romania and the SU). Cf. ILA, 'Aspects of the Law of State Succession' (n 616) 10; Zimmermann, 'State Succession in Respect of Treaties' (n 1107) 88.

1156 Art. 1 No. 5 lit. b) Verordnung zur Änderung der Verordnung über die vorübergehende weitere Anwendung verschiedener völkerrechtlicher Verträge der Deutschen Demokratischen Republik im Bereich der sozialen Sicherheit (18 December 1992) BGBl. 1992 II 1231 (FRG); incorrect therefore the statement in ILA, 'Aspects of the Law of State Succession' (n 616) 10 that "ces accords a Été [sic] prolongée successivement *ad infinitum*" [italics in original].

1157 The government expected "uneven" financial burdens for the FRG compared to the treaty partners due to "unilateral immigration flows from Middle-, East- and Southeast-Europe", did not want to accord immigrants to the GDR a better position than immigrants to the FRG, and considered the "integration" principle to be outdated, cf. BR Drs. 776/92, 05.11.1992 at 7, 11; also Bernd Abendroth, 'Beendigung der Sozialversicherungsabkommen der DDR: Weitreichende Übergangsregelungen vorgesehen' (1993), 40(6) DAngVers 209 210. On the different approach with respect to treaties on social security the FRG had concluded with the former Yugoslavia see Reimold, 'Headnote on Ms S and ors, Decision on a constitutional complaint, 2 BvR 194/05' (n 996).

rejected the idea of a FRG succession into these treaties but declared the bilateral treaties to have been extinguished at the date of unification.[1158]

3) Domestic Law

With respect to domestic law, the UT opted for a similar, albeit more nuanced, approach.[1159]

a) The Continuity of the Legal Order in General

According to Art. 3 UT, the GG, subject to exceptions provided for in the UT itself,[1160] would be applicable to the territory of the former GDR. Only few provisions in the GG were changed in the course of unification,

1158 *Continued Application of the Treaty on Social Security with the SU,* B 4 RA 4/98, 29 September 1998, BSGE 83 19 paras. 16-17, 20-23, 29 (German Federal Social Court (BSG)); *Continued Application of Social Security Treaty with Bulgaria,* B 4 RA 62/99 R, 29 June 2000 paras. 29–30, 38 (German Federal Social Court (BSG)); *Continued Application of the Treaty on Social Security with SU (II),* B 5 RJ 6/00 R, 25 July 2001 para. 13 (German Federal Social Court (BSG)); but cf. Explanatory Memorandum UT (n 1131) 362 which leaves the status of the treaties in a case of limbo. Additionally, the social courts often even curtailed the interim application period to 31 December 1991 *Continued Application of the Treaty on Social Security with the SU* (n 1157) para. 37; *Recognition of Work in East-Bloc States,* B 13 R 427/12 B, 7 August 2014, SozR 4-8580 Art 7 Nr 1 (German Federal Social Court [BSG]). This meant that much of the work conducted in East-Bloc states was not recognized by the FRG's pension authorities and pension claims therefore rejected, also for German nationals, cf. e.g. *Continued Application of the Treaty on Social Security with the SU* (n 1157); *Recognition of Work Executed in East-Bloc States* (n 1157); *Continued Application of Social Security Treaty with Bulgaria* (n 1157) para. 42. Cf. for the consequences e.g. *Continued Application of the Treaty on Social Security with the SU* (n 1157) especially para. 30 (denying the applicant any claim to old-age pension under German law despite years of work in the SU because she had not attained the pension age by the end of 1992 but only in 1993). On the constitutionality of these provisions *Continued Application of Social Security Treaty with Bulgaria* (n 1157) paras. 44-46. For further details Abendroth (n 1156), 210–214.

1159 For an overview of the different alternatives envisaged before unification Herwig Roggemann, 'Von der interdeutschen Rechtsvergleichung zur innerdeutschen Rechtsangleichung' (1990), 45(8) JZ 363.

1160 Such as Art. 6 UT (concerning Art. 131 GG) or Art. 7 UT.

cf. Art. 4 UT.[1161] The GG contains no explicit provision dealing with the survival of the GDR's domestic legal order.[1162] Art. 8 and 9 UT contain the basic rules with respect to domestic law under the constitution:[1163] Unless there were explicit exceptions, especially contained in Annex I, FRG law was implemented in the territory of the former GDR as well, Art. 8 UT.[1164] Yet, GDR law, in principle, remained in force unless it contradicted the law of the FRG and/or as long as the special field was not regulated by FRG law or EC law, Art. 9 para 1 UT.[1165] For specific subjects enlisted in Annex II of the UT, the GDR law even remained in force if it was (merely) conform with the GG and EC law, Art. 9 para. 2 UT. Thus, the transitional arrangements for harmonizing the law were subject to a sophisticated rule-exception relationship, which was regulated in Annex I and II to the

1161 For an overview of the constitutional changes Stern, 'Die Wiederherstellung der staatlichen Einheit' (n 1140) 41–46.

1162 Art. 123 para. 1 GG ("Law in force before the Bundestag first convenes shall remain in force insofar as it does not conflict with this Basic Law") was only applicable to the legal order of the German Reich, i.e. a case of state continuity. It was therefore not applicable to the accession of the GDR, a case of state succession, Hans D Jarass, 'Art. 123' in Hans D Jarass and Bodo Pieroth (eds), *Grundgesetz für die Bundesrepublik Deutschland: Kommentar* (17th ed. Beck 2022) paras. 4; Jasper, 'Art. 123' (n 1131) paras. 8, 18; Roland Broemel, 'Art. 123' in Jörn-Axel Kämmerer and Markus Kotzur (eds), *von Münch/Kunig Grundgesetz Kommentar* (7th ed. C.H. Beck 2021) para. 17; Fabian Wittreck, 'Art. 123' in Horst Dreier (ed), *Grundgesetz-Kommentar* (3rd ed. Mohr Siebeck 2018) para. 27; Giegerich, 'Art. 123 (August 2012)' (n 1133) para. 60. Furthermore, it is disputed within German academia if this norm is of a constitutive (Jarass, 'Art. 123' (n 1161) Rn. 1; Jasper, 'Art. 123' (n 1131) para. 2; Wittreck, 'Art. 123' (n 1161) para. 19) or merely a declaratory (Heinrich A Wolff, 'Art. 123' in Peter Huber and Andreas Voßkuhle (eds), *von Mangoldt/Klein/Starck: Grundgesetz Kommentar* (7th ed. C.H. Beck 2018) paras. 4, 5, 10; cf. Christian Seiler, 'Art. 123' in Volker Epping and Christian Hillgruber (eds), *Beckscher Online Kommentar GG* (52nd ed. C.H. Beck 2022) para. 1.1; Broemel, 'Art. 123' (n 1161) para. 2) character. Not completely clear, speaking of a constitutive effect but maintaining that statutory law "has to remain in place in order to "prevent legal wholes" due to "legal security" Giegerich, 'Art. 123 (August 2012)' (n 1133) paras. 1-2.

1163 In more detail Michael Kloepfer and Heribert Kröger, 'Rechtsangleichung nach Art. 8 und 9 des Einigungsvertrags' [1991] DVBl 1031, 1032–1040.

1164 The reason for this approach was that, for the sake of legal security, unity ought to be achieved as swiftly as possible, cf. Explanatory Memorandum UT (n 1131) 356. Cf. also Brunner (n 1139), 353 who suggests that shortly later unity would not have been possible any more. Kloepfer and Kröger (n 1162), 1031 hold the view that FRG law did not apply automatically to the GDR's territory, but this extension of scope had to be provided for explicitly.

1165 For an overview of GDR law remaining in force Brunner (n 1139); Nissel (n 1139).

UT. GDR law enacted *after* the signing of the UT only remained in force if, additionally,[1166] the FRG agreed, Art. 9 para. 3 UT. In comparison, all *decisions* of GDR courts and administration rendered before unification remained in force, Art. 18, 19 UT.[1167] Hence, the UT, on the one hand, opted for the continuity of the GDR order but, on the other hand, declared FRG law to be applicable to the former GDR territory and to supersede conflicting GDR law.

GDR law thus, in principle, only applied in gaps or in specifically named exceptions. Protection of acquired rights of GDR nationals therefore had to be sought through those exceptions. As an example, Art. 4 No. 5 UT introduced into the GG Art. 143, which, in paras. 1 and 2, provided for interim periods in which the laws within the territory of the former GDR were to be adapted to the new constitutional order and could therefore deviate from the GG as long as they did not encroach upon certain core requirements. Those particularly "sensitive" areas of law were made subject to special interim regimes until 1992 or 1995 and were supposed to be grounded on a completely new basis after unification.

b) Private Rights

Unification was an enormous task as it had to be effectuated in a comparably short period of time and touched upon a vast array of topics of relevance to individual rights. To cover all of them would go beyond the scope of this book.[1168] However, the book will investigate two subject areas of particular relevance: social welfare law, especially pension law (Art. 30 UT), and the law on property.

1166 Kloepfer and Kröger (n 1162), 1038.

1167 Both articles provide for the possibility of revocation of such decisions in case they violate the rule of law, though. The Explanatory Memorandum UT (n 1131) says both articles only "clarify" the situation which militates in favour of their declaratory character.

1168 Cf. the list of references in Kloepfer and Kröger (n 1162), footnote 9. For an overview of the changes in private law Magnus (n 1150), 457–461. For the new challenges posed to private international law and several other fields of German private law see e.g. Erik Jayme and Oliver Furtak (eds), *Der Weg zur deutschen Rechtseinheit: Internationale und interne Auswirkungen im Privatrecht* (C.F. Müller 1991).

aa) Old-Age Pensions of Former GDR Citizens

The pension systems in both states had functioned pursuant to different schemes and, in particular, to different social environments established on disparate political assumptions.[1169] The TMU in Art. 20 para. 1 required the GDR to "introduce all necessary measures to adapt its pension law to the pension insurance law of the Federal Republic of Germany" but a good faith protection of legitimate expectations was foreseen for "persons approaching pensionable age" for a "transitional period of five years". Art. 20 para. 2 TMU contained the basic decisions for adaption, stipulating that

> "[t]he existing supplementary and special pensions schemes shall be discontinued as of 1 July 1990. *Accrued claims and entitlements shall be transferred to the pension insurance fund*, and benefits on the basis of special arrangements shall be reviewed with a view to abolishing unjustified benefits and reducing excessive benefits." [emphasis added]

Thus, while in principle already accrued rights of GDR citizens should be protected as "acquired rights",[1170] "special" pension schemes were abolished for the future and reviewed for the past. Art. 30 UT stipulated rules for an interim period until the GDR pension scheme was to be transferred into the FRG system. For example, for those retiring between 1 January 1992 and 30 June 1995, Art 30 para. 3 UT contained a guarantee that their pensions were to amount to at least the basic amount they would have received under GDR law in 1990 ("Zahlbetragsgarantie"). Other GDR employees close to retirement were granted an "early retirement payment" of at least 65% of their last wage until the beginning of their pension, Art. 30 para. 2 UT. To a large part, the expenses were born by the FRG's social security system, cf. Art. 20 para. 2 sentence 4 TMU. Those principles were cast into federal statutory law in 1991 and put into practice in 1992, when the two systems were united.[1171]

1169 For an overview of the differences Judith Kerschbaumer, *Das Recht der gesetzlichen Rentenversicherung und die Deutsche Einheit* (VS Verlag 2011) 78–90.

1170 The ECtHR in *Kuna v. Germany,* Appl. No. 52449/99, 10 April 2001, ECLI:CE:ECHR:2001:0410DEC005244999 (ECtHR) even translated the phrase "[a]ccrued claims and entitlements" as "acquired rights".

1171 See on the factual and legal background also ibid. and *Klose and Others v. Germany,* Appl. No. 12923/03, 25 September 2007, Decision on Addmisibilty (ECtHR).

While those seemingly straightforward provisions tend to support acquired rights of GDR citizens with respect to their pension rights, their factual implementation proved technically difficult and politically delicate. As could be expected, especially the distinction between "ordinary" and "supplementary" GDR pensions became a bone of contention. What was called "transition" was not treated as a "transferal" of rights acquired under the GDR pension regime but often seen as a "novation" of pension claims under FRG law.[1172] According to the German Constitutional Court (*Bundesverfassungsgericht* (BVerfG)), while positions acquired under GDR law could be protected as property, they could only fall under the respective constitutional guarantee if accepted and acknowledged by the UT.[1173] According to the BVerfG, the FRG authorities, when negotiating and concluding the UT, were bound by the guarantee of property under the GG[1174] but had a wide margin in how to define and modify property as long as any curtailments were not disproportionate or unbearable.[1175] They were not bound to treat persons having acquired pension entitlements under GDR law as if they had acquired these entitlements within the FRG.[1176] An important argument for cutting the specific extra payments some GDR citizens had received was, e.g., the viability of the social system in the FRG.[1177] However, the BVerfG denounced a further capping of the "Zahlbetragsgarantie" as unconstitutional as those affected were held to have a legitimate expectation in the amount stipulated in the UT. Although such payments of sometimes high pensions later seemed politically inopportune,

1172 *Recognition of Times of Work in the Former SU,* B 4 RA 34/98 R, 29 September 1998, SozR 3-8000 Art 3 Nr 1, SozR 3-8580 Art 7 Nr 1 para. 11 (German Federal Social Court [BSG]) "it was necessary […] to *substitute* and form *new* claims, rights and entitlements through a *constitutive* federal act within the frame and according to the stipulations of the federal legal order" [own translation from German, emphasis added].

1173 *Rentenüberleitung I,* 1 BvL 32/95, 1 BvR 2105/95, 28 April 1999, BVerfGE 100 1 paras. 123-130, 132-133 (German Federal Constitutional Court [BVerfG]); affirmed by *Rentenüberleitung II,* 1 BvR 713/13, 13 December 2016, NJW 2017 876 para. 10 (German Federal Constitutional Court [BVerfG]); for an overview of the leading BVerfG decisions on the unification of the two pension systems see [in German] https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/1999/bvg99-052.html.

1174 *BVerfG Rentenüberleitung I* (n 1172) para. 134.

1175 ibid paras. 135-137, 143.

1176 ibid para. 142; for a succinct overview of the jurisprudence of the BVerfG on this issue Kerschbaumer (n 1168) 122–125.

1177 *BVerfG Rentenüberleitung I* (n 1172) para. 144.

that consequence was already known when the UT was drafted.[1178] The BVerfG reasoning was accepted by the ECtHR, which declared pertaining complaints inadmissible as no *prima facie* case of a violation of P-I 1 could be made.[1179]

> "La Cour rappelle qu'un requérant ne peut alléguer une violation de l'article 1 du Protocole no 1 que dans la mesure où les décisions qu'il incrimine se rapportent à ses « biens » au sens de cette disposition. La notion de « biens » peut recouvrir tant des « biens existants » que des valeurs patrimoniales, y compris des créances, en vertu desquelles le requérant peut prétendre avoir au moins une « espérance légitime » d'obtenir la jouissance effective d'un droit de propriété. […] En l'espèce, ni le Traité d'Etat ni le Traité d'unification n'ont conféré aux requérants des droits qui iraient au-delà de ceux conférés par les lois litigieuses telles qu'amendées suite aux arrêts de principe de la Cour constitutionnelle fédérale."[1180]

Thus the ECtHR reiterated that, to qualify under P-I 1, a claimant had to prove a legal right acknowledged by the UT. Even if the FRG was the legal successor of the GDR, the ECtHR did not assume continuity of individual positions derived from pension legislation unless the legislation was accepted by the FRG. The ECtHR again showed a remarkable self-restraint in controlling the German legal acts.

> "Or dans les affaires liées à la réunification allemande dont elle a eu à connaître, la Cour a évoqué le contexte unique de celle-ci et l'immense tâche à laquelle le législateur était confronté pour régler toutes les questions qui se sont nécessairement posées lors du passage d'un régime communiste à un régime démocratique d'économie de marché. A cet égard, le législateur disposait d'une ample marge d'appréciation […]."[1181]

For the most claimants, that approach led to acceptable solutions, and pensioners were better off than they would have been in the GDR.[1182] Yet,

1178 ibid paras. 166-182, 185.

1179 *ECtHR Klose and Others* (n 1170), affirmed by *Peterke and Lembcke v. Germany,* Appl. No. 4290/03, 4 December 2007, Decision on Admissibility (ECtHR).

1180 *ECtHR Klose and Others* (n 1170) [references omitted].

1181 ibid. [references omitted]. Similarly, but with respect to Art. 14 ECHR (in combination with P-I 1) *ECtHR Kuna v. Germany* (n 1169).

1182 Research Services of the German Parliament, 'Von der Rentenüberleitung betroffene besondere Personen- und Berufsgruppen: Expert Opinion' (22 March 2019)

for some former GDR employees, the transfer engendered harsh economic and personal consequences, e.g., workers eligible for extra pensions under the GDR system or women divorced in the GDR.[1183] The disadvantage was due to the transfer of pension biographies into a completely different economic and social system without enough account being taken of their particularities or without enough willingness or ability to adapt the FRG system to new realities in the midst of a huge, exceptional transition process.[1184] Therefore, the hardships tended often not to result from acquired rights not being recognized (in the GDR the mentioned individuals would not have received much more money) but from the change of the social system those people had previously trusted and the corresponding change in the effective value of the pension. Such a prospective value, however, was not protected.

Resultingly, a general, not an individual, approach to acquired pension rights was administered. Such an approach, in particular, took only limited notice of legitimate expectations of former GDR citizens. The approach has, of course, to be evaluated with an eye to the enormous task of transitioning about four million GDR pension biographies to the FRG system[1185] while trying to maintain payments already running. The envisaged political solution to the problem was to initiate a financial fund for cases of hardship,[1186] but such a fund has still not been established.[1187] It should not be forgotten that, at the time of unification, the GDR was practically bankrupt[1188] and

WD 6 - 3000 - 047/19 6. Cf. on the first reforms still under GDR authority in July 1990 Kerschbaumer (n 1168) 99 and for the later developments ibid 117, 120.

1183 For an overview *Expert Opinion Pension Claims* (n 1181). On divorced women, CEDAW Committee, 'Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Germany' (9 March 2017) UN Doc. CEDAW/C/DEU/CO/7-8 para. 49 lit. (d) and the reply by the FRG, 'CEDAW Interim Report' (March 2019) 6–8 <https://www.bmfsfj.de/resource/blob/136168/41562bdf33d23798f1b1fcbb21f669fc/20190517-cedaw-zwischenbericht-englisch-data.pdf>.

1184 On the parliamentary discussion Kerschbaumer (n 1168) 111–116, in general ibid 125. Moreover, wrong perceptions about the future developments, e.g. the convergence of salaries and wages in both parts of Germany, see Art. 30 para. 5 UT, have influenced the process, too.

1185 *BVerfG Rentenüberleitung I* (n 1172) para. 10.

1186 Cf. German Government, 'Coalition Agreement of the Governing Parties in Germany' (2018) 93 paras. 4323-4325.

1187 German Government, 'Antwort auf die Kleine Anfrage: Zeitnahe Lösung für die Härtefälle in der Rentenüberleitung' (12 October 2020) BT-Drs. 19/23275.

1188 Hill and Wood, 'Germany, Reunification of (1990) (2022)' (n 1135) para. 12.

hence the actual value of the pension claims would have been severely diminished.

bb) Property Questions, Especially Land Rights

The notion of property was different in the two German states.[1189] In the openly socialist GDR state, private property, especially property in the hands of natural persons, was a rare exception.[1190] Property was classified according to its function.[1191] In the wake of unity on 15 June 1990, the GDR and the FRG concluded the "Joint Declaration" ("Gemeinsame Erklärung")[1192]. That document, pursuant to its own words, tried to solve problems emanating from the separation of the two Germanys, the related moving of parts of the population from East to West, and the two distinct national legal orders. Notably, legal certainty ("Rechtssicherheit"), legal clarity ("Rechtseindeutigkeit"), and the right of property were considered guiding principles. Moreover, it was agreed that a "(socially) acceptable balance of different interest" ("verträglicher Ausgleich verschiedener Interessen") had to be found in order to secure legal peace ("Rechtsfriede") in a future united Germany.

After unification, the principle of Art. 8 UT applied which meant that the Civil Code of the FRG, the Bundesgesetzbuch (BGB), and hence the corresponding notion of property was extended to the GDR territory.[1193] However, in principle, property acquired under GDR law was recognized,

1189 Starting with the same civil code (the BGB from 1900), after their separation both states interpreted and modified the code independently. Eventually, the GDR even enacted its own new Civil Code, the ZGB, in 1976. On the historical evolution Magnus (n 1150), 456–457.

1190 On the notion of property in the GDR George Turner, 'Der Eigentumsbegriff in der DDR' [1990] NJW 555; cf. Magnus (n 1150), 460; decidedly negative Otto Kimminich, 'Bemerkungen zur Überleitung der Eigentumsordnung der ehemaligen DDR' in Klaus Stern (ed), *Deutsche Wiedervereinigung. Die Rechtseinheit: Band I Eigentum - Neue Verfassung - Finanzverfassung* (Heymanns 1991) 3-14 (completely "incompatible" notions of property).

1191 Susanne Jung and Milos Vec, 'Einigungsvertrag und Eigentum in den fünf neuen Bundesländern' [1991] JuS 714, 714–715.

1192 Gemeinsame Erklärung (Annex III to the UT) (15 June 1990) BGBl II 1990 1237 (FRG/GDR). Before incorporation into the UT, the Declaration was not legally binding, Stern, 'Die Wiederherstellung der staatlichen Einheit' (n 1140) 43.

1193 §§ 230, 233 Einführungsgesetz zum Bürgerlichen Gesetzbuche (18 August 1896) BGBl. I 2494; 1997 I S. 1061 (FRG).

albeit subject to the new BGB provisions.[1194] The BGB did not apply retroactively. Additionally, multiple provisions existed for protecting real rights acquired under GDR law, which even extended the effect of GDR provisions to the FRG legal system.[1195]

i. Restitution

Privatization began in the last days of the GDR.[1196] In addition, similar to the Yemen case, the upheavals surrounding unification also raised the question of a potential reversal of GDR policies, especially the, generally non-compensated, expropriation or taking under state administration of large rural private estates, land owned by foreigners or people fleeing the GDR.[1197] As a principle, the Joint Declaration stipulated that real estate ("Grundstücke und Gebäude") expropriated by the GDR was to be returned to the owners or their heirs and any measures restricting the freedom to dispose over property were to be terminated. That rule, however, was subject to fairly wide exceptions, e.g., when the estates had been converted to objects for the public good, were used as apartments or premises, or had been acquired in good faith etc. In those cases, the fair balance of interests mentioned in the Joint Declaration had to be achieved by an exchange of property or compensation. Moreover, business enterprises and pertaining shares had to be re-transferred to the owner as well. Corrupt, unethical or illicit ("unlauter") acquisition of assets had to be reversed. Notwithstanding the reversal of ownership, GDR tenants and owners of usufruct rights ("Nutzungsrechte") had to be accorded legal protection and

1194 On the compatibility of most property forms of GDR law with the FRG notion of property Franz J Säcker, 'Art. 233 EGBGB, § 2 "Eigentum"', *Münchener Kommentar zum BGB* para. 2, cf. also Art. 231 EGBGB § 5 Abs. 1.

1195 See e.g. Art. 231 EGBGB, § 5; Art. 232 EGBGB, §§ 2, 3; Art. 233 EGBGB, §§ 3-6; Quack, 'Art. 233 EGBGB § 3' in: *Münchener Kommentar zum BGB* (n 1193) para. 1. Cf. on the continuing effect of the GDR Civil Code after unification, Brunner (n 1139), 354–355. Cf. on the réglement in the UT for real property Günther Rohde, 'Die Entwicklung der Grundeigentums– und Bodennutzungsverhältnisse nach dem Einigungsvertrag' [1990] DtZ 312.

1196 For an overview of procedure and methods of privatization in the GDR territory Haxhi Gashi, *A Comparative Analysis of the Transformation of State/Social Property: Privatization and Restitution in the Post-Communist Countries - Kosovo as a sui generis Case of Privatization* (Nomos 2013) 70–74.

1197 Jung and Vec (n 1190), 715–716. For an overview Gashi (n 1195) 102–105.

their rights were preserved according to GDR law. Furthermore, any former owner could choose compensation instead of restitution. A further exception was added by Art. 41 para. 2 UT: Land or buildings deemed by statutory law as necessary for investment purposes were also exempted from the restitution scheme, but compensation had to be provided for in the law.[1198] Those basic rules were dealt with in more detail in the *Vermögensgesetz* (VermG).[1199] Today, almost all of the claims under der VermG have been dealt with.[1200] While *formally* the legal force of the expropriations was not questioned, in practice, expropriations of doubtful lawfulness were *reversed* while trying to protect rights acquired in good faith.[1201]

ii. The Land Reform ("Bodenreform") before the BVerfG and the ECtHR

As already mentioned, under the GDR system, private property, especially property to land, was an exception rather than the rule and was mostly distributed for specific reasons perceived as socially important. That principle also held true for the "Bodenreform-Land", real estate that had been expropriated from war criminals and Nazi-supporters or taken from individuals owning more than 100 hectares of land without compensation after the Second World War and then given to farmers, especially for agricultural purposes. While those lands, in principle, could be inherited, their disposal was subject to several legal restrictions and official approval. However, there was some backlog in executing the laws, and several pieces of land were owned by heirs not satisfying those formal criteria.

Briefly before unification, in March 1990, the GDR authorities, as a step to adapting their own legal system to the system in the FRG,[1202] had adopt-

1198 See also Gesetz über besondere Investitionen in der Deutschen Demokratischen Republik (31 August 1990) BGBl. 1990 II 1157 (GDR).

1199 Gesetz zur Regelung Offener Vermögensfragen Annex II Chapter III Subject B Sec. I No. 5 UT, BGBl. 1990 II 1159 (GDR).

1200 See https://www.badv.bund.de/DE/OffeneVermoegensfragen/Statistik/start.html.

1201 Very critical about the partial upholding of the expropriations Stern, 'Die Wiederherstellung der staatlichen Einheit' (n 1140) 43–46 with further references; outrightly rejecting an international guarantee for the persistence of the GDR property order Kimminich, 'Bemerkungen zur Überleitung der Eigentumsordnung der ehemaligen DDR' (n 1189) 8, 9.

1202 Such limited right as those to "Bodenreform-land" probably would not have qualified as property under the BGB Säcker, 'Art. 233 EGBGB, § 2 "Eigentum"' (n 1193) para. 3; Jörn Eckert, '§ 233 EGBGB Vorbemerkung zu § 1l' in: *Münchener*

ed the "Modrow Law" lifting all public restrictions on the "Bodenreform-Land", which from then on could be freely disposed of and inherited.[1203] In 1992, the unified Germany enacted a further law obliging owners of such estates to transfer their property *without any compensation* to the state if they had not used the land according to the provisions of the old GDR law.[1204] Several heirs of "Bodenreform-Land", who were then being asked to give up their property, appealed the decision before the German courts, but their challenges were quashed even by the highest echelons. Furthermore, the BVerfG had rejected their constitutional complaint, which had alleged a violation besides others of their right of property and the prohibition of the retroactive application of laws under the GG.

The BVerfG reasoned that, after the lifting of the restrictions by the law of March 1990, "Bodenreform-Land" had to be considered as property protected under Art. 14 GG. The obligation to transfer those lands to the state therefore amounted to a taking of property.[1205] Nevertheless, according to the chamber, those takings could not be considered as "expropriations", for which compensation would have to be paid. The law merely re-defined and clarified the contours and content of property under German law. Thereby, it was within the state's power to eliminate formerly existing rights ("Rechtspositionen") without having to pay compensation.[1206] The legislator had to take into account all interests, public and private, when constructing a new order of property.[1207] Because of the groundbreaking nature of the changes in the German economic and legal order, which needed time, the German legislator had a wide margin of appreciation and was allowed to achieve its goal in several consecutive steps.[1208] Crucially, the BVerfG rejected the claim that the complainants had legitimate expectations. Such trust in the

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Kommentar zum BGB (n 1193) paras. 2-4; but its qualification is controversial, see ibid para. 2.

1203 Cf. in detail on the Modrow Law ibid paras. 7-10.

1204 Cf. in more detail on the factual and legal background of the case *ECtHR [GC] Jahn and others* (n 1069) paras. 14-24, 55-69; German Federal Constitutional Court [BVerfG], 'Press Release Nr. 144/2000: Zum Eigentumserwerb an Bodenreformland' (9 November 2000) <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2000/bvg00-144.html>.

1205 *Bodenreformland,* 1 BvR 1637/99, 6 October 2000 para. 17 (German Federal Constitutional Court [BVerfG]), partly translated in *ECtHR [GC] Jahn and others* (n 1069) para. 42.

1206 *BVerfG Bodenreformland* (n 1204) paras. 17, 19.

1207 ibid para. 18.

1208 ibid para. 19.

perpetuity of laws worthy of protection in general could not have existed at a time when unification was forseeable. Only in exceptional circumstances could people have legitimately believed in the persistence of GDR law by then.[1209] An unintended gap existed in the Modrow Law since it could not be expected that the GDR legislator had wanted to confer property to those heirs who did not conduct agricultural activities as initially foreseen.[1210] Therefore, even if the legal position had not already been modified but upheld by the UT, property rights concerning "Bodenreform-Land" could be abrogated once the German legislator had realized the problem.[1211]

The decision was later successfully challenged before a chamber of the ECtHR[1212] but that decision was again reversed by the Grand Chamber (GC), which confirmed the taking's lawfulness under the ECHR, especially P-I 1.[1213] The GC agreed with the initial Chamber's findings that a deprivation of property had taken place (which was not challenged by the German government either),[1214] which was "provided for by law",[1215] and that it was in the public interest.[1216] The GC emphasized, again, that "the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, that it will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation" and that "[t]he same applies necessarily, if not *a fortiori*, to such radical changes as those occurring at the time of German reunification"[1217]. However, while the GC opined that "the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances",[1218] it - in contradiction to the initial chamber judgment - found such exceptional circumstances to exist here.[1219]

1209 ibid paras. 28, 29.
1210 ibid para. 29.
1211 ibid para. 30.
1212 *Jahn and Others v. Germany,* Appl. Nos. 46720/99, 72203/01 and 72552/01, 22 January 2004 (ECtHR).
1213 *ECtHR [GC] Jahn and others* (n 1069).
1214 ibid paras. 79-80.
1215 ibid paras. 81-87.
1216 ibid paras. 88-92.
1217 ibid para. 91 [italics in original].
1218 ibid para. 94.
1219 ibid paras. 99-117. However, there were also several dissenting opinions on the question of a violation of P I-1.

It largely followed the reasoning of the BVerfG by relying on mainly three factors: "the circumstances of the enactment of the Modrow Law" shortly before unification, which had only led to a "precarious" title;[1220] the short time frame within which the new German legislator had to tackle the issue;[1221] and the "reasonable" purpose to rectify lapses in the Modrow Law that would otherwise have led to unjustified, socially unjust privileges for some heirs.[1222]

Therefore, even if the FRG in principle accepted the allocation of property rights or other real rights by the GDR legal system, it reserved the right to reverse such decisions for material reasons. The main criterium for this decision was whether those rights had been acquired in good faith or not. § 4 para. 3 lit. a VermG stipulated that the acquisition of a right had to be considered as having taken place in bad faith if it was not in compliance with laws, administrative principles, or practice of the GDR and the person acquiring the right knew or ought to have known of the circumstance. However, to generally deny the existence of good faith even in cases in which a "hidden loophole" existed in the law goes one step further. The reasoning of the BVerfG, backed up by the ECtHR, in fact seems to accord all laws enacted within a short time before the formal act of succession a "precarious" status from which no trust worthy of protection can emerge.

4) Interim Conclusions

Succession, and with it the theory of acquired rights, was typically based on the idea that the "political" constitution changed while the "a-political" private law remained intact.[1223] Yet, as *Tomuschat* expected in 1990,[1224] in the case of German (re-)union, the real fights were fought on the level of statutory law, not on the constitutional level. Only a few changes were made to the GG. That limited need for change was due not only to the GG anticipating re-unification but also to the mode of succession: Because the GDR acceded to the state of the FRG, with the one state perishing while the other state continued, the more general, theoretical "roof" of the FRG

1220 ibid para. 116(a).
1221 ibid para. 116(b).
1222 ibid para. 116 (c).
1223 Cf. Benjamin Kneihs, 'Rente und Revolution: Zum Schicksal prärevolutionärer Ansprüche und Anwartschaften im postrevolutionären System aus menschenrechtlicher Sicht' (2007), 62(4) ZÖR 501 504.
1224 Christian Tomuschat, 'Wege zur deutschen Einheit' (1990), 49 VVDStRL 70 100.

stayed the same or was easier to substitute than the practical, social fabric of domestic law defining everyday life of the population.

The example of German unification vividly shows the need to fill the "envelope" of property with content and life through statutory law. It is an exceptional example of how, in the absence of an international agreed standard of property protection, an absence of a customary rule providing for succession, and in the face of a state refuting succession into most international treaties of the predecessor, it is "ordinary" domestic law that in fact defines property and therefore fleshes out the constitution. In most cases involving the "Wende", the GG offered only little protection to status acquired under GDR law if that status was not accepted in the UT or afterwards in FRG statutory law. Moreover, courts accorded much leeway to the state and accepted many justifications for redistribution and redefinition of property after the end of the GDR. The BVerfG and the ECtHR both clarified that trust in the persistence of a certain system of law or in the non-modification of laws in the future was not protected. Crucially, individuals and their legitimate expectations were taken into account - but only on a general scale and only if not contrary to the "greater goal" of unification, which placed a heavy financial burden on the FRG. In the end, however, individual positions in practice were recognized and were therefore important in the weighing process, and restrictions had to be justified.

While the general goal was to adapt the GDR's legal order to that of the FRG, Art. 8 and 9 UT, in all justice, a reticence existed on the part of the new legislator and the UT to consider the GDR legal order as having lapsed automatically with the vanishing of the state. It is not clear whether Art. 9 UT is constitutive or declaratory for the (partial) persistence of the GDR's domestic legal order.[1225] As shown, the FRG did not question the transferal of property by GDR authorities *per se*. Especially in the field of private law, there were generous transitional arrangements and most real rights persisted. There was a preparedness to accept rights acquired under the former legal order and decisions of GDR authorities as a certain *status quo*. Art. 143 paras. 1 and 2 GG even provide that, in some particularly "sensitive" areas, GDR law was allowed to partly deviate from the GG. With respect to acquired pension rights of former GDR citizens, the task was to

1225 By implication from the discussion surrounding Art. 123 GG, *supra*, footnote 1161, it could be suggested that the majority of German academic commentary holds the view that there is rather no *automatic* continuity of the domestic legal order.

completely transfer their pension biographies into the FRG system. First of all, it seemed clear that the FRG accepted already acquired rights to pensions under GDR law, but the pivotal question of how to adapt such rights to the new pension system remained. In comparison to the regulation of real and movable property, the approach to acquired pensions rights was even more general with less focus on the individual case. Furthermore, as pensions are inherently vulnerable to future changes in lifestyle and external economic factors, a comparable protection of quality of life was not guaranteed.

III) The Demise of the Soviet Union (1990s)

1) General Background

After the fall of the Berlin Wall and the unification of the German state(s), it became increasingly clear that the Union of Soviet Socialist Republics (Soviet Union (SU)) would not continue to exist in the form it had taken during the time of the Cold War, during which it had represented one of the world's superpowers. The exact categorization of its demise remains subject to dispute. The controversy centers around the question whether there was a complete dismemberment of the SU leading to several successor states, *including* Russia,[1226] or whether the Russian Federation can claim to be the continuator state of the former SU, with all the other successor states seceding or separating from the "rump-SU"[1227].

1226 E.g. Yehoda Z Blum, 'Kaleidoscope: Russia Takes Over the Soviet Union's Seat at the United Nations' (1992), 3(2) EJIL 354 360; Theodor Schweisfurth, 'Ausgewählte Fragen der Staatensukzession im Kontext der Auflösung der UdSSR' (1994), 32 AVR 99 103–104, 106 (Russia as "universal successor" [own translation from German]); Tancredi, 'Dismemberment of States (2007)' (n 324) para. 7; Tomuschat, 'Die Vertreibung der Sudetendeutschen' (n 266), 51 (Russia as "the main successor state" [own translation from German]); Arnauld *Völkerrecht* (n 255) § 2 paras. 104, 110. Epping, '§7. Der Staat als die „Normalperson" des Völkerrechts' (n 2) 185, para. 210 asserts that Russia re-gained its pre-Soviet independent status; Thürer and Burri, 'Secession (2009)' (n 317) para. 35 reject the idea that a "series of secessions" took place.

1227 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation),* 15 October 2008, Order on Provisional Measures, ICJ Rep 2008 353 384 (ICJ); *BVerfG Bodenreform III* (n 602) para. 114; ILA, 'Aspects of the Law of State Succession' (n 616) 15, 27; Anatoli Kolodkin, 'Russia and International Law: New Approaches' (1993), 26(2)

Before 1991, the Russian Soviet Federated Socialist Republic had been one of the 15 socialist republics within the SU.[1228] While the republics formally retained sovereignty, over time the unionist character of the SU had gained an upper hand, and it in fact controlled all the federation's republics.[1229] The disintegration of the SU, from the end of the 1980s to the beginning of the 1990s, began when several republics declared their "sovereignty" or even "independence", the first being the Baltic states Latvia, Estonia, and Lithuania.[1230] The integration of the Baltic states by the SU in 1940 had been seen as a forcible annexation by most Western states and therefore never recognized *de jure*.[1231] In line with that approach, after the demise of the SU, the three states' declarations that they were going to continue their former identity was by and large endorsed by the international community,[1232] but not by Russia, which viewed them as new

RBDI 552 554; Koskenniemi and Lehto (n 255), 189–190, 198, 211; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 525, 530 ("separation"); Zimmermann, 'State Succession in Respect of Treaties' (n 1107) 100; Crawford *The Creation of States* (n 308) 205, 676–678; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 403, 406, 415; Devaney, 'What Happens Next? The Law of State Succession' (n 283) footnote 10 ("separation of some States that had formed the USSR"); Hafner and Kornfeind (n 27), 7, 12 ("separation"); Tancredi, 'Dismemberment of States (2007)' (n 324) para. 16 ("fiction of continuity"); official statements by Belgium and France, cited after Stern, 'La Succession d'États' (n 283), 61, 62; cf. also Klabbers and Koskenniemi, 'Succession in Respect of State Property, Archives and Debts, and Nationality' (n 297) 124; Aust *Modern Treaty Law and Practice* (n 294) 327; Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 476.

1228 In general on the history of Russia Angelika Nußberger, 'Russia (2009)' in: *MPEPIL* (n 2) paras. 76-108.

1229 ibid paras. 81-82. Cf., emphasizing the remaining sovereignty of the republics, Schweisfurth, 'Ausgewählte Fragen der Staatensukzession im Kontext der Auflösung der UdSSR' (n 1225), 100–101, 106.

1230 Nußberger, 'Russia (2009)' (n 1227) paras. 83-88. On the Baltic process Peter van Elsuwege, 'Baltic States (2009)' in: *MPEPIL* (n 2) paras. 25-27.

1231 For an overview of the - varying - recognition practice ibid paras. 15-22; Koskenniemi and Lehto (n 255), 196-19; Lehto (n 902), 206–207. For the uniform US position (against both a *de jure* and *de facto* recognition of the annexation) Cummins and Stewart, David P. (US Office of the Legal Adviser) (n 929) 1169.

1232 Klabbers and Koskenniemi, 'Succession in Respect of State Property, Archives and Debts, and Nationality' (n 297) 124, 126, 128; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 415; Koskenniemi and Lehto (n 255), 211; Lehto (n 902), 208 "virtually unanimous"; Peter van Elsuwege, 'State Continuity and its Consequences: The Case of the Baltic States' (2003), 16(2) LJIL 377 384; in more detail van Elsuwege, 'Baltic States (2009)' (n 1229) paras. 28-30; for Austria cf.

states.[1233] Consequently, the Baltic states did not take part in the further re-integration process of the East-Bloc states.

In the Minsk Agreement of 8 December 1991, Belarus, Ukraine, and Russia founded the Commonwealth of Independent States (CIS),[1234] and agreed that the SU, as a subject of international law, had ceased to exist. That demise was affirmed by eleven former Soviet republics in the Alma-Ata-Declaration of 21 December 1991.[1235] On 24 December 1991, Russia notified the UN that "membership of the Union of Soviet Socialist Republics [...] in the United Nations is being continued by the Russian Federation" and requested that, as of that date, "the name 'Russian Federation' be used in the United Nations in place of the name 'Union of Soviet Socialist Republics'."[1236] All former republics that had signed the Declaration of Alma Ata supported Russia's claim, especially with respect to its permanent seat in the UN Security Council (UNSC).[1237] That rather ambiguous stance - declaring the SU to have ceased to exist, but simultaneously supporting Russia's claim to continue what remained of the SU - contributed to the above-mentioned split in opinion.[1238] Despite these contradictions, in prac-

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Reinisch, 'Das Schicksal des österreichisch-sowjetischen Investitionsschutzabkommens in den Wirren der Staatensukzession' (n 610), 19. On the importance of recognition in cases of continuity, *supra*, Chapter II B) II).

1233 van Elsuwege, 'State Continuity and its Consequences' (n 1231), 798-80; Peter van Elsuwege, *From Soviet Republics to EU Member States: A Legal and Political Assessment of the Baltic States' Accession to the EU* (Nijhoff, Brill 2008) 60–64.

1234 Agreement Establishing the Commonwealth of Independent States (8 December 1991), 31 ILM 143. With the Protocol to the Agreement Establishing the Commonwealth of Independent States (8 December 1991), 31 ILM 147 further eight former republics (Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Uzbekistan) joined the CIS. Georgia joined by the end of 1993 cf. Nußberger, 'Russia (2009)' (n 1227) para. 86, but notified its withdrawal from the organization in 2008, Thürer and Burri, 'Secession (2009)' (n 317) para. 35.

1235 Alma-Ata-Declaration (21 December 1991), 31 ILM 148, 149. This was, according to Schweisfurth, 'Ausgewählte Fragen der Staatensukzession im Kontext der Auflösung der UdSSR' (n 1225), 101–102, the point when the SU ceased to exist, cf. also Nußberger, 'Russia (2009)' (n 1227) paras. 84-85.

1236 Russia, 'Communication' (1991) <https://treaties.un.org/pages/HistoricalInfo.aspx?clang=_en#RussianFederation>.

1237 Decision by the Council of Heads of State of the Commonwealth of Independent States (21 December 1991), 31 ILM 151, 151 No. 1.

1238 On the different arguments Nußberger, 'Russia (2009)' (n 1227) 94–108; Koskenniemi and Lehto (n 255), 184–189. Some authors consider the use of the term "continuator" by Russia of rather political significance, e.g. Schweisfurth, 'Ausgewählte Fragen der Staatensukzession im Kontext der Auflösung der UdSSR' (n 1225), 103,

tice almost all other states accepted Russia as the continuator state,[1239] and Russia in fact took up the SU's position in the UN. That attitude was bolstered by Russia's share in the territory and population of the former SU as well as by the fact that, bearing in mind that Belarus and Ukraine had been independent UN member states since the UN's foundation, it had already mostly been Russia's voice talking through the SU in the UN.[1240] Furthermore, a benefit was seen in keeping Russia without interruption within important international treaties, especially the UNC or arms-control treaties and to consider the Russian Federation as a debtor state with respect to former debts of the SU.[1241]

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cf. also *infra* for a similar discussion with respect to recent changes of the Russian constitution.

1239 Cf. the examples in Koskenniemi and Lehto (n 255), 188–189; official statements by Belgium, France and the UK, cited in Stern, 'La Succession d'États' (n 283), 61-63; the Austrian statement cited in Reinisch and Hafner (n 2) 91, footnote 494, 93/94; but also the ambiguous statement in Cummins and Stewart, David P. (US Office of the Legal Adviser) (n 929) 1170 "The United States viewed each newly created state of the former U.S.S.R. as a successor state, and not a 'continuation' state. However, in certain cases, the United States did endorse the notion that Russia was the continuation of the U.S.S.R., where rights and obligations were indivisible and could not be recreated."

1240 ibid.; cf. also Nußberger, 'Russia (2009)' (n 1227) paras. 100-104.

1241 Cummins and Stewart, David P. (US Office of the Legal Adviser) (n 929) 1170; Tancredi, 'Dismemberment of States (2007)' (n 324) para. 15; for treaties Brigitte Stern, 'General Concluding Remarks' in Brigitte Stern (ed), *Dissolution, Continuation and Succession in Eastern Europe* (Martinus Nijhoff 1998) 197 209. While in the beginning, the CIS states meant to share the debt of the SU, cf. 'Memorandum of Understanding on the Debt to Foreign Creditors of the Union of Soviet Socialist Republics and its Successors', *Reinisch/Hafner Staatensukzession und Schuldenübernahme beim Zerfall der SU* (1991) 21 121–129 and Treaty on Succession With Respect to the State Foreign Debt and Assets of the U.S.S.R. (4 December 1991) in: Reinisch/Hafner Staatensukzession und Schuldenübernahme beim Zerfall der SU (Service-Fachverlag 1995) 123, 121–129 In 1993 it was generally agreed between Russia and the other former SU republics that Russia would take over all debts in exchange for the SU's property and assets which were to be ceded to it, Nußberger, 'Russia (2009)' (n 1227) para. 107; cf. Koskenniemi and Lehto (n 255), 203; Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 480; Ukraine was no party to the agreement; cf. also Reinisch and Hafner (n 2) 110–131; accord sur la répartition de toute la propriété de l'ex-URSS a l'étranger.

Only recently, in 2020, did Russia include a new provision into its constitution:

> "[T]he Russian Federation is the state successor of the USSR on its territory and also state successor (continuator) of the USSR in terms of membership in international organizations and their organs, membership in international treaties, and also when foreseen with international treaties with respect to actions and obligations of the USSR beyond Russian borders."[1242]

Its ambiguous wording, conflating the notions of succession and continuity, was apparently chosen for domestic reasons and to keep utmost room to maneuver with respect to the taking over of rights and duties of the former SU.[1243] This "modern" self-perception ought not be decisive in light of decades of pragmatic diplomatic international and Russian state practice in line with the continuity thesis.[1244]

2) The Baltic States

Estonia, Lithuania, and Latvia each claimed independence from the SU in 1990. As an illegal occupation does not lead to a change in sovereignty

1242 Cited after Lauri Mälksoo, 'International Law and the 2020 Amendments to the Russian Constitution' (2021), 115(1) AJIL 78 83. Another translation is provided by Johannes Socher, 'Farewell to the European Constitutional Tradition: The 2020 Russian Constitutional Amendments' (2020), 80 HJIL 615 630 who only uses the term "continuator".

1243 On the reasons for this choice of words Mälksoo, 'International Law and the 2020 Amendments to the Russian Constitution' (n 1241), 84–85. Cf. Nußberger, 'Russia (2009)' (n 1227) paras. 92, 105-108 opining that the view advanced by Russian legal scholars that Russia was a "continuator state" but not identical with the SU, represented a third, "differentiated" or "pragmatic" view on the issue; also Socher (n 1241), 631. But cf. also the rather straightforward statements by Kolodkin (n 1226), 554 using the term continuator state as meaning continuing the SU's identity.

1244 *See* Mälksoo, 'International Law and the 2020 Amendments to the Russian Constitution' (n 1241), 84; also Paul Kalinichenko and Dimitry V Kochenov, 'Introductory Note to the Amendments to the 1993 Constitution of the Russian Federation Concerning International Law (2020)' (2021), 60(2) ILM 341 341 who – without further discussion of the succession issue – maintain that the provision "consolidates the status of Russia as a legal successor of the Soviet Union" and "[f]rom a strictly dogmatic legal point of view, there was no need for all these amendments to be included in the Constitution. They bring absolutely nothing new."

over the territory,[1245] they purported not to constitute successor states to the SU but to continue or "restore" their identity and independence of the pre-Soviet era.[1246] Their approach shows that the case of the Baltic states is not a clear-cut example of a succession process entailing the question of acquired rights. The main argument would rather go along the line that rights acquired under an unlawful regime could not be held against the lawful sovereign and/or would not be acquired in good faith.[1247] However, even if the continuity thesis was, in principle, accepted by most states (except Russia)[1248] and in academic literature[1249], the claim to "restitution" in practice found its limits.

a) International Treaties

The Baltic states refused to continue either bilateral or multilateral treaties of the SU,[1250] and attempted to re-institute pre-war treaty relations.[1251] Yet, that pattern could not always be followed consistently in practice.[1252] For

1245 Cf. in more detail *supra*, Chapter II B) IV).

1246 For Latvia cf. Declaration on the Renewal of Independence (4 May 1990), 1 Baltic YB Int'l L 245 (Latvia); for Lithuania cf. Sigute Jakstonyte and Michail Cvelich, 'Lithuania - Constitutional and International Documents Concerning the International Legal Status of Lithuania' (2001), 1 Baltic YB Int'l L 301 301–303; for Estonia Eesti Riiklikust Iseseisvusest (20 August 1991) https://www.riigiteataja.ee/akt/13071519 (Estonia).

1247 Cf. Koskenniemi and Lehto (n 255), 193; van Elsuwege, 'State Continuity and its Consequences' (n 1231), 383.

1248 See references in *supra*, footnotes 1230-1232.

1249 Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 482; Stern, 'General Concluding Remarks' (n 1240) 200; with respect to Lithuania Dainius Zalimas, 'Legal Issues on the Continuity of the Republic of Lithuania' (2001), 1 Baltic YB Int'l L 1 10, 19; cf. Hafner and Kornfeind (n 27), 11. Against such doctrine of reversion Reinisch and Hafner (n 2) 108 under the assumption that the rules of state succession can be applied to cases of unlawful occupation as well. See also Pavković and Radan, 'Introduction' (n 392) calling the independence of Latvia and Estonia cases of "secession".

1250 van Elsuwege *From Soviet Republics to EU* (n 1232) 80; van Elsuwege, 'State Continuity and its Consequences' (n 1231), 384; for bilateral treaties Koskenniemi and Lehto (n 255), 211, 216-217.

1251 van Elsuwege *From Soviet Republics to EU* (n 1232) 80; van Elsuwege, 'State Continuity and its Consequences' (n 1231), 384; for Lithuania in particular Jakstonyte and Cvelich (n 1245), 305–310.

1252 For examples of such inconsistency cf. van Elsuwege, 'State Continuity and its Consequences' (n 1231), 387; also Koskenniemi and Lehto (n 255), 216–217. E.g.

example, the Baltic states were not allowed to resume their pre-war membership of several international organizations but had to undergo a new accession process, i.e. were treated like successor states.[1253]

> "[I]nternational state practice led to a general revision of treaties whether they were concluded before or after 1940. In fact, the principle of state continuity served as a basis for negotiations in order to clarify the situation with regard to international law."[1254]

The rejection of the Soviet legal order also concerned border limitations,[1255] which were finally settled by diplomatic means for Latvia in 2007,[1256] while the ratification process for the 2014 border treaty with Estonia is still not completed[1257]. In line with their general understanding, the three states refused to take over debts of the SU and did not claim any SU property abroad.[1258]

Estonia declared several bilateral SU treaties temporarily applicable and several of the pre-1940s bilateral treaties (formally) terminated. On the case per case approach with respect to Latvian bilateral treaties e.g. Ieva Jakobsone, 'Latvia - The Claim for Independence' (2001), 1 Baltic YB Int'l L 233 242–243.

1253 van Elsuwege *From Soviet Republics to EU* (n 1232) 60–64.

1254 van Elsuwege, 'State Continuity and its Consequences' (n 1231), 385 [footnote omitted].

1255 While Lithuania did not seem keen to alter the existing borders at the time of its independence (as it would have lost territory to Russia if relying on the pre-1940 situation), Estonia and Latvia went for territorial re-arrangements according to the treaty of Tartu from 1920, van Elsuwege *From Soviet Republics to EU* (n 1232) 80–85; van Elsuwege, 'State Continuity and its Consequences' (n 1231), 385; Koskenniemi and Lehto (n 255), 194–195; Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 485. Cf. also Art. 122 para. 1 of the Constitution (28 June 1992) https://www.servat.unibe.ch/icl/en00000_.html (Estonia).

1256 Nußberger, 'Russia (2009)' (n 1227) para. 47.

1257 ERR News, 'Postimees: Preparations Underway for Russian Border Agreement Ratification' (11 March 2021) <https://news.err.ee/1608138730/postimees-preparations-underway-for-russian-border-agreement-ratification>; Pekka Vanttinen, 'Russia May Finally Ratify 2014 Border Agreement with Estonia' *Euractiv* (15 November 2021) <https://www.euractiv.com/section/politics/short_news/russia-may-finally-ratify-2014-border-agreement-with-estonia/>; ERR News, 'Russia Shows Interest in Ratifying Estonian Border Agreement' (9 February 2022) <https://news.err.ee/1608493796/russia-shows-interest-in-ratifying-estonian-border-agreement>. Considering the ongoing Russian war in Ukraine a ratification of the treaty in the near future is unlikely.

1258 Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 483 [footnotes omitted].

It is commonly acknowledged that the continuation of the Baltic states' pre-war existence was more a legal fiction than a realistic proposal.[1259] It is often not clear whether its acceptance by other states followed political motives or legal convictions.[1260] Especially with respect to individual rights, the marks of 50 years of SU jurisdiction could not easily be wiped off.

> "There is, in other words, a tendency in public international law to distinguish between the continuity of the Baltic States' legal status on the one hand and the qualified continuity of the legal rights and duties on the other."[1261]

The issue of succession to the SU's human rights treaty obligations did not become too problematic in this respect, as all three states *acceded* to the respective treaties after their independence.[1262] In its Declaration on the Renewal of Independence,[1263] Latvia professed

> "[t]o guarantee citizens of the Republic of Latvia and those of other nations permanently residing in Latvia social, economic, and cultural rights, as well as those political rights and freedoms which are defined in international human rights instruments" and "[t]o apply these rights also to those citizens of the USSR who express the desire to continue living in the territory of Latvia."

1259 ibid 483–484; also van Elsuwege *From Soviet Republics to EU* (n 1232) 66; Koskenniemi and Lehto (n 255), 197; Lehto (n 902), 208. On the inconsistencies in the treatment of the issue by both sides van Elsuwege, 'State Continuity and its Consequences' (n 1231), 387. On the practical limits of reversion Ronen *Transition from Illegal Regimes* (n 14) 185.

1260 Cf. van Elsuwege *From Soviet Republics to EU* (n 1232) 60–64.

1261 van Elsuwege, 'Baltic States (2009)' (n 1229) para. 48; also Koskenniemi and Lehto (n 255), 193 "En clair, l'Etat occupant ne peut pas invoquer un droit établi en fonction d'une occupation dépourvue de base juridique. Mais cette maxime ne s'applique pas automatiquement aux droits qui ont été établis en faveur de l'Etat occupé, de ses nationaux ou d'Etats tiers (et de leurs nationaux)". On this "provisional *de facto* recognition" (Hofmann, 'Annexation (2013)' (n 351) para. 30) already *supra*, Chapter II B) IV).

1262 Koskenniemi and Lehto (n 255), 193; for Latvia Declaration on the Accession to Human Rights Instruments (4 May 1990) https://www.servat.unibe.ch/icl/lg02000_.html (Latvia), reprinted as Annex 5 to Jakobsone (n 1251).

1263 Latvian Declaration on Independence (n 1245) Section 8.

b) Domestic Law

Domestically, in line with the theory of discontinuity, the three states restored their pre-Soviet constitutions or enacted new ones.[1264] All three state constitutions guaranteed the right of property to everyone and foresaw expropriations only in the public interest, according to law and against fair compensation.[1265] Yet, conversely, all of them in principle relied on their pre-independence private domestic legal order.[1266] Section 6 of Latvia's Declaration on the Renewal of Independence,[1267] for example, provided for implementing "during the transition period"

> "those constitutional and other legal acts of the Latvian SSR which are in effect in Latvia when this Declaration is adopted, insofar as they do not contradict Articles 1, 2, 3, and 6 of the Constitution of the Republic of Latvia."

In the same vein, Art. 2 para. 1 of the Law on the Application of the Estonian constitution[1268] stipulated that

> "[l]egal acts currently in force in the Republic of Estonia shall continue to be in force after the Constitution enters into force, insofar as they do not contradict the Constitution or of the Law on the Application of the Constitution and until such a time as they are voided or brought into full accordance with the Constitution."

1264 Koskenniemi and Lehto (n 255), 192; Latvian Declaration on Independence (n 1245) Section 3; Estonian Constitution (n 1254) and Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 484; Constitution (25 October 1992) https://www.servat.unibe.ch/icl/lh00000_.html (Lithuania); an updated and consolidated version is also available at the homepage of the Constitutional Court of Lithuania, https://www.lrkt.lt/en/about-the-court/legal-information/the-constitution/192.

1265 Art. 105 of the Constitution (15 February 1922) https://www.saeima.lv/en/legislative-process/constitution (Latvia); Art. 32 of the Estonian Constitution (n 1254), Art. 23, 46 para. 1 of the Lithuanian Constitution (n 1263). In *Lithuanian Constitutional Court Restoration of Ownership Rights* (n 602) a human right to property was proclaimed.

1266 Ronen *Transition from Illegal Regimes* (n 14) 170–171, 185; for Lithuania Zalimas (n 1248), 18–19.

1267 Latvian Declaration on Independence (n 1245).

1268 Law on the Application of the Constitution (28 June 1992) https://www.servat.unibe.ch/icl/en01000_.html (Estonia).

Finally, Art. 2 of the Lithuanian Law on the Procedure for the Entry into Force of the Constitution[1269] provides that

> "[l]aws, as well as other legal acts or parts thereof, that were in force on the territory of the Republic of Lithuania prior to the adoption of the Constitution of the Republic of Lithuania shall be effective inasmuch as they are not in conflict with the Constitution and this Law, and shall remain in force until they are either declared null and void or brought in line with the provisions of the Constitution."[1270]

While, in the Latvian case, it is not completely clear whether the wording refers to acts enacted by the Latvian socialist republic only, or, more likely, embraces all law in force on Latvian territory at the time of independence, the statements by Estonia and Lithuania clearly encompass all law "in force" on the respective territory and therefore espouse continuity of the pre-independence domestic order. Yet, in specific fields, the Baltic states diverted from that route, mostly for political reasons involving rejection of any impression of being a successor to the SU.

aa) Nationality Legislation and Pertaining Civil Status

In its Declaration on the Renewal of Independence,[1271] Latvia had promised to afford the named civil and social rights from international treaties "also to those citizens of the USSR who express the desire to continue living in the territory of Latvia." However, what became a significant bone of contention after independence was Estonia's and Latvia's new citizenship legislation.[1272] In line with their theory of pre-war continuity, both states revived their citizenship laws and provided for citizenship only for children

1269 The Law on the Procedure for the Entry Into Force of the Constitution (6 November 1992) https://www.lrkt.lt/en/about-the-court/legal-information/the-constitution/192 (Lithuania).

1270 *Lithuanian Constitutional Court Restoration of Ownership Rights* (n 602) mentioned that the Lithuanian "Law on the Reinstatement of the Lithuanian Constitution" stipulated that the re-enactment of the 1938 Constitution did not mean that other laws from that time were reinstalled as well.

1271 Section 8 Latvian Declaration on Independence (n 1245).

1272 For an overview on the different views van Elsuwege *From Soviet Republics to EU* (n 1232) 69–80; for Lithuania van Elsuwege, 'Baltic States (2009)' (n 1229) para. 35; van Elsuwege, 'State Continuity and its Consequences' (n 1231), 383; Nida M Gelazis, 'The European Union and the Statelessness Problem in the Baltic States'

of former citizens.[1273] Taking into account that, during Soviet occupation, large population transfers had taken place,[1274] the revival meant that, at that time, about 40% of the people living in Estonia and Latvia, especially the large minority of Russian-speaking immigrants, were not considered as nationals, some even becoming stateless, and had to go through a naturalization process to become citizens.[1275] International criticism later forced a lowering of these nationalization requirements,[1276] but apart from that criticism, the treatment was by and large accepted by the international community.[1277]

After independence, Latvia had provided social security benefits to all residents who had been entitled to such benefits under the former SU system. But in a 1995 law, it differentiated between the so-called "permanently resident non-citizens" and Latvian nationals with respect to the assessment of time spent working abroad.[1278] In June 2022, the GC of the ECtHR upheld the Latvian law in a controversial decision.[1279] In that judgment, the

(2004), 6(3) EJML 225 227–228; Ronen *Transition from Illegal Regimes* (n 14) 221–223.

1273 In more detail Gelazis (n 1271), 228–232.

1274 On the background of this population shift ibid 226; Ronen *Transition from Illegal Regimes* (n 14) 216–217.

1275 van Elsuwege, 'Baltic States (2009)' (n 1229) paras. 34-35; van Elsuwege, 'State Continuity and its Consequences' (n 1231), 383; for Estonia Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 484. This also meant that those persons were not eligible for EU citizenship, cf. Gelazis (n 1271), 225, 240-242.

1276 On the process van Elsuwege, 'Baltic States (2009)' (n 1229) para. 38; Ronen *Transition from Illegal Regimes* (n 14) 224–225.

1277 On the EtCHR jurisprudence and the (critical) view of some human rights treaty bodies on this topic van Elsuwege, 'Baltic States (2009)' (n 1229) paras. 36-37. Accepting the legislation Koskenniemi and Lehto (n 255), 193. Critizising the Estonian legislation Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (n 26), 484–485 "both politically doubtful and legally unsound. […] it was not considerations of legal consistency but, rather, the desire to obtain or at least to approximate to ethnic purity that led to such an approach towards citizenship questions in Estonia […] constitutes discrimination."

1278 *Savickis and Others v. Latvia,* Appl. No. 49270/11, 9 June 2022 paras. 64-68 (ECtHR [GC]). Cp. on a similar problem in Germany, *supra*, IV) B) II) 2).

1279 ibid. While ten judges supported the judgment on the merits, seven judges voted against it. See dissenting opinions of judges O'Leary, Grozev and Lemmens and dissenting opinion of judge Seibert-Fohr, joined by judges Turković, Lubarda and Chanturia (from Germany, Croatia, Serbia and Georgia!) *ibid.*

ECtHR not only diverted from its earlier case law[1280] but explicitly accepted as legitimate aim for discrimination on the grounds of nationality both Latvia's policy of continuity and non-recognition of legal acts of an unlawful regime and the goal of "avoid[ing] retrospective approbation of the consequences of the immigration policy practised in the period of unlawful occupation and annexation of the country […and…] to rebuild the nation's life following the restoration of independence"[1281]. The court emphasized that the case was not comparable to cases of succession, though.[1282]

bb) Non-recognition of SU Nationalization Measures

As a second, significant, exception to the continuity of the pre-independence (Soviet) domestic civil law, Lithuania, Latvia and Estonia did not recognize nationalization measures undertaken by the SU after their incorporation in 1940.[1283] The restitution of nationalized property was an integral part of the states' general privatization measures after independence and in the wake of their turn to market economies. But beyond that, the restitution programs were comprehensive, costly, and pursued mainly for the political reasons of disconnecting them from their SU history and remedying historical injustices.[1284]

Instead of simply providing for the handing back of the property, the Baltic states explicitly re-connected to the legal situation *before* occupation and negated the general validity of expropriation measures undertaken by the SU. For example, in 1991 Lithuania enacted the "Law On the Restoration of Ownership of Citizens"[1285], which repeatedly (e.g., in the Preamble and Art. 1 para. 1) emphasized that it assumed the continuity of existence of the

1280 Cp. *Andrejeva v. Latvia,* App. No. 55707/00, 18 February 2009, ECHR 2009-II 71 (ECtHR [GC]).

1281 *ECtHR Savickis and Others* (n 1277) paras. 198, 211, 216. For the arguments of the Latvian government ibid paras. 98-99, 168-169, 176.

1282 ibid para. 200.

1283 See on this Ronen *Transition from Illegal Regimes* (n 14) 270–279.

1284 ibid 273–274; Frances H Foster, 'Restitution of Expropriated Property: Post-Soviet Lessons for Cuba' (1996), 34(3) Colum J Transnat'l L 621 626. See e.g. § 2 para. 1 of the Estonian "Principles of Ownership Reform Act".

1285 Law On the Restoration of the Rights of Ownership of Citizens to the Existing Real Property (1 July 1997) No VIII-359 (Lithuania), English version available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/949193f215a011e9bd28d9a28a9e9ad9?jfwid=j4ag0vxi.

property nationalized by the SU and was not only reinstating the former situation.[1286] Also the Estonian "Land Reform Act"[1287] in § 2 spoke of "the continuity of rights of former owners". Finally, in Latvia, § 1 of the law "On the Denationalisation of Building Properties in the Republic of Latvia"[1288] tried to achieve the old situation basically by repealing all nationalization laws enacted in Soviet times.

In all three states, the default option was restitution in kind, but monetary compensation was possible and all kinds of restrictions to restitution applied.[1289] All restitution programmes differed in details, e.g., in who was eligible for restitution, what kind of property was protected, and in how far new rights to the estate acquired in good faith would constitute a bar to restitution.[1290] Notably, none of the states completely ignored potential rights acquired in good faith by private persons:[1291] Often restoration was excluded when property had lawfully changed hands to a private person or tenancies were protected for certain interim periods.[1292] Nevertheless, having implemented the most comprehensive restitution programs, Latvia and Estonia even introduced reservations to P I-1 in order to pursue their agenda.[1293] Yet, the restitution process in the Baltic states also showed vividly that the quest for rectification of former injustices could lead to

1286 However, the Lithuanian Supreme Court emphasized that property rights were not established by this law but only when compensation or restitution was granted, cf. *Jurevičius v. Lithuania,* Appl. No. 30165/02, 14 November 2006 para. 20 (ECtHR).

1287 Land Reform Act (17 October 1991) RT 1991, 34, 426 (Estonia), English version available at https://www.riigiteataja.ee/en/eli/529062016001/consolide.

1288 Law On the Denationalisation of Building Properties in the Republic of Latvia (30 October 1991) https://likumi.lv/ta/en/en/id/70829-on-the-denationalisation-of-building-properties-in-the-republic-of-latvia (Latvia).

1289 Foster (n 1283), 633–637.

1290 For more details ibid 627–640; Ronen *Transition from Illegal Regimes* (n 14) 274–275.

1291 Cf. e.g. § 2 para. 2 of Republic of Estonia Principles of Ownership Reform Act (13 June 1991) RT 1991, 21, 257 (Estonia) made clear that "[r]eturn of property to or compensation of former owners or their legal successors for property in the course of ownership reform shall not prejudice the interests protected by law of other persons or cause new injustices".

1292 In more detail Ronen *Transition from Illegal Regimes* (n 14) 275–276.

1293 Reservation to PI-1 (27 June 1997) https://www.coe.int/en/web/conventions/cets-number-/-abridged-title-known?module=declarations-by-treaty&numSte=009&codeNature=2&codePays=LAT (Latvia); Reservation to PI-1 (16 April 1996) https://www.coe.int/en/web/conventions/full-List?module=declarations-by-treaty&numSte=009&codeNature=2&codePays=EST (Estonia).

new injustices as the developments of 50 years could not be eradicated by law.[1294]

3) Russia and the (Other) Successor States of the SU

a) International Treaties

Art. 12 of the Minsk Agreement reads "[t]he High Contracting Parties undertake to discharge the international obligations incumbent on them under treaties and agreements entered into by the former Union of Soviet Socialist Republics." Concordantly, in the Alma Ata Declaration, "[t]he States participating in the Commonwealth guarantee in accordance with their constitutional procedures the discharge of the international obligations deriving from treaties and agreements concluded by the former Union of Soviet Socialist Republics." The Russian Federation, in accordance with its general stance, assumed "full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General ".[1295] What at first sight looks like the espousal of a theory of universal succession[1296] was significantly diminished in the CIS states' "Mémorandum relatif au consensus sur la question de la succession d'Etat, relative aux traités de l'ex-URSS présentant un intérêt mutuel"[1297] of 6 July 1992. There, negotiations in good faith about the SU's international treaties were considered the means of choice. Multilateral treaties, though deemed to be in the "common interest", were subjected to the individual decision of each former republic (no. 1). That understanding held especially true for bilateral treaties, for which merely a general duty to decide anew on their fate was foreseen (no. 2). An exception to the rule was introduced for territorial and/or border treaties, which ought to remain binding on all of the republics (no. 3). Hence, the agreement, while probably being based on a theoretical commitment to

1294 On the ensuing conflicts and problems Ronen *Transition from Illegal Regimes* (n 14) 276–279; Foster (n 1283), 641–648.

1295 Russia, 'Communication' (n 1235); in general Koskenniemi and Lehto (n 255), 211.

1296 In this way ibid 180 "Ainsi, en ce qui concerne la succession d'Etats en matière de traités conclus par l'Union soviétique, les membres de la CEI ont pris comme point de départ officiel de leurs discussions une espèce de principe de succession universelle"; cf. also Reinisch and Hafner (n 2) 83–84.

1297 Reprinted in in Lev Entine, 'Communaute des Etats Independants (CEI) - Chronique de Sa Creation et de Son Evolution' (1992), 26(2) RBDI 614 627.

continuity, in fact rejected the idea of automatic succession of SU treaties. Succession into multilateral treaties of the former SU did not follow a stringent path[1298] and bilateral treaties have regularly been re-negotiated.[1299]

b) Domestic Law

For domestic law, the unclear wording of Art. 11 of the Minsk Agreement, "[f]rom the moment of signature of the present Agreement, application of the laws of third States, including the former Union of Soviet Socialist Republics, shall not be permitted in the territories of the signatory States", has led to divergent interpretations.[1300] It seems to repudiate the assumption of SU law being applicable in the territory of its former republics.

The specific laws for those republics vary but show apparent similarities. Section 2 of the part "Concluding and Transitional Provisions" of the *Russian* constitution from 1993[1301] provided that "[l]aws and other legal acts in effect on the territory of the Russian Federation until the enactment of this Constitution are enforced in so far as they do not contravene the Constitution." In addition, procedural law in criminal matters was upheld according to Section 6. Therefore, in practice, Russia opted for the persistence of statutory SU law unless it violated the Russian constitution,[1302] which was in line with Russia's claim to continuity. In Chapter 9 on "Provisions for the Transitional Period", the constitution of *Armenia* (1995)[1303] provided for the continuity of "[l]aws and other legal acts of the Republic of Armenia

1298 For Belarus and Ukraine Bokor-Szego, 'Continuation et Succession en Matière des Traités Internationaux' (n 610) 51. For human rights treaties see *supra*, Chapter III, C) II) 2) d).

1299 Reinisch and Hafner (n 2) 84; Bokor-Szego, 'Continuation et Succession en Matière des Traités Internationaux' (n 610) 50–51. But see Kirill Guevorguian, 'Comment' in: *Burdeau/Stern Succession en Europe de l'Est* (n 610) 59 60 who sees no difference between multilateral and bilateral treaties of the former SU as both would persist but were subject to renegotiation.

1300 Cf. Koskenniemi and Lehto (n 255), 199; Ger P van den Berg, 'Human Rights in the Legislation and the Draft Constitution of the Russian Federation' (1992), 18(3) RCEEL 197 199.

1301 Constitution (12 December 1993) https://www.servat.unibe.ch/icl/rs00000_.html (Russia).

1302 van den Berg (n 1299), 199; Koskenniemi and Lehto (n 255), 199; Reinisch and Hafner (n 2) 85–86.

1303 Constitution (5 July 1995) https://www.servat.unibe.ch/icl/am00000_.html (Armenia).

[…] to the extent they do not contravene this Constitution", Art. 166 para. 2. Courts and tribunals were supposed to operate on the basis of the old law as long as no new law had entered into force, Art. 116 paras. 7 and 8. The constitution also provided that, until further amendment of the criminal code "current procedures for searches and arrests shall remain in effect", Art. 116 para. 14. The *Azerbaijani* constitution (1995)[1304] also upheld national law valid at the time before acceptance of the new constitution unless contradicting the latter, Transitional Clause 8. While the constitution of *Belarus* (1994)[1305] did not contain explicit provisions on the permanence of domestic rights, Art. 5 of the Belarus Enactment Law[1306] stipulated that even if parts of "laws and other enforceable enactments" were contrary to the constitution, the other parts should be applied. Art. 92 para. 4 of the constitution of *Kazahkstan*[1307] contained an almost identical provision and urged the legislator to ensure the other parts of the law were conform with the constitution within two years. The constitution of *Tajikistan* (1994)[1308] did not contain any provision on transition of former law. Title XV of the constitution of *Ukraine* (1996),[1309] entitled "Transitional Provisions", in No. 1 provided for the continuity of national laws unless contrary to the constitution. No. 13 foresaw that "[t]he effective procedures for arrest, retaining in custody, and detention of persons suspected of a crime, and also for the examination and search of a domicile or other property of a person, are preserved for five years after this Constitution enters into effect." Extraordinarily, the Ukrainian constitution contained a special transitory provision concerning the dedication of military bases on Ukrainian territory, No. 14. *Georgia* is also a special example as, after its independence, it did not claim its emergence as a new state but the restoration of its former

1304 Constitution (12 November 1995) https://www.servat.unibe.ch/icl/aj00000_.html (Azerbaijan).
1305 Constitution (15 March 1994) https://www.servat.unibe.ch/icl/bo__indx.html (Belarus).
1306 Enactment Law (15 March 1994) https://www.servat.unibe.ch/icl/bo01000_.html (Belarus).
1307 Constitution (1995) https://www.constituteproject.org/constitution/Kazakhstan_2017.pdf?lang=en (Kazakhstan).
1308 Constitution (6 November 1994) https://www.servat.unibe.ch/icl/ti00000_.html (Tajikistan).
1309 Constitution (28 June 1996) https://www.servat.unibe.ch/icl/up00000_.html (Ukraine).

existence after unlawful occupation.[1310] Nevertheless, the constitution of Georgia (1995)[1311] in Art. 106 adopted a similar approach to the ones listed above: Legal acts existing prior to the coming into force of the constitution were to have legal force unless contradicting the constitution. Within two years, all normative acts adopted before were to be registered and amended accordingly. Additionally, the legislation constituting the basis of jurisdiction of Georgian courts was upheld in Art. 107. Restitution of nationalized property played no significant role in the SU successor states.[1312]

4) Interim Conclusions

In sum, therefore, while the attitude of the CIS states with respect to international obligations of the former SU was relatively inconsistent, for domestic law, constitutional practice of most SU successor states opted for continuity, even using similar terms.[1313] Some authors infer from the choice that acquired rights posed no problem with respect to SU succession.[1314] In general, modifications of domestic law in the SU successor states and Russia, as well as in Baltic states, seems to have been less incited by SU dismemberment than by the incremental shift from a planned to a free-market economy in the course of the 1990s. For example, arguably, SU law on pensions from 1990 was carried over to the new states and pension reforms only began in the mid-1990s.[1315] Therefore, social reforms are often not discussed in relation to the independence of these states

1310 Act of Restoration of State Independence (9 April 1991) Gazette of the Supreme Council of the Republic of Georgia, 1991, No 4, Art. 291; https://matsne.gov.ge/en/document/view/32362 (Georgia).

1311 Constitution (24 August 1995) https://www.venice.coe.int/webforms/documents/?pdf=CDL(2004)041-e (Georgia); a more recent version (without the transitory provisions) is also available on the website of the Legislative Herald of Georgia, see https://matsne.gov.ge/en/document/view/30346?publication=36.

1312 Foster (n 1283), 625.

1313 For Ukraine and Belarus van den Berg (n 1299), 200; in general for the CIS states Reinisch and Hafner (n 2) 85–86.

1314 Koskenniemi and Lehto (n 255), 199 who base this finding, however, on a thin empirical basis with respect to domestic law; very optimistic also Hasani (n 2), 144 „During the dissolution of the former communist federations, these rights were respected to the greatest possible extent. No hesitation or refusal to apply them ever surfaced".

1315 Cf. Marta de Castello Branco, 'Pension Reform in the Baltics, Russia, and Other Countries of the Former Soviet Union (BRO): IMF Working Paper' (1998) WP/98/11 8.

from the SU but with respect to the demise of socialism in a multitude of - independent - East-Bloc states.[1316] The property system within the SU had already been subject to profound changes by the end of the 1980s, i.e. before the first republics declared their independence.[1317] In March 1990, respective amendments were adopted to the SU constitution, as were several laws such as the "Law on Property", the "Law on Land", and the "Law on Leasing", which all departed from the original socialist model of state property or "socialist property".[1318] Moreover, "[i]nvestment legislation in the Russian Federation has a short history. The two basic laws - the Law on Investment Activity and the Law on Foreign Investments in the Russian Socialist Federal Republic - were enacted in Russia only in 1991, when economic reforms were actively performed."[1319]

Additionally important here is that the mode of succession, dismemberment or separation, lends itself more to an upkeeping of domestic law because that legal system does not have to be reconciled with another one but only updated and amended step-by-step in the years to come. In that respect, of relevance is also that the SU's demise took place relatively smoothly, consensually, and in friendly relations between most of the former members states. Nevertheless, the still existing frictions related to the taking-over of international duties again underlines the potential advantages of a doctrine of acquired rights in the face of non-succession to international instruments containing individual rights. Furthermore, even if the self-perception of and the international reactions to the independence of the Baltic states, and potentially Georgia, do not allow them to be treated as genuine cases of succession, their analysis can be fruitful: If even states that declare non-continuity a necessary requirement of their existence and explicitly cut all international ties to their "predecessor" consciously uphold at least parts of the national legal order implemented by that state, the action can be seen as a strong commitment to legal continuity and conducive

1316 E.g. Katharina Müller, 'From the State to the Market?: Pension Reform Paths in Central–Eastern Europe and the Former Soviet Union' (2002), 36(2) Social Policy & Administration 156.

1317 Richard C Schneider, 'Developments in Soviet Property Law' (1989), 13(4) Fordham Int'l LJ 446.

1318 On all three laws ibid with translations at 468-480.

1319 Natalia Doronina and Natalia Semilutina, 'Russia' in: *Shan Legal Protection of Foreign Investment* (n 598) 579. This is probably the reason why many Western states concluded bilateral investment treaties with the SU still in 1989 and 1990; cf. examples in Schneider (n 1316), 457.

to a theory of acquired rights. On the other hand, in the case of the Baltic states, the limits of such a recognition become obvious.

IV) The Dismemberment of the Socialist Federative Republic of Yugoslavia (1990s)

Besides the dismemberment of the SU, the demise of former Yugoslavia, leading to several successor states and extending over more than a decade, constitutes the second large "wave" of successions in the time frame under scrutiny. Compared to the SU's relatively quiet succession process, the disintegration of Yugoslavia has become stuck in the conscience of mankind due to the ethnic tensions, violence, and human suffering associated with it. Several UN forces were deployed in the course of the conflicts and international organizations, commissions, and courts have had to cope with related international crimes and political deadlocks.[1320]

1) General Background

The Socialist Federative Republic of Yugoslavia (SFRY), a federation consisting of six republics, Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia, emerged after the Second World War out of the former kingdom of Yugoslavia[1321] and was a founding member of the UN. The constitution of the multi-ethnic state accorded its members with the

1320 In order to cope with the international crimes committed on the territory, the UNSC installed the International Criminal Tribunal for the former Yugoslavia (1993-2017) by UNSC, 'Resolution 827: On the Establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991' (25 May 1993) UN Doc. S/RES/827. For an overview of ICJ jurisprudence on the conflict in Yugoslavia cf. Tobias Thienel and Andreas Zimmermann, 'Yugoslavia, Cases and Proceedings before the ICJ (2019)' in: *MPEPIL* (n 2).

1321 Cf. on the historical context Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 1-9; Paula M Pickering and Jelena Subotić, 'Former Yugoslavia and Its Successor States' in Zsuzsa Csergo, Daina S Eglitis and Paula M Pickering (eds), *Central and East European Politics: Changes and Challenges* (5th ed. Rowman & Littlefield 2022) 525 526–530; Lidija Basta Fleiner and Vladimir Djeric, 'Serbia (2012)' in: *MPEPIL* (n 2) paras. 1-8.

right to self-determination and considerable autonomy.[1322] By the end of the 1980's, several of its republics, induced by nationalist movements in Serbia, sought more independence and ethnic quarrels erupted.[1323] That evolution coincided with the federation's central authorities losing power.[1324]

In 1991, Slovenia and Croatia were the first SFRY republics to declare their independence.[1325] When the federal army intervened, the conflict in Slovenia was quickly solved, while the situation in Croatia escalated violently.[1326] To allay the imminent conflict on the ground, the European Communities (EC) initiated a peace conference at The Hague in September 1991.[1327] Due to Serbian opposition, the initiative was not successful.[1328] Yet, the peace conference did manage to install an arbitration commission: The "Badinter Commission"[1329], which issued several "Opinions" that were highly influential in the international legal evaluation of the Yugoslavian situation. Macedonia declared its independence in September 1991,[1330] Bosnia and Herzegovina in April 1992[1331]. Serbia and Montenegro, as the remaining two member states, formed another state, the Federal Republic of Yugoslavia (FRY), comprising considerably less than 50% of the original territory and of the population of the SFRY. Nevertheless, the FRY claimed

1322 Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 1, 6, 8. The scope of the "right to secession" contained in the constitution of the SFRY in fact was a matter of dispute, cp. e.g. Mateja Steinbrück Platiše, 'Slovenia (2013)' in: *MPEPIL* (n 2) para. 8.

1323 Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) para. 14.

1324 ibid paras. 10-13; Pickering and Subotić, 'Former Yugoslavia and Its Successor States' (n 1320) 530.

1325 For Slovenia Steinbrück Platiše, 'Slovenia (2013)' (n 1321) para. 9; for Croatia Maja Sersic, 'Croatia (2011)' in: *MPEPIL* (n 2) para. 4.

1326 Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 15-18, especially on Croatia 34-41; Pickering and Subotić, 'Former Yugoslavia and Its Successor States' (n 1320) 530–531; Sersic, 'Croatia (2011)' (n 1324) paras. 10-12; Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) para. 12.

1327 See relevant documents compiled in (1992) ILM 31(6) 1421-1594 with Paul C Szasz, 'Introductory Note' (1992), 31(6) ILM 1421.

1328 Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) para. 19.

1329 Named after its chairman, Robert Badinter. For more information on the commission see documents compiled in (1992) ILM 31(6) 1488-1526 with Maurizio Ragazzi, 'Introductory Note' (1992), 31(6) ILM 1488, and Malgosia Fitzmaurice, 'Badinter Commission (for the Former Yugoslavia) (2019)' in: *MPEPIL* (n 2).

1330 Michael Wood and Niko Pavlopoulos, 'North Macedonia (2019)' in: *MPEPIL* (n 2) para. 8.

1331 Pickering and Subotić, 'Former Yugoslavia and Its Successor States' (n 1320) 531.

to be the continuator state of the SFRY and considered itself bound by the SFRY international obligations.[1332]

The legal qualification of the chain of events is controversial. From the outset, the declarations of independence of four of the six republics appeared to be secessions from the federation.[1333] After the declarations of independence by Croatia and Slovenia, European states were divided on how to best react to the events.[1334] Eventually, both were recognized by many states in January 1992,[1335] Bosnia-Herzegovina in April 1992,[1336] and all three admitted to the UN in May 1992. Under the name "North Macedonia", the fourth successor state was admitted to the UN in April 1993 and formally recognized by several states successively throughout 1993.[1337] On FRY status, the UN's and states' attitudes were, initially, at least ambivalent.[1338] However, with the unfolding of the war in Bosnia-Herzegov-

1332 Permanent Mission of Yugoslavia to the UN, 'Note dated 27 April 1992' (7 May 1992) UN Doc. A/46/915 2 "strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia". Cf. also Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 32, 100; Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) paras. 17-18. Comprehensively on the pros and cons of this claim Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294) 98–112.

1333 For Croatia and Slovenia Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) para. 99.

1334 ibid paras. 21-22, 87-89.

1335 ibid para. 90; for Slovenia Steinbrück Platiše, 'Slovenia (2013)' (n 1321) paras. 13, 16; for Croatia Sersic, 'Croatia (2011)' (n 1324) para. 9.

1336 Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) para. 30.

1337 On Macedonia's difficult recognition process ibid para. 31.

1338 The UNSC, 'Resolution 757: On Sanctions against Yugoslavia' (30 May 1992) UN Doc. S/RES/757 1454 noted in a preambulatory clause "that the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted"; the ICJ in *Legality of Use of Force (Serbia and Montenegro v. Belgium),* 15 December 2004, Preliminary Objections, ICJ Rep 2004 279 para. 73 (ICJ) took note of the "rather confused and complex state of affairs that obtained within the United Nations surrounding the issue of the legal status of the Federal Republic of Yugoslavia in the Organization during this period". In particular on the depositary practice Rasulov (n 617), 145–146. Cf. also Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) paras. 20-21; Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 101–103; Stern, 'La Succession d'États' (n 283), 46 "continuation suspendue"; Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294) 109–111.

ina, led by Serbian authorities,[1339] the international reaction shifted: The Badinter Commission, while in its Opinion No. 1 merely declaring the SFRY to be "in the process of dissolution"[1340], even in July 1992 stated that "the process of dissolution […] is now complete and […] the SFRY no longer exists"[1341] and that "all [new states created on the territory of the former SFRY] are successor states to the former SFRY"[1342]. In September 1992, the UNSC considered that "the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist, […] the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations" and recommended "to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly"[1343]. The proposal was promptly followed by the UNGA,[1344] which, in December 1993, moreover requested "[m]ember States and the Secretariat […] to end the de facto working status of Serbia and Montenegro."[1345]

The majority of voices therefore considered the SFRY demise as a complete dismemberment into several successor states (including the FRY) and not as several successive secessions from a "rump-state" (S)FRY.[1346] In

1339 See for a more detailed account of the war in Bosnia-Herzegovina Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 42-58; Pickering and Subotić, 'Former Yugoslavia and Its Successor States' (n 1320) 531–533.

1340 Badinter Commission, 'Opinion No. 1' (n 306), 1497, para. 3.

1341 Badinter Commission, 'Opinion No. 8' (1992), 31(6) ILM 1521 1523.

1342 Badinter Commission, 'Opinion No. 9' (n 616), 1524.

1343 UNSC, 'Resolution 777: On the Question of Membership of the Federal Republic of Yugoslavia (Serbia and Montenegro) in the United Nations' (19 September 1992) UN Doc. S/RES/777 op. cl. 1.

1344 UNGA, 'Recommendation of the Security Council of 19 September 1992' (22 September 1992) UN Doc. A/RES/47/1 para. 1.

1345 UNGA, 'The Situation in Bosnia and Herzegovina' (29 December 1993) UN Doc. A/RES/48/88 para. 19.

1346 Arnauld *Völkerrecht* (n 255) para. 105; Hasani (n 2), 111, 113, 149; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 403, 406, 417; Hafner and Kornfeind (n 27), 1, 14; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 520; Zimmermann, 'State Succession in Respect of Treaties' (n 1107) 102, 104; Tancredi, 'Dismemberment of States (2007)' (n 324) para. 7; Thürer and Burri, 'Secession (2009)' (n 317) para. 36. Differently Theodor Schweisfurth, 'Das Recht der Staatensukzession: Die Staatenpraxis der Nachfolge in völkerrechtliche Verträge, Staatsvermögen, Staatsschulden und Archive in den Teilungsfällen Sowjetunion, Tschechoslowakei und Jugoslawi-

practice, the matter was (only) finally settled when the *Milosevic* regime came to an end and, in 2000, the new Serbian government accepted the FRY's status as a successor state to the former SFRY.[1347] The FRY then was quickly admitted to UN membership on 1 November 2000.[1348]

2) Domestic Regulations of the SFRY Successor States

a) General Preliminary Remarks

Private law used to be a shared competence in the SFRY with the federation only being responsible for the law of obligations and "*basic* relations concerning the law of property; *basic* relations which ensure the unity of the Yugoslav market; *basic* law of property relations […]; copyright […]"[1349] and the federated members enacting their own civil codes or laws on property matters.[1350] Therefore, in the field of private property, independence was not expected to lead to a massive overhaul. Until the beginning of the 1990s, the SFRY property regime was reported as having been considerably steadfast.[1351] In the 1960s, the SFRY departed from the traditional Soviet socialist model – besides others by introducing the concept of "social property" (to be distinguished from state property).[1352] Moreover, it pragmatically

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en' (24. Tagung der Deutschen Gesellschaft für Völkerrecht, Leipzig, April 1995) 203; Vladan Kulisic, 'On Principles of Constitution of the Federal Republic of Yugoslavia, Constitution of the Republic of Serbia and the Constitution of the Republic of Montenegro' (2000), 7(1-2) J Const L East & Cen Eur 25-39. Very critical towards the succession thesis Epping, '§7. Der Staat als die „Normalperson" des Völkerrechts' (n 2) 183, para. 208 claiming that "coming from the theory of continuity of a state" this decision was "hardly tenable"; cf. also Stern, 'La Succession d'États' (n 283), 46 speaking of a "continuation suspendue"; Pavković and Radan, 'Introduction' (n 392).

1347 Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) para. 22; Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 33, 103.

1348 UNGA, 'Admission of the Federal Republic of Yugoslavia to Membership in the United Nation' (10 November 2000) UN Doc. A/RES/55/12.

1349 Art. 281 (4) of Constitution of the Socialist Federal Republic of Yugoslavia (Jugoslovenski Pregled 1989) (SFRY) [emphasis added].

1350 Marco Roccia, 'Reforming Property Law in Kosovo: A Clash of Legal Orders' (2015), 23(4) European Review 566 566-567.

1351 Milica Uvalić, *Investment and Property Rights in Yugoslavia: The Long Transition to a Market Economy* (CUP 1992) 9 "probably the most constant feature of the Yugoslav system over the last forty years".

1352 ibid 5–6; Gashi (n 1195) 77.

acknowledged to a limited extent the need for the existence of private property, also relating to real estate.[1353] Comparable to Yemen or Germany, particular post-succession issues were the privatization or "de-nationalization" of property and the restitution of property nationalized by the SFRY after the Second World War,[1354] and its consequences for those having acquired rights in relation to such property.[1355]

In the case of the SFRY, an analysis of changes in private law, especially the law of property, after independence is subject to several caveats. First, comparable to the situation in the SU, the demise of the SFRY went hand-in-hand with the demise of the socialist economic order. The SFRY economy had been one of the most modern and, for quite some time, most successful socialist economies in the world. Nevertheless, as early as the 1980s, it started to falter and finally all SFRY successor states had, even before their independence, introduced new systems more or less modelled on a market economy and western traditions of private property.[1356] Dissociating the measures undertaken as a consequence of state succession from those taken due to independent economic reforms is therefore impossible. Second, as mentioned, the independence processes of the former SFRY republics were not always peaceful. Especially states having to cope with enduring war activities and flows of refugees on their territories often enacted (purportedly temporary) emergency legislation also related to allocating real property.[1357] Additionally, in some of the successor states shortly after their independence, international forces were deployed to administer the territory. Here, the potential deprivation or preservation of rights cannot always be directly attributed to the new state and is not necessarily a direct consequence of the succession process but rather one of the violent conflict behind that process.

1353 UN-HABITAT, 'Housing and Property Rights in Bosnia and Herzegovina, Croatia and Serbia and Montenegro: Security of Tenure in Post-Conflict Societies' (2005) 17–20 <https://unhabitat.org/sites/default/files/download-manager-files/Housing%20and%20Property%20Rights%20-%20Bosnia%20and%20Herzegovina%2C%20Croatia%20and%20Serbia%20and%20Montenegro.pdf>.

1354 On privatization and resitution ibid 20, 88.

1355 For three of the successor states ibid 2, 13; for the example of the Roma population in Bosnia and Herzegovina ibid 53–56.

1356 For an overview of the economic reforms before independence Uvalić (n 1350) 11-15, 176–209; see also Gashi (n 1195) 77–78.

1357 For Croatia and Bosnia and Herzegovina *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 1–2.

b) Domestic Law of Slovenia

The four legal acts of most relevance for regulating the attitude of independent Slovenia towards the previous legal order are the Basic Constitutional Charter (CC) on the Sovereignty and Independence of the Republic of Slovenia[1358], enacted on the declaration of independence on 25 June 1991, complemented by the Constitutional Act Implementing the CC (Implementation Act CC)[1359], as well as the Constitution of the Republic of Slovenia,[1360] enacted on 23 December 1991 and the corresponding Implementation Act (Implementation Act Constitution).[1361] Questions concerning the transmission of acquired positions were generally regulated by the Implementation Acts rather than by the CC or the constitution, which contain relatively few provisions on the topic.

aa) Continuity of the Legal Order in General

Art. 3 of the Implementation Act CC provided that "[t]reaties concluded by Yugoslavia which apply to the Republic of Slovenia remain in force on the territory of the Republic of Slovenia". Slovenia is reported as having succeeded to "most of the bilateral and multilateral treaties to which the

1358 Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (25 June 1991) OG of Slovenia 1/1991 1 (Slovenia) (English translation on HeinOnline https://heinonline-org).

1359 Constitutional Act Implementing the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia (25 June 1991) OG of Slovenia 1/1991 2 (Slovenia), English translation available at https://www.dz-rs.si/wps/wcm/connect/en/dz%20documents_en/politicnisistem/ustava%20republike%20slovenije/ustavni%20zakoni%20za%20izvedbo/d118b71c-e164-4a27-8ec7-f8ca4f4b112c.

1360 Constitution (23 December 1991) OG of Slovenia No. 33/91-I (Slovenia), an English translation is available at the webside of the National Assembly of Slovenia at https://www.dz-rs.si/wps/portal/en/Home/!ut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfIjo8zinfyCTD293Q0N3L2cTAwCjf19nYLMgwwNA030wwkpiAJKG-AAjgb6BbmhigCxzCxp/dz/d5/L2dBISEvZ0FBIS9nQSEh/.

1361 Constitutional Act Implementing the Constitution of the Republic of Slovenia (23 December 1991) OG of Slovenia 33/1991 1386 (Slovenia), English translation available at https://www.dz-rs.si/wps/wcm/connect/en/dz%20documents_en/politicnisistem/ustava%20republike%20slovenije/ustavni%20zakoni%20za%20izvedbo/e0ff961a-130e-402b-b74d-baf2c1aaf69d#_ftn1.

former SFRY was a party, and which were of relevance to Slovenia"[1362]. Art. 8 of the Slovenian constitution postulated the supremacy of "generally accepted principles of international law" and international treaties over national laws and regulations and provided for direct application of such treaties. Therefore, in theory, all international rights guaranteed by Slovenia before its independence continued to be in force, also domestically.

Analogically, Art. 4 para. 1 of the Implementation Act CC provided for the continuity of "those federal regulations that were in force in the Republic of Slovenia when this Act entered into force" which, until new regulations were made by Slovenia, were to "be applied mutatis mutandis as regulations of the Republic of Slovenia, insofar as they are not contrary to the legal order of the Republic of Slovenia and unless otherwise provided by this Act". Furthermore, "[a]ll judicial and administrative proceedings initiated before the authorities of the SFRY shall continue before the competent authorities of the Republic of Slovenia", Art. 8 para. 1 Implementation Act CC. Individual legal acts of the SFRY or other republics dating prior to independence were to remain enforceable subject to reciprocity and congruency with the Slovenian legal order, Art. 8 para. 2 Implementation Act CC.[1363] Slovenia therefore opted for legal continuity as the default rule. That rule was subject, however, to the broad prerequisite of compliance with the whole corpus of the "new" Slovenian law, allowing SFRY law to be modified at any point in time. Six months later, the Slovenian constitution did not add much to that stipulation: The corresponding Implementation Act provided in Art. 1 for the preservation of "regulations and other general acts on the day of the promulgation of the Constitution" and therefore again for continuity. In contrast to the Implementation Act CC, for an interim period until 31 December 1993, the continuity was not contingent on compliance with the constitution.

bb) Private Rights

None of the mentioned documents contained explicit provisions on the permanence of individual rights acquired before independence in particular, but Art. 3 CC guaranteed in general terms "the protection of human

1362 Steinbrück Platiše, 'Slovenia (2013)' (n 1321) para. 20; cf. also UNSG, 'Depositary Notification on Succession by Slovenia' (28 October 1992) UN Doc. C.N.240.1992.

1363 Legal acts issued after that date were treated like foreign acts, Art. 8 para. 3 Implementation Act CC (n 1358).

rights and fundamental freedoms to all persons in the territory of the Republic of Slovenia irrespective of their national origin, without any discrimination whatsoever, in accordance with the Constitution of the Republic of Slovenia and the treaties in force."

i. The "Erased"

In the implementation of that seemingly generous constitutional provision, pursuant to Art. 13 Implementation Act CC, citizens of other former SFRY republics were eligible to the same rights as Slovenian citizens if they had been registered as permanent residents of Slovenia and actually lived there on the date of the Slovenian independence plebiscite. But such a status was only guaranteed by Art. 13 until those citizens "acquire citizenship of the Republic of Slovenia […] or until the expiry of the time limits determined" under national law. That reservation became one of the most problematic provisions of the Slovenian transition process, being challenged before the Slovenian Constitutional Court and eventually before the ECtHR because it impaired the status previously held by citizens of other SFRY republics.

During the existence of the SFRY, all of its citizens held two nationalities - the federal Yugoslavian nationality and the nationality of one of its republics.[1364] Yugoslav citizens had been allowed to travel freely between and within the constituent republics and to settle in any one of them. The exercise of civil, economic, social, and political rights was tied to a registered permanent residence in one of the republics. The pertaining registration procedure was the same for all citizens of the SFRY republics but differed for third-country nationals. In that time, about 200,000 citizens of other SFRY republics took residence in Slovenia. After independence, Slovenia enacted the legislation foreseen by Art. 13 Implementation Act CC setting out a procedure to apply for Slovenian citizenship. In 1992, Slovenian authorities deleted from the register of permanent residents all persons who had not applied for Slovenian citizenship within the time limit provided for or whose application was denied. In that way, around 25,000 former SFRY citizens were re-registered as foreigners in Slovenia and not only lost their residence permit in Slovenia but with it in fact any status they had before. Some of these so-called "erased" became stateless, were deported, did not receive passports or travel documents, were unable to

1364 Cf. Art. 249 SFRY Constitution (n 1348).

lease a flat, apply for social assistance or a driver's license, or to find employment.[1365] The Slovenian Constitutional Court in 1999 rendered its first judgment on the treatment of the "erased" and found that the actions of Slovenia had violated "the principle of protection of confidence in the law, as one of the basic principles of the rule of law".[1366] According to the court, an interpretation of the relevant legislation revealed that it did not embrace former SFRY citizens, but only third-country nationals. The status of the "erased" was thus left in limbo. The reasoning is worth citing in length:

> "The principle of protection of confidence in the law guarantees an individual, that the state shall not impair his/her legal status without a justified reason. […] In its Independence Acts, Slovenia, as a new country, obliged itself to ensure protection of human rights and fundamental freedoms to all the persons in the territory of the Republic of Slovenia, regardless of their nationality, without any discrimination and in accordance with the Constitution of the Republic of Slovenia and the valid international law […]. According to the a.m. Independence Acts, *the citizens of other republics, who had not applied for the citizenship of the Republic of Slovenia or whose applications were rejected, were quite justified to expect, that this circumstance should not essentially impair their status and that they should be permitted to continue their permanent residing in the Republic of Slovenia if they wish to do so*. Furthermore, these persons were quite justified to expect […] that they [sic] legal status would be regulated according to the international law. Thus, Article 12 of the International Covenant on Civil and Political Rights […] stipulates, that all the persons who are legally residing in a territory of a state, have the right to move freely in the territory and to chose their residence freely, and that this right can only be limited due to specific reasons".[1367]

After additionally finding a violation of the principle of equality,[1368] the court declared the respective law unconstitutional and required the legislator to rectify the legal lacuna. The court's reference to Art. 12 ICCPR may be contestable since, after independence, Slovenia itself constituted a new

1365 On the history and background of the "erasure" *Kurić and Others v. Slovenia,* Appl. No. 26828/06, 26 June 2012, ECHR 2012-IV 1 paras. 16-39, 69 (ECtHR [GC]).

1366 *The Erased,* U-I-284/94, 4 February 1999, Procedure for Verification of Constitutionality para. 15 (Slovenian Constitutional Court).

1367 ibid para. 16 [emphasis added].

1368 Oddly, third country nationals' permanent residence permits acquired before independence were recognized.

state free to regulate the lawful residence within its borders. Nevertheless, its reliance on the potential expectations of the SFRY citizens towards the permanence of their status is remarkable. The judgment accords crucial significance to confidence in the survival of rights when there is a legal void, i.e. when a successor state has not regulated the issue. In the aftermath of the judgment, the Slovenian legislator enacted a new law, which in 2003 was again declared partly unconstitutional by the Supreme Court.[1369] The newly reformed law, due to a referendum opposing it and after years of only incomplete implementation of the court's decisions, only came into force in 2010.[1370]

Before the ECtHR, where a complaint against the "erasure" had been lodged, the Slovenian government relied heavily on the exceptionality of the succession situation. It argued that

> "the events in 1991 had involved the historic creation of a new State and that it had therefore been necessary, on the one hand, to establish rapidly a corpus of citizens in view of parliamentary elections and, on the other hand, to regulate the status of aliens, including that of citizens of the other former republics of the SFRY with permanent residence in Slovenia. This pivotal time for the establishment of a new State called for the quick adoption of decisions owing to the pressing social need."[1371]

The procedure of nationalization in Slovenia was accepted by the court as furthering the legitimate aim of protecting "the interests of the country's national security".[1372] But in a judgment that became a milestone for acquired rights protection, both a chamber and the GC of the ECtHR found Slovenia in violation of Art. 8 ECHR, the right to private and family life, as the treatment was not "in accordance with the law".[1373]

> "[A]t least until 2010, the domestic legal system failed to regulate clearly the consequences of the "erasure" and the residence status of those who had been subjected to it. Therefore, not only were the applicants not in a

1369 The new law had required the issuance of the permits *ex tunc*, not *ex nunc*. On the history of the legislative enactments *ECtHR Kurić and Others* (n 1364) paras. 49-61.

1370 On the cumbersome legislative and administrative history of the case ibid paras. 62-83.

1371 ibid 325.

1372 ibid 353.

1373 As this was seen as a "continuing" violation, the fact that Slovenia only became party to the ECHR on 28 June 1995, was no bar to the Court's jurisdiction, ibid para. 339.

position to foresee the measure complained of, but they were also unable to envisage its repercussions on their private or family life or both."[1374]

Additionally, since the ECtHR did not deem it necessary to bereave the applicants of their residence permit in order to establish a "corpus of citizens", it declared the actions not to be "necessary in a democratic society".[1375] When weighing the interests of the "erased" individuals against the purported state interests, here, the ECtHR did not accord much leeway to the Slovenian authorities but served a reminder that "there may be positive obligations inherent in effective 'respect' for private or family life or both, in particular in the case of long-term migrants such as the applicants"[1376]. It therefore held that Slovenia was under an obligation to "regularize [...] the residence status of former SFRY citizens". Hence, the court developed a right for citizens to maintain an acquired status from Art. 8 ECHR even when a state becomes independent *and irrespective of the grant of nationality*. As one of the rare decisions finding a violation of human rights through the curtailment of a domestic status in a succession case, the judgment can be considered a veritable "fork in the road" for the development and acceptance of the doctrine of acquired rights.

ii. Property

The right of private property and inheritance was explicitly mentioned in Art. 33, 67, and 69 of the Slovenian constitution.[1377] As the domestic private property law was simply continued after succession (see above), rights to movable property remained intact. For immovable property, the original version of Art. 68 of the constitution stipulated that "[a]liens may acquire ownership rights to real estate under conditions provided by law. Aliens may not acquire title to land except by inheritance, under the condition of reciprocity."[1378] Those provisions were meant to protect the relatively new

1374 ibid para. 348.
1375 ibid paras. 354-359.
1376 ibid para. 358.
1377 For the content of the right reference is made to statutory law. Art. 60 of the constitution includes the protection of intellectual property rights. The Slovenian constitution does not refer to the Hull-formula. See also Art. 70 (Public Good and Natural Resources) and Art. 71 (Protection of Land).
1378 Cf. also Art. 9 of the Implementation Act Constitution (n 1360) "[u]ntil the adoption of the law referred to in Art. 68 of the Slovenian Constitution (n 1359), aliens

country from a sellout by western investors.[1379] Yet, importantly, also for aliens, "ownership rights and other real rights to real estate" were guaranteed on the basis of reciprocity "to the same extent as on the entry into force of this Act". Thus, while the (future) right of aliens *to acquire* real estate was not protected on a constitutional basis in Slovenia, *already acquired* real property rights were. That protection was underscored by Art. 68's exception for inheritated property, which protected the *already acquired* rights of another person, the descendent. The rule was approved by Art. 16 Implementation Act CC.

While privatization had already started in 1988, after independence Slovenia enacted its own privatization laws.[1380] People living in residential houses under "social property" were then allowed to buy the premises at a reduced price.[1381] When privatizing social property, Slovenia paid particular attention to restitution for former owners who were expropriated under communism.[1382] Restitution in kind was the priority, but it could also take place through compensation for reasons of public good.[1383]

may not acquire ownership rights to real estate." Also under Art. 16 Implementation Act CC (n 1358) foreigners were not allowed to acquire ownership rights or real rights to real estate, "except on the basis of inheritance and on condition of actual reciprocity". In the later (2006) version of Art. 68 "[a]liens may acquire ownership rights to real estate under conditions provided by law or a treaty ratified by the National Assembly."

1379 Gisbert H Flanz, 'The Republic of Slovenia: Introduction' in Gisbert H Flanz and Albert P Blaustein (eds), *Constitutions of the Countries of the World: A Series of Updated Texts, Constitutional Chronologies and Annotated Bibliographies - Vol. 16* (Oceana Publ) v vi.

1380 In detail Gashi (n 1195) 78; on the privatization of enterprises ibid 78–82.

1381 ibid 78.

1382 ibid 79, 108-109. See on denationalization also (albeit not deciding the material questions) *Attems and Others v. Slovenia,* Appl. No. 48374/99, 4 January 2008, Decision on Admissibility (ECtHR).

1383 Gashi (n 1195) 108–109.

c) Domestic Law of Croatia

aa) Continuity of the Legal Order in General

In Art. 3 para. 2 of Croatia's "Declaration on the Proclamation of the Sovereign and Independent Republic of Croatia",[1384]

> "[t]he Republic of Croatia guarantees, in accordance with the rules of international law, to other states and international organizations that it will fully and conscientiously exercise all rights and obligations as the legal successor of the former SFRY in the part relating to the Republic of Croatia."

Pursuant to Art. 3 of its "Constitutional Decision on the Sovereignty and Independence",[1385] it took on all obligations from international treaties of the SFRY if they were in line with the legal order of Croatia.[1386] With respect to domestic law, according to Art. 4 of the Constitutional Decision,[1387] Croatia upheld not only its own law but also federal laws unless they had been withdrawn.[1388]

1384 Declaration on the Proclamation of the Sovereign and Independent Republic of Croatia (25 June 1991) OG of Croatia 31/1991 875 (Croatia). I am very grateful to Dr. Mateja S. Platise, Max Planck Institute for International Law Heidelberg, for checking the linguistic accuracy of all translations from Croatian original sources in this section c). All mistakes of course remain with me.

1385 Constitutional Decision on the Sovereignty and Independence (25 June 1991) OG of Croatia 31/1991 872 (Croatia), cf. also Siniša Petrović and Petar Ceronja, 'Croatia' in: *Shan Legal Protection of Foreign Investment* (n 598) 287 292.

1386 The provision even alluded to the international rules of state succession. Cf. also Sersic, 'Croatia (2011)' (n 1324) para. 14. See also Art. 29 of the Law on the Conclusion and Enforcement of International Treaties (20 April 1996) OG of Croatia 28/96 542 (Croatia). "The Republic of Croatia shall apply the relevant rules of international law to succession in respect of international agreements of the predecessor state if such agreements are not in conflict with the Constitution of the Republic of Croatia and the legal order of the Republic of Croatia"; Petrović and Ceronja, 'Croatia' (n 1384) 292.

1387 Croatian Decision on Independence (n 1384).

1388 Similarly, Art. 4 of the Croatian Declaration of Independence (n 1383) explained that "In the territory of the Republic of Croatia, only laws passed by the Parliament of the Republic of Croatia are valid, and until the end of the dissolution, federal regulations that have not been repealed."

bb) Private Rights

Art. 48 para. 1 and 4 of Croatia's constitution, enacted in 1990,[1389] contained a protection of property. That right was qualified by general welfare considerations, para. 2, and foreigners were only allowed to acquire ownership "under conditions spelled out by law", para. 3. Art. 48 para. 4 protected the right to inheritance. Possible limitations to property rights were subject to law, public interest, and "indemnity equal to its market value", Art. 50 para. 1. Notably, even then "[e]ntrepreneurial and market freedom" were explicitly named as the basis of the Croatian economic system, Art. 49 para. 1, and entrepreneurs', Art. 49 paras. 2, Art. 50 para. 2, and foreign investors', Art. 49 para. 5, property was specially protected. Art. 49 para. 4 even stipulated that "[t]he rights acquired through the investment of capital may not be lessened by law, nor by any other legal act". In the Declaration, the inviolability of property was said to be one of the "highest values of the constitutional order" on a level with principles such as the rule of law, democracy, and human rights.

Croatia started its privatization process in 1990 but until 1995 was hindered in finalizing it in all parts of the country by the war.[1390] While, in rural areas, apartments were mostly privately owned,[1391] especially in the urban areas, apartments had regularly been occupied on the basis of so-called "occupancy rights" or "specially protected tenancies", which gave holders a right to live in the apartment for life unless the apartment remained uninhabited for more than six months on "unjustified" grounds.[1392] Normally, in the process of privatization, such occupancy rights of socially owned apartments were transformed into lease agreements unless the hold-

1389 Constitution (22 December 1990) OG of Croatia 56/1990 (Croatia) reprinted in Ivan Bekavac (ed), *Zbirka pravnih propisa* (1993) 344; an English tranlsation can be found online at https://www.servat.unibe.ch/icl/hr01000_.html; a consolidated 2014 English version is available online at the homepage of the Croatian Constitutional Court https://www.usud.hr/en.

1390 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 1, 66, 69; see on the privatization of public enterprises Gashi (n 1195) 82–86.

1391 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 78.

1392 On the content of such tenancy rights Petar Đurić, 'The Right to Restitution of Tenancy Rights in Croatia: In Search of Redress for Violations of Individual and Minority Rights of Ethnic Serbs' (2014), 13 European Yearbook of Minority Issues 321 322.

er of the right chose to buy the apartment at favorable conditions.[1393] Yet, occupancy rights with respect to private property were transformed into lease agreements.[1394] That transformation can be interpreted as a means for protecting owner interests in property as well. Furthermore, Croatia instituted restitution procedures for property lost in the SFRY.[1395] While, in principle, restitution in kind was owed, only compensation could be claimed in cases of good faith acquisition of property by a third person.[1396]

However, in the following period, the war erupting in Croatia shortly after its independence profoundly influenced the further protection of property, especially for minority populations on the territory. During the military conflict in the Serb-populated border region, there were massive flows of refugees from one part of the country to the other.[1397] Those flights left many houses and apartments, especially those owned by people of non-Croatian ethnicity, in particular Serbs, empty; but thousands of people who had fled the border region, especially of Croatian ethnicity, became homeless. Croatia then enacted legislation according those refugees the right to house in the abandoned apartments.[1398] Thus, the new occupants of the houses were mostly of Croatian ethnicity, the former rights' holders, who had fled the country, were mostly of another ethnicity. Even during, but also after the war, occupancy rights of the original owners were cancelled as their absence was considered "unjustified"[1399] and the institute of

1393 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 84–86; Đurić (n 1391), 324.

1394 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 85–86; cf. European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo: Study' (15 March 2010) PE 419.632 92; for construction land ibid 93.

1395 Gashi (n 1195) 110–113.

1396 ibid 111.

1397 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 68.

1398 Đurić (n 1391), 323; *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 69, 73-74.

1399 ibid 65, 69-72, 83-84. *Blečić v. Croatia,* Appl. No. 59532/00, 29 July 2004, Decision on the Merits (ECtHR) had declared this practice to be within Croatia's margin of appreciation. In this judgment, the court, however, did not talk about any discriminatory application of the procedure. The case was referred to the GC which (in a six to eleven votes split bench) declined its jurisdiction *ratione temporis*, cf. *Blečić v. Croatia,* Application No. 59532/00, 8 March 2006, ECHR 2006-III 51 (ECtHR [GC]). Very critical on the judgments Đurić (n 1391), 346. In light of the content of an occupancy right and since Croatian domestic legislation had given the rights-holder the possibility to buy the socially owned apartment, the curtailment of these rights can be considered an expropriation, cf. ibid 328; *UN-HABITAT 2005*

occupancy rights was abolished altogether in 1996.[1400] Furthermore, abandoned property was put under state administration.[1401]

Due to short application deadlines for the sale of the apartments or restitution of property, which could hardly be met by displaced people residing in other countries,[1402] the consequences of what initially was meant to constitute an "emergency measure" were substantially perpetuated, also after the war. Despite the UNSC reaffirming "the right of all refugees and displaced persons originating from the Republic of Croatia to return to their homes of origin throughout the Republic of Croatia" and calling upon Croatia to "remove legal obstacles and other impediments to two-way returns, including through the resolution of property issues",[1403] many people, mostly ethnic Serbians, lost their rights without any compensation. Croatia seems to be the only former Yugoslav republic that did not restitute occupancy rights.[1404] For the private property taken under administration and not given back after the war, Croatia was prepared to enact a new law giving former owners more possibilities to regain their property, but only after considerable international pressure. Yet, rights of the new occupants of the apartments were often still given more weight than the property rights of former owners. Despite several decisions by international institutions such as the Human Rights Committee[1405] and the European Committee of

Housing and Property Rights (n 1352) 72, 75; Tom Allen and Benedict Douglas, 'Closing the Door on Restitution' in Antoine Buyse and Michael Hamilton (eds), *Transitional Jurisprudence and the European Convention on Human Rights: Justice, Politics and Rights* (CUP 2011) 208 218–220.

1400 Đurić (n 1391), 323.

1401 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 73–74.

1402 Đurić (n 1391), 323–324. On the openly discriminatory intent ibid 331–332; *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 74–75.

1403 UNSC, 'Resolution 1145: On the Establishment of a Support Group of Civilian Police Monitors in the Danube Region' (19 December 1997) UN Doc. S/RES/1145 (1997) para. 7.

1404 Đurić (n 1391), 324; *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 83–84.

1405 On the loss of occupancy rights *Vojnovic v. Croatia,* UN Doc. CCPR/C/95/D/1510/2006, 30 March 2009 (Human Rights Committee).

Social Rights[1406] finding Croatia's acts in violation of international law, the issue has not yet been completely solved.[1407]

d) Domestic Law of Macedonia

For Macedonia,[1408] the constitution[1409] did not illuminate the relationship to the SFRY's legal order, but guidance can be found in the pertaining Implementation Law[1410]. Art. 4 of the Implementation Law clarified that Macedonia considered itself as "an equal legal successor" to the SFRY, therefore undertaking "the rights and the duties arising from the establishment of the Socialist Federal Republic of Yugoslavia" which - unless an international agreement was concluded - "shall be determined in conformity with the general rules of International Law" and the Vienna Conventions.

It basically opted for succession to the international treaties relevant for its territory as foreseen in Art. 34 VCSST. According to Art. 118 of the Macedonian constitution, those treaties automatically became part of the domestic law and ranked higher than statutory law. For domestic law, Art. 5 of the Implementation Law determined that "existing federal legal acts" should become legal acts of Macedonia.[1411] Art. 30 of the constitution

1406 *Centre on Housing Rights and Evictions (COHRE) v. Croatia,* Complaint No. 52/2008, 22 June 2010, Decision on the Merits (European Committee of Social Rights), which found a violation of Art. 16 European Social Charter (The Right of the Family to Social, Legal and Economic Protection).

1407 In more detail on this process *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 73–82, 84; European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 96–107. Still in 2015 the Human Rights Committee, 'Concluding Observations on the Third Periodic Report of Croatia' (30 April 2015) UN Doc. CCPR/C/HRV/CO/3 para. 13 remained "concerned that a considerable number of refugees, returnees and internally displaced persons have still not been resettled and continue to reside in collective shelters."

1408 The state was originally admitted to the UN under the name of "Fomer Yugsolav Republic of Macedonia (FYROM)". Later, a dispute with Greece ensued about the name which was only settled in 2019. Since then the state is officially named "Republic of North Macedonia". On this dispute and the choice of words Wood and Pavlopoulos, 'North Macedonia (2019)' (n 1329).

1409 Constitution (17 November 1991) OG No. 52/1991 (Macedonia).

1410 Constitutional Law on the Implementation of the Constitution OG No. 52/91 (Macedonia).

1411 Excluded are "federal legal acts which regulate the organization and the competencies of the bodies of the Federation".

protected the "right to ownership of property and the right of inheritance". As ownership "should serve the well-being of both the individual and the community", expropriations could only take place in the public interest and compensation of at least its market value had to be provided for. Foreigners could acquire ownership only under special conditions determined by law, Art. 31. Similar to Croatia, Art. 59 of the Macedonian constitution explicitly protected foreign investors and their rights acquired "on the basis of invested capital". Privatization had already started during the SFRY period.[1412] Restitution legislation was not linked to that process but enacted only in 1998, years after independence.[1413] Restitution in kind was foreseen as the primary remedy, which, however, was substituted by compensation when another person had acquired ownership in goof faith.[1414]

e) Domestic Law of Bosnia-Herzegovina

Only shortly after the independence of the Republic of Bosnia and Herzegovina, the country was ravaged by a war that lasted until 1995, when NATO forces intervened.[1415] The Bosnian war was formally ended by the Dayton Agreement,[1416] concluded under international supervision in December 1995 between the Republic of Bosnia-Herzegovina, the Republic of Croatia and the newly built FRY. The new constitution of Bosnia and Herzegovina was appended as Annex 4 to the Dayton Agreement. Its content was therefore strongly internationally influenced. The "Dayton Constitution" changed the name of the state from "Republic of Bosnia and Herzegovina" to "Bosnia and Herzegovina", Art. 1 para. 1, and re-arranged its inner constitution: From then on, the state of Bosnia and Herzegovina was composed of the Federation of Bosnia and Herzegovina (FBH) and the Republika Srpska (RS).[1417] Art. 1 para. 3. Art. 1 para. 1 of the constitution provided that

1412 Gashi (n 1195) 86–90.
1413 ibid 113–114.
1414 ibid 115.
1415 On the military conflict Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) paras. 42-52; Pickering and Subotić, 'Former Yugoslavia and Its Successor States' (n 1320) 531–533.
1416 Dayton Agreement (n 1084).
1417 The constitution was approved by Bosnia and Herzegovina and its two constituent parts, respectively.

> "[t]he Republic of Bosnia and Herzegovina, the official name of which shall henceforth be 'Bosnia and Herzegovina,' shall continue its legal existence under international law as a state […]. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations."

Thus, the Dayton Constitution deals with Bosnia and Herzegovina not as a successor state to the SFRY but as a *continuator* state to the *Republic* of Bosnia and Herzegovina. Resultingly, only limited inferences can be drawn from the Dayton Constitution on the question as to which consequences a *change* in sovereignty entails for the rights of individuals. However, the Republic of Bosnia and Herzegovina had enacted its own constitution (still as a republic of the federation of the SFRY) in 1974 and changed it several times but apparently, after its independence, never enacted a new constitution.[1418] As the coming into force of the Dayton Constitution was not in line with the amendment procedure of the foregoing constitution it is to be assumed that the foregoing constitution was replaced, not amended.[1419] Art. XII para. 1 of the Dayton Constitution maintained that it was "*amending* and *superseding* the Constitution of the Republic of Bosnia and Herzegovina" [emphasis added] and hence does not clearly answer the issue. While the continuity of a state and the complete replacement of its constitution are not necessarily mutually exclusive,[1420] it is still questionable whether the expression to "continue" correctly described the state of affairs. Under the assumption that Bosnia-Herzegovina *continued* the *Republic* of Bosnia and Herzegovina, continuity of the legal system would have been a matter of course and the partly detailed provisions on "transitional arrangements" in the Dayton Constitution hardly explicable. Of significance remains, therefore, how the first Bosnian Herzegovinian constitution after independence treated the issue of private rights.

1418 Also Sienho Yee, 'The New Constitution of Bosnia and Herzegovina' (1996), 7(2) EJIL 176 176, especially footnote 6.
1419 ibid 179.
1420 ibid.

aa) Continuity of the Legal Order in General

With respect to international agreements, Art. 2 para. 7 of the constitution stipulates that Bosnia and Herzegovina will "remain" party to the human rights treaties listed in Annex I to the constitution. Other treaties ratified by Bosnia and Herzegovina between 1 January 1992 and the entry into force of the constitution were subject to revision, Art. 5 Annex II to the constitution. The date referred to is remarkable as it was before the declaration of independence by the republic, the state it was supposed to refer to. While, for treaties with a humanitarian character, continuity was provided for, the fate of other treaties concluded before the mentioned date was left in limbo. Strikingly, the constitution did not contain a provision dealing with treaties of the SFRY concluded before 1 January 1992. Even with respect to treaties concluded by the Republic of Bosnia and Herzegovina, continuity of the treaties was subject to approval by the new government and parliament, a relatively clear sign of discontinuity. According to Art. III para. 3 lit. b, "[t]he general principles of international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities." Further transitional arrangements, in particular with respect to domestic law, were explicitly provided for in Annex II. Art. 2 of that Annex contained a general rule:

> "All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina",

thereby stipulating a continuity rule. Court or administrative proceedings within Bosnia and Herzegovina were to continue as well, Art. 3 Annex II to the constitution.

bb) Private Rights

Even in its preamble, the constitution underlined the desire "to promote the general welfare and economic growth through the protection of private property and the promotion of a market economy". The ECHR rights were

made part of national law of highest rank, Art. 2 para. 2. All those rights,[1421] including the right of property and rights emanating from international agreements still in force for Bosnia and Herzegovina were to be guaranteed on a non-discriminatory basis to all persons "in Bosnia and Herzegovina", i.e. irrespective of their nationality, Art. 2 paras. 3 and 4, and were secured from any constitutional abrogation or curtailment, Art. 10 para. 2 of the constitution.

In the implementation of its privatization policy, Bosnia-Herzegovina, similar to Croatia, from the beginning was severely impeded by the war on its territory.[1422] During the military conflict, the country was the setting scene of massive inflows of refugees, practices of ethnic cleansing, and a mass exodus of ethnic minorities.[1423] It enacted "emergency laws" to accommodate the housing needs of refugees by letting them occupy abandoned houses of Bosnian displaced people. After the war was over, Bosnian authorities took no steps to undo the policy, set unattainable deadlines for claims to recover ownership or occupancy rights or tended to protect the new users of the property.[1424] The institute of social ownership was abandoned during the war.[1425] The ethnic minority owners or occupancy rights holders who had been expelled during the war were, thus, expropriated without compensation, thereby perpetuating the ethnic reversal of the population.[1426] The first genuine "ordinary" de-nationalization laws were

1421 Annex 6 [Agreement on Human Rights], Chapter 1, Article I almost verbally reiterated these commitments.

1422 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 1. For an overview of the privatization process in Bosnia and Herzegovina European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 62 and Enisa Salimović, 'Privatisation in Bosnia and Herzegovina' (1999), 2(3) SEER 163, who mentions that first attempts at privatization were already undertaken by Bosnia and Herzegovina as a republic of the SFRY in 1990.

1423 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 27; Hans van Houtte, 'Commission for Real Property Claims of Displaced Persons and Refugees (2019)' in: *MPEPIL* (n 2) para. 5; *Mago and Others v. Bosnia and Herzegovina,* Appl. Nos. 12959/05, 19724/05, 47860/06 et al. 3 May 2012 para. 53 (ECtHR).

1424 ibid.; European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 63, 70, 74, 75, 80 "misuse"; for construction land ibid 65.

1425 *ECtHR Mago and Others* (n 1422) para. 8.

1426 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 31–35; cf. European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 75 and the facts reported in *ECtHR Mago and Others* (n 1422).

enacted by the FBH and the RS in 1997.[1427] Generally, former holders of occupancy rights of socially owned apartments were allowed to buy them; if they did not, the occupancy rights were transformed into a lease.[1428] Yet, the discriminatory practice and taking of former occupancy rights eventually also meant that, after the privatization process was resumed, such former bearers of occupancy rights often were not entitled to acquire a premise.[1429]

The Dayton Peace Agreements had attempted to counter such development. Art. 5 of the Dayton Constitution [Refugees and Displaced Persons] maintained that

> "[a]ll refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void."

The mentioned Annex 7 was devoted to elaborating such a right. That right of return, linked to a right to restitution of property, was meant to reverse the ethnic homogenization and was seen as an important step in settling the conflict.[1430] Annex 7, Chapter One, Art. 1 para. 1, besides almost verbally reiterating Art. 5 of the constitution, spelt out that objective clearly. In order to enforce such a right, Chapter II of Annex 7 established a "Commission for Displaced Persons and Refugees", which was later re-named as the "Commission for Real Property Claims" (CRPC).[1431] Its mandate was to "receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return", Art. XI of Annex 7. In carrying out

1427 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 1, 46 Salimović (n 1421), 164.

1428 In detail ibid 174–176; *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 46–51.

1429 European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 64, 75.

1430 Cf. also van Houtte, 'Commission for Real Property Claims of Displaced Persons and Refugees (2019)' (n 1422) para. 7.

1431 In detail on this commission, its mandate and working methods ibid.

these functions, "the Commission shall consider domestic laws on property rights", Art. XV Annex 7.

In the course of its work, the CRPC also assumed jurisdiction over occupancy rights.[1432] While the international supervision of the restitution process helped the cause of restitution of property immensely and made it more effective than in the case of Croatia,[1433] the warring political and ethnic fractions within the country thwarted any effective implementation of the scheme, and displaced persons longing to return to their home of origin were still facing discrimination and harassment.[1434] The deadlock was overcome when the High Representative for Bosnia and Herzegovina intervened in 1999 and, in line with the powers conferred on him by the Dayton Agreement, enacted laws for implementing the restitution, and former property or occupancy rights holders were restituted or compensated.[1435] However, the regulations enforced by the Representative were imprecise and indiscriminately cancelled all occupancy rights acquired between 1 April 1992 and 7 February 1998, even if the acquisition had to be considered having taken place in good faith.[1436]

f) Domestic Law of the FRY

After independence of the aforementioned four republics, a referendum in Montenegro in 1992 saw 62% of the voters opting to stay with Serbia.[1437] The remaining two Yugoslav republics therefore formed the FRY - at that

1432 ibid para. 36.

1433 Cf. *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 46.

1434 ibid 36–37, 41-42.

1435 ibid 37, 42-46; van Houtte, 'Commission for Real Property Claims of Displaced Persons and Refugees (2019)' (n 1422) paras. 66-68. See in general on property legislation during and after the war *Đokić v. Bosnia and Herzegovina,* Appl. No. 6518/04, 27 May 2010 paras. 5-10 (ECtHR) where the ECtHR upheld the duty to restitute even in cases of members of the former Yugoslav army. But for persisting implementation deficits see *Orlović and Others v. Bosnia and Herzegovina,* Appl. No. 16332/18, 1 October 2019 (ECtHR).

1436 European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 76. On the same problem with the CRPC ibid 82.

1437 Tuerk, 'Montenegro (2007)' (n 673) para. 9; Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) para. 49. On the background of this referendum Kenneth Morrison, 'Change, Continuity and Crisis. Montenegro's Political Trajectory (1988-2016)' (2018), 66(2) Südosteuropa 153 156–157.

time under the explicit assumption of continuing the SFRY. The FRY's constitution from 1992[1438] was, therefore, enacted according to the amendment procedure contained in Art. 398 - 304 of the SFRY constitution,[1439] and did not contain any transitory provisions. Other SFRY statutory laws, in principle, remained in place.[1440]

According to Art. 77 no. 5 of the FRY constitution "the principles of the system of property relations" are within its jurisdiction.[1441] The constitution protected the rights of property and inheritance, Art. 51, but made them explicitly subject to definition by (statutory) law. While "property shall be inviolable", expropriations were possible in the public interest, according to the law, and against compensation of, at least, its market value, Art 69. Special regulations existed for real estate, natural resources, agricultural land, forests and timberland, and property in the public domain, Art. 72. Comparable to some of the other states' constitutions, the acquisition of property by aliens was made subject to further regulation by law and reciprocity and was excluded for "immovable property of cultural significance", Art. 70.[1442]

1438 Constitution (27 April 1992) in: Ile Kovačević (ed), Ustavi Savezne Republike Jugoslavije, Srbije i Crne Gore: The Constitutions of the Federal Republic of Yugoslavia, Serbia and Montenegro (Jugoslovenski Pregled 2001) 5 (FRY), also available online at https://www.refworld.org/docid/3ae6b54e10.html; see also Kulisic (n 1345).

1439 ibid 27-28.

1440 Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294) 98/99.

1441 This provision took priority (Art. 6 para. 2, Art. 115 of the FRY Constitution (n 1437)), over potentially conflicting provisions in the member republics' constitutions.

1442 Stateless persons were even excluded from acquisition of immovable property/property rights to land, Art. 70 ibid.

Both Serbia[1443] and Montenegro started their privatization processes at the beginning of the 1990s.[1444] In Serbia, occupancy rights holders were generally eligible to buy their formerly socially owned apartments, but private owners were allowed to evict occupants from their apartments by offering alternative accommodation.[1445] In 1992, occupancy rights were abolished.[1446] In Montenegro, occupancy rights were already abolished by law in 1990, which at the same time, gave the occupancy rights holders the right to buy the apartment or (mostly when the owner of the building was a private person) to transform the occupancy right into a lease.[1447]

3) The 2001 Agreement on Succession Issues

When the FRY finally gave up its claim to continue the SFRY, it paved the way for the 2001 Agreement on Succession Issues (Succession Agreement),[1448] concluded between Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia and the

1443 In fact, Art. 55 of the 'Constitution (1990)' in Ile Kovačević (ed), *Ustavi Savezne Republike Jugoslavije, Srbije i Crne Gore: The Constitutions of the Federal Republic of Yugoslavia, Serbia and Montenegro* (Jugoslovenski Pregled 1990) 49 stipulated that Serbia's economic and social order was "based on a free market economy with all forms of ownership". The Serbian legal system for a long time combined various legal forms of property. The Serbian constitution contained an extensive part entitled "Economic and Social Order" regulating several forms of ownership and objects of property. Cf. in particular Art. 56 of the constitution which pronounced that "Social, state, private and cooperative property and other forms of ownership shall be guaranteed. All forms of ownership enjoy equal protection of law". Cf. also *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 108.

1444 ibid 1, 107, 112. For an overview of the Serbian privatization process Ile Kovačević, 'Privatisation in Serbia 1989-2003' (2003), XLIV(4) Survey Serbia and Montenegro 69.

1445 *UN-HABITAT 2005 Housing and Property Rights* (n 1352) 108–110.

1446 ibid 110–112.

1447 ibid 112–113.

1448 Agreement on Succession Issues Between the Five Successor States of the Former State of Yugoslavia (29 June 2001) UNTS 2262 251, 41 ILM 3. On the agreement in general Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410); Mirjam Škrk, Ana Petrič Polak and Marko Rakovec, 'The Agreement on Succession Issues and Some Dilemmas Regarding Its Implementation' (2015), 75 Zbornik Znanstvenih Razprav 213; Hasani (n 2), 122–146.

FRY.[1449] That agreement was one of the most important documents in the process of SFRY dismemberment. Concluded "to resolve questions of State succession arising upon the break-up of the former Socialist Federal Republic of Yugoslavia", the Succession Agreement set out in some detail the agreed consequences of the demise of the federation for the successor states. Despite being drawn up with the support of the International Peace Conference on Yugoslavia, the Agreement may furnish proof of the *opinio juris* of several states involved in one of the largest and most recent waves of state succession about how to cope with such events.

Not included in the Succession Agreement were the topics of succession to international treaties and citizenship, both of which were dealt with outside the agreement on a bilateral basis.[1450] According to Art. 10, no reservations to the Succession Agreement were allowed. Nevertheless, throughout the agreement, several provisions explicitly provided for the prevalence of potential bilateral agreements on covered issues (e.g., Art. 3 Annex E, Art. 5 Annex G). Often reflecting the least common denominator, the instrument did not contain one but many decisive dates referring to different points in time during the succession process.[1451] Art. 8 of the Succession Agreement set out that each state was obliged "on the basis of reciprocity" to ensure that the provisions of the agreement" were recognized and effective in courts".

1449 Cf. Škrk, Petrič Polak and Rakovec (n 1447), 214, 218; Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 379–381; Hasani (n 2), 119–120. The agreement's preamble spoke of the treaty partners as "being in sovereign equality the five successor States to the former Socialist Federal Republic of Yugoslavia" and therefore definitively repudiated the continuity thesis of the FRY. At the same time, the agreement was remarkably imprecise with respect to the actual form of succession having taken place and did not use the words "dissolution" or "secession", Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 382; Škrk, Petrič Polak and Rakovec (n 1447), 222.

1450 ibid 223-224.

1451 Cf. also ibid 225. On the problematic complexity of the dates referred to in the agreement Ana Stanic, 'Financial Aspects of State Succession: The Case of Yugoslavia' (2001), 12(4) EJIL 751 755–758.

a) Private Property and Acquired Rights

Annex G is of particular importance for this analysis as it is explicitly dedicated to protecting "Private Property and Acquired Rights", cf. also Art. 1.[1452] That dedication is remarkable as such explicit reference to "acquired rights" is unique in modern international instruments relating to succession.[1453] Beyond the uniqueness, it furnishes proof of the fact that, despite the far-reaching acceptance of or "succession" to the SFRY's international obligations by the five successor states and the often generous continuity provisions in their national (constitutional) laws, those states considered there was still room and a need for protecting acquired rights.

Art. 1 of Annex G distinguished between "private property rights" and "acquired rights", therefore according acquired rights a different or broader meaning than those of private property. Furthermore, the same provision designated "citizens or other legal persons of the SFRY" as the holders of those rights. Third party nationals were explicitly excluded and had to rely on the law of foreigners. Annex G, therefore, especially targeted individuals who could not rely on the law of foreigners and diplomatic protection by their home state or whose eligibility could at least be contested as they had been SFRY nationals.

Art. 2 para. 1 lit. a) stipulated that

> "[t]he rights to movable and immovable property located in a successor State and to which citizens or other legal persons of the SFRY were entitled on 31 December 1990 shall be recognised, and protected and restored by that State in accordance with established standards and norms of international law and *irrespective of the nationality, citizenship, residence or domicile of those persons*. This shall include persons who, after 31 December 1990, acquired the citizenship of or established domicile or residence in a State other than a successor State. Persons unable to realize such rights shall be entitled to compensation in accordance with civil and international legal norms." [emphasis added]

That quote is a relatively straightforward expression of the traditional acquired rights theory concerning private property. Notably, such acquired

1452 Cf. for more information on the original draft text Škrk, Petrič Polak and Rakovec (n 1447), 247–248.

1453 Comparing the agreement to the VCSSPAD Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 397.

property should not only be recognized and protected; it should be restored. Compensation was only an alternative when restitution was not possible. Under what circumstance restoration was "impossible", especially if rights of other individuals were relevant, was not detailed any further. Importantly, while the link to the SFRY on 31 December 1990 was crucial, a *later* change of nationality or residence was of no relevance. That restriction paid tribute to nationality being fluent after a change of sovereignty. The provision therefore included persons who may have acquired the nationality of the expropriating state. According to Art. 2 para. 1 lit. b) in combination with lit. a), any transfer of property after 1990 "concluded under duress" or contrary to "established standards and norms of international law" "shall be null and void". That stipulation must be understood in light of ethnic cleansing and forced displacement during the Yugoslav wars.[1454] Interestingly, the cut-off date for recognizing the legal situation, 31 December 1990, was different from the one for pension claims and also even lay before the declarations of independence by Slovenia and Croatia. Seemingly, 1990 was chosen since it was the last year in which all republics and provinces were duly represented in the SFRY organs.[1455] While such a reference to an objective early date was conducive to legal security, it excluded from protection much of the property that changed hands legally after 1990 but later still fell victim to succession regulations. Analogically, pursuant to Art. 2 para. 2,

> "[a]ll contracts concluded by citizens or other legal persons of the SFRY as of 31 December 1990, including those concluded by public enterprises, shall be respected on a non-discriminatory basis. The successor States shall provide for the carrying out of obligations under such contracts, where the performance of such contracts was prevented by the break-up of the SFRY."[1456]

1454 Cf. ibid 396; Škrk, Petrič Polak and Rakovec (n 1447), 248.

1455 Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 396; Degan (n 2), 180.

1456 It is disputed whether the words "as of" mean "up to" or "from…on" and therefore whether contracts concluded before or after 31 December 1990 are encompassed (Škrk, Petrič Polak and Rakovec (n 1447), 248–249 with further references). A comparison with the disparate wording in para. 1 could support the second reading. Also the following sentences support the latter interpretation: Only the performance of such contracts could be prevented by the "break-up" of the SFRY which had already been in place when the break-up began. Additionally, it is not convincing to apply a different approach to property rights than to contractual

Art. 3 of Annex G extended protection to intellectual property rights such as "patents, trade marks, copyrights, and other allied rights (e.g., royalties)". Article 4 obliged the treaty members to ensure the effective application of the obligations under Annex G.[1457] That provision was remarkable as it added to the general obligation under Art. 8 of the Succession Agreement. In the same vein, Art. 7 of Annex G maintained that "[a]ll natural and legal persons from each successor State shall, on the basis of reciprocity, have the same right of access to the courts, administrative tribunals and agencies, of that State and of the other successor States for the purpose of realising the protection of their rights." Art 7 was, thus, an important step fostering the enforcement of acquired rights.

In addition to the foregoing provisions, which routinely prohibited any differentiation on grounds of ethnic origin or nationality,[1458] Art. 6 of Annex G required states to apply domestic legislation concerning "dwelling rights […] equally to persons who were citizens of the SFRY and who had such rights, without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Finally, pursuant to Art. 8, "[t]he […] provisions of this Annex are without prejudice to any guarantees of non-discrimination related to private property and acquired rights that exist in the domestic legislation of the successor States".

b) Pensions

The topic of retirement plans was dealt with under Annex E, and hence also explicitly separately from the topic of acquired rights.[1459] In socialist times, each of the Yugoslav republics was, in principle, independently responsible

rights. However, an analogy with para. 1 would lead to the conclusion that the *status quo* at that point in time should be preserved, also ibid 249.

1457 According to ibid. this extends to providing for "the right to have access to the court, the right to ensure an effective legal remedy, an independent judiciary, the right to equality of arms, etc".

1458 Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 382, 396 also alludes to the special importance of the principle of non-discrimination in the Succession Agreement.

1459 But see ibid 395 who discusses Annex E under the heading of "private property and acquired rights".

for paying pensions.[1460] Now, pursuant to Art. 1 Annex E, each state should "assume responsibility for and regularly pay legally grounded pensions" funded when it was still a republic of the SFRY. The payment was to be made in particular without regard to "nationality, citizenship, residence or domicile of the beneficiary". In comparison, SFRY civil or military servants, whose pensions were formerly funded from the federal budget, were to be paid pensions by their respective state of nationality, Art. 2 no. (i), irrespective of their place of residency or domicile. Only for a person who held more than one nationality but was not domiciled in one of the successor states should payment of the pension "be made by the State in the territory of which that person was resident on 1 June 1991". Hence, pension claims were upheld on a non-discriminatory basis and paid to those who had been eligible before dismemberment. The liability of the state of nationality for civil or especially military servants' pensions seems sensible in light of the hostile and violent ethnic conflicts in the SFRY. It has been reported that "[t]his Annex is the only one where the implementation is satisfactory and almost complete."[1461]

c) External Debts of the SFRY, Especially Foreign Currency Accounts

In the wake of the SFRY demise, probably one of the most important questions that touched upon individuals' acquired rights was how to cope with the former federation's debts. The largest part of the SFRY's external debt was settled before and outside the Succession Agreement, partly on a bilateral basis, under agreements with international organizations, groups of states, or private commercial banks, cf. Art. 3 paras. 1 and 2 of Annex C.[1462] Unallocated debts were distributed according to a key initially introduced for debts owed to the International Monetary Fund (IMF)[1463], and allocated debts were attributed to the territory directly benefitting from

1460 Kneihs (n 1222), 525.

1461 Škrk, Petrič Polak and Rakovec (n 1447), 247; more sceptical Kneihs (n 1222), 522–534.

1462 In detail Stanic (n 1450), 758–763.

1463 Hasani (n 2), 137–140. This represented an interesting application of the equitable proportion rule contained in Art. 41 VCSSPAD (n 22), cf. Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 397.

the loan[1464]. Those settlements were not meant to be touched upon by the Succession Agreement, Art. 3 para. 3 of Annex C.[1465]

Such general frames of debt allocation did not account for the individual perspective, though. A related issue of utmost controversy while the agreement was being negotiated,[1466] the liability for the foreign currency accounts of private persons "frozen" after the dismemberment, is thus of particular relevance for this research.[1467] When, in the 1970s/80s, the SFRY's economy began to falter, its foreign currency depots especially were diminished. The SFRY therefore offered its citizens highly profitable interest rates if they deposited their foreign currency in Yugoslavian bank accounts. The SFRY undertook to guarantee the payment of those savings if a local bank went bankrupt or suffered "manifest insolvency".[1468] In the wake of economic reforms in the years 1989/1990, the local currency was declared convertible. To hinder an uncontrolled withdrawal of foreign currency, the SFRY enacted legislation obstructing withdrawal of those assets from the Yugoslav banks and hence "froze" the accounts.[1469] After the SFRY demise, each successor state applied a different approach towards the claims of owners of such "old" foreign currency accounts.[1470] In that way, thousands of individuals who had deposited large parts of their savings in

1464 Annex C Art. 2 para. 1 lit. (b) Succession Agreement (n 1447), cf. Stanic (n 1450), 758–763. According to Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 397, while basically, the Succession Agreement (n 1447) aligned with the VCSSPAD (n 22), that "final beneficiary rule" represented a novelty.

1465 Škrk, Petrič Polak and Rakovec (n 1447), 232–233.

1466 ibid 237; Janja Hojnik, 'Individuals' Right to Property under International Succession Law: Reimbursement of Bank Deposits After the Collapse of the SFR Yugoslavia' (2017), 30 HgYbIL 157.

1467 Apparently, states disagreed as to whether the issue of "old" foreign currency accounts should be dealt with under Annex C (Financial Assets and Liabilities) or Annex G (Private Property and Acquired Rights), cf. *Ališić et al. v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia,* Appl. No. 60642/08, 16 July 2014, ECHR 2014-IV 213 para. 62 (ECtHR [GC]).

1468 In detail on the background of the freezing ibid paras. 13-20; Hojnik, 'Individuals' Right to Property under International Succession Law' (n 1465), 160–165.

1469 *ECtHR Ališić* (n 1466) paras. 21-22.

1470 Hojnik, 'Individuals' Right to Property under International Succession Law' (n 1465), 170–173, 177-179; *ECtHR Ališić* (n 1466) paras. 24-52.

Yugoslav bank accounts during the SFRY period were denied repayment for decades.[1471]

Strikingly, all SFRY successor states seemed to have been of the opinion that the money should be paid back but had divergent views of how to distribute liability for the payments.[1472] While some states considered the issue to be a primarily "civil law question" to be solved between depositor and bank (and hence attributable under civil law regimes to the state that had restricted the possibility of withdrawal for the specific bank),[1473] others advocated for a more "public law" solution[1474], distributing the debts according to succession rules and hence amongst all successor states.[1475] The conceivably broad compromise formula of Art. 7 of Annex C of the Succession Agreement that the issue should "be negotiated without delay taking into account in particular the necessity of protecting the hard currency savings of individuals" is evidence of the pivotal nature of the question but, at the same time, of the unfeasibility of finding a solution within the agreement.[1476] Despite long negotiations,[1477] no final agreement was reached, even after 2001.

It was exactly those lines of argument along which both sides advocated in the case of *Ališić*[1478] before the ECtHR, when several applicants brought

1471 On the general background, with extensive citation to the relevant domestic and international law *Kovačić and Others v. Slovenia,* Appl. No. 44574/98, 45133/98 and 48316/99, 3 October 2008 paras. 26-111, 164-188 (ECtHR [GC]).

1472 Cf. *ECtHR Ališić* (n 1466) para. 77 with reference to *Ališić et al. v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia,* Application No. 60642/08, 17 October 2011, Decision on Admissibility para. 54 (ECtHR).

1473 E.g. Bosnia and Herzegovina, Croatia and Macedonia. *see ECtHR Ališić* (n 1466) paras. 57, 85, 87-88, 96.

1474 E.g. Slovenia and Serbia ibid paras. 54, 56, 58, 89, 91-92 arguing that there was only a duty to negotiate in good faith.

1475 Škrk, Petrič Polak and Rakovec (n 1447), 237.

1476 According to Hojnik, 'Individuals' Right to Property under International Succession Law' (n 1465), 175, it was "surprising" that the agreement "recognised the issue" of the old foreign currency deposits "as a succession issue at all".

1477 On the history of negotiations before the ECtHR entered the scene Škrk, Petrič Polak and Rakovec (n 1447), 238–239; Hojnik, 'Individuals' Right to Property under International Succession Law' (n 1465), 176–177.

1478 *ECtHR Ališić* (n 1466). Critically evaluating the judgment Škrk, Petrič Polak and Rakovec (n 1447), 243, 252; Hojnik, 'Individuals' Right to Property under International Succession Law' (n 1465), 206–207 and *Ališić et al. v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia,*

cases against all SFRY successor states[1479] for the payment of their "old" foreign currency accounts. In line with the findings above, all states agreed that the assets should be paid to their owners, but while Slovenia and Serbia argued for distributing liabilities to all successor states, all other states denied liability and advocated for attribution of liability to those states in which the headquarters of the respective banks were located, Slovenia and Serbia. In a pilot judgment procedure, the ECtHR, considering the circumstances rather unsurprisingly, unanimously held that there had been a violation of P-I 1.[1480] The clear majority of the GC solved the case by following the second strain of argument and attributing the liabilities of national banks to Serbia and Slovenia,[1481] while determining that all other successor states therefore had not breached the ECHR.[1482] Even if especially Slovenia was badly struck by the judgment, both states implemented it.[1483]

Appl. No. 60642/08, 16 July 2014, Partly Dissenting Opinion Judge Nußberger, ECHR 2014-IV 279 (ECtHR [GC]).

1479 Montenegro was not included in the list of respondents as by the time the application was lodged Montenegro had seceded from Serbia and the latter had assumed the role of the sole continuator state of the former union. Cf. on the status of Montenegro in more detail *infra*, section 4) b).

1480 By Serbia and Slovenia *ECtHR Ališić* (n 1466) para. 125, dispositif 2 and 3. Those two states were also held to have violated Art. 13 ECHR, ibid para. 136, dispositif 5 and 6.

1481 ibid paras. 109-117. This was termed "civil law approach" by *ECtHR Ališić - Dissenting Opinion Nußberger* (n 1477) 279 that severely criticized the judgment. Judge Nußberger would have preferred a "public law approach" holding all respondent states collectively responsible for the violations; ibid 281–283, 287.

1482 *ECtHR Ališić* (n 1466) para. 125.

1483 On the financial ramifications for Slovenia Škrk, Petrič Polak and Rakovec (n 1447), 241. On the political and juridical follow-up of the judgment Janja Hojnik, 'Slovenia v. Croatia: The First EU Inter-State Case before the ECtHR' *EJIL Talk!* (17 October 2016) <https://www.ejiltalk.org/slovenia-v-croatia-the-first-eu-inter-state-case-before-the-ecthr/>; Hojnik, 'Individuals' Right to Property under International Succession Law' (n 1465), 191–194; cf. also Council of Europe - Committee of Ministers, 'Resolution: Execution of the Judgment of the European Court of Human Rights Ališić against Serbia and Slovenia (Slovenia)' (15 March 2018) CM/ResDH(2018)111 <https://hudoc.echr.coe.int/eng?i=001-181978>. On the Slovenian law implementing the decision http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7238. On Serbia Hojnik, 'Individuals' Right to Property under International Succession Law' (n 1465), 194–196; Council of Europe - Committee of Ministers, 'Resolution: Execution of the Judgments of the European Court of Human Rights Ališić and Others against Serbia and Slovenia (Serbia)' (3 September 2020) CM/ResDH(2020)184 <https://hudoc.exec.coe.int/eng?i=001-204668>.

The judgment has been criticized for its approach, which to some seemed too simple, too undifferentiated, and not sensitive enough to the historical, social, and economic circumstances of socialist times.[1484] Be that as it may, the ruling is a vivid example of the vigor and potential of an acquired rights theory (even if the term was not used by the ECtHR itself in this case) in a human rights case. The GC assumed that - in the absence of any legislation to the contrary - the domestic law of the successor states upheld the legal relations originating in the SFRY's legal order. There was no need to "affirm" or "revive" them:

> "[T]he legislation of the successor States had never extinguished the applicants' claims or deprived them of legal validity in any other manner and there had never been any doubt that some or all of the successor States would in the end have to repay the applicants".[1485]

It was the permanence of civil law obligations between bank and private consumer that ensured the existence of any "property" to which access could be obstructed by the successor states. The SFRY never had been party to the ECHR, and all its successors only became members years after the SFRY demise.[1486] Therefore, at the time the accounts were "frozen", they had not qualified as property under P-I 1. In most of the already mentioned succession cases and the ensuing massive overhaul of the economic and social systems, the ECtHR had accorded a huge margin of appreciation to the state parties concerning how to reconcile the public interest with the potential legitimate expectations of the individual owners concerned.[1487] In some cases where the predecessor state had not been a party to the ECHR, the court had denied any actionable position at all if the new state had not affirmed the curtailment of rights or introduced a compensation scheme on its own motion.[1488] That strategy was underlined by judge *Nußberger*, who would have preferred an approach taking into account the "public law background" of the case and questioned the value of the accounts at the

1484 *ECtHR Ališić - Dissenting Opinion Nußberger* (n 1477) 280.
1485 *ECtHR Ališić* (n 1466) para. 77.
1486 Ratification dates: Serbia 2004, Montenegro 2004, Slovenia 1994, Croatia 1997, Bosnia-Herzegovina 2002, Macedonia 1997, for more information cf. https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005.
1487 See e.g. *ECtHR [GC] Jahn and others* (n 1069) even justifying an uncompensated expropriation or cp. *ECtHR Blečić v. Croatia* (n 1398).
1488 See *ECtHR Maltzan and others* (n 1069) paras. 77, 79; cp. also *ECtHR [GC] Blečić v. Croatia* (n 1398).

time the SFRY was dismembered. Following her approach, states would have had more leeway in compensating and would have had to negotiate the distribution of the potential debts towards the private owners. That "public law approach" probably would not have led to any definite claim of the complainants against a single state but only led to a verdict of violation and potentially a "joint and several liability". The majority's approach gave the claimants a much more forceful tool than the malleable "equitable proportion" option applied between states. Were it not for that approach, the claimants probably would not have recovered their full savings plus interest. Therefore, the acquired rights perspective has entered the distribution and attribution of liability for debts towards individuals through the vehicle of ECtHR litigation, rather than through the Succession Agreement. Viewed through that lens, it has shown its special potential to broaden and enforce the strength of the human right of property in practice.

d) Interim Conclusions

Shortly after the conclusion of the Succession Agreement, *Stahn* opined that it

> "may be invoked in support of the emergence of a rule of customary international law that imposes an obligation in principle on the successor state to respect acquired rights existing on the date of the succession, and a duty to enter into the necessary arrangements with the states concerned."[1489]

Even if proclaiming a customary international norm of acquired rights at the time may have been mistaken,[1490] the Agreement on Succession Issues is definitely a mark in the history of the doctrine. The agreement was then probably the only important multilateral international treaty that not only

1489 Stahn, 'The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia' (n 410), 395 [footnotes omitted]; see also Hasani (n 2), 144 "During the dissolution of the former communist federations, these rights were respected to the greatest possible extent. No hesitation or refusal to apply them ever surfaced [...] The application of acquired rights is connected to respect for universal human rights values, which had been incorporated in the national legislation of the former Communist countries." [footnote omitted].

1490 But apparently also of this opinion ibid 147.

explicitly mentioned acquired rights but regulated them in more detail.[1491] It therefore revived the topic and showed that there was room as well as a need for its application. After the war, and against the background of a situation of complete dismemberment not condoned by the federation, crucial issues arose: ethnic cleansing and the displacement of large parts of the SFRY population, restitution, continuity of legal orders or at least the coordination of different domestic legal systems. Those issues had to be solved to build new states and prevent new social unrest within the communities. That need may explain the explicit and elaborate inclusion of Annex G in the agreement.

While in principle adhering to a traditional idea of acquired rights as rights vested in an individual by a domestic legal order, the Succession Agreement added three further aspects. First, the protection of acquired rights under Annex G of the agreement decoupled the doctrine of acquired rights from the law on the protection of foreigners. It explicitly protected former SFRY citizens irrespective of their new nationality. Non-discrimination on the basis of nationality was a recurrent theme through the agreement and represented an acknowledgement of the fluidity of citizenship in cases of state succession. Second, the agreement did not stop there but contained special provisions for member states implementing their acquired rights obligations. It inter-linked the material rights with procedural rights in order to enforce them. Although both these duties, of course, still constituted international obligations not directly enforceable before national courts, the evolution was remarkable. It showed a sensitivity of the participating states for the weakness of international rights under domestic law and tried to rectify the drawback. Even if such a clause cannot really guarantee domestic implementation, it was further proof of a remarkable *opinio juris* to secure such private rights. Finally, the Succession Agreement explicitly did not use "acquired rights" as a synonym for property rights. In fact, by referring to acquired dwelling rights as positions to be protected under the new national laws on a non-discriminatory basis, it enlarged the scope beyond "rights of a monetary value". On the other hand, the agreement explicitly separated the protection of pensions rights (Annex E) from the protection of acquired rights, the latter being defined as "pri-

1491 Cp. Annex 7, especially Chapter One Dayton Agreement (n 1084) which provided for the right to return and to restitution for persons displaced during the war. However, those accords were not concerned with the regulation of a succession situation but resembled a peace treaty.

vate rights". The Succession Agreement therefore endorsed the traditional distinction between rights acquired under "private" or "public law", with private law meaning relations between private individuals. Yet, not only the ECtHR's *Ališić* case showed that it is illusory to neatly distinguish both areas, especially in the field of state debts. The pension systems were also upheld in all parts of the former federation.

4) The Independence of Montenegro from the State Union of Serbia and Montenegro

a) Serbia and Montenegro

In 2003, Serbia and Montenegro, the constituent republics of the FRY, adopted a new constitutional basis of their relationship, the "Constitutional Charter of the State Union of Serbia and Montenegro" (CC),[1492] and the international entity was renamed the "State Union of Serbia and Montenegro".[1493] Since those processes were internal and did not change the international personality of the state itself, no succession took place.[1494] It is therefore surprising that the CC and the Law on the Implementation of the CC[1495] contained a relatively extensive catalogue of transitional provisions on FRY law. Probably due to that background, the CC did not contain a provision dealing in particular with the international obligations of the FRY; instead Art. 23 para. 2 CC stipulated in general terms that "[o]nce this Constitutional Charter comes into force, all rights and responsibilities of the Federal Republic of Yugoslavia shall be *transferred* to Serbia and Montenegro" [emphasis added]. Art. 23 paras. 3 and 4 CC maintained that

> "[t]he laws of the Federal Republic of Yugoslavia shall be applied in the affairs of Serbia and Montenegro as the law of Serbia and Montenegro.

1492 Constitutional Charter of the State Union of Serbia and Montenegro (27 January 2003) 2002 Rev.Int'l Aff. No. 1108 I, 2003 Rivista di Studi Politici Internazionali 70(2) 292 (Serbia and Montenegro). On the content of the CC Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) paras. 49-51.

1493 On the tensions between both states and the international involvement in the making of their new constitutional basis Tuerk, 'Montenegro (2007)' (n 673) paras. 14-16; Morrison (n 1436), 157-15.

1494 Arnauld *Völkerrecht* (n 255) para. 105; Tuerk, 'Montenegro (2007)' (n 673) para. 16.

1495 Law on the Implementation of the Constitutional Charter (27 January 2003) Rev.Int'l Aff. 2002, No. 1108, VII (Serbia and Montenegro).

> The laws of the Federal Republic of Yugoslavia beyond the scope of the affairs of Serbia and Montenegro shall be applied as the laws of the member states until the adoption of new regulations by the member states except for laws whose application the assembly of a member state shall decide against."[1496]

Art. 12 of the Implementation Law regulated the takeover of open cases by the courts of Serbia and Montenegro. As member states, both Serbia and Montenegro were supposed to amend their own constitutions to bring them in line with the CC within six months, para. 5. Persons "who have acquired the Yugoslav citizenship before the Constitutional Charter comes into effect shall retain the citizenship and the right to use existing public documents until a law governing this matter is passed", Art. 25 Implementation Law, and "[t]he current money, securities and other documents shall be valid even after the Constitutional Charter comes into effect", Art. 27 Implementation Law.

The CC text itself did not provide for an individual right of property,[1497] but Art. 9 para. 1 CC incorporated a Human Rights Charter[1498] into the CC.[1499] Art. 23 of the Charter protected the right of property and inheritance but again put it under the reservation of regulation by law. Expropria-

1496 Similarly, according to Article 20 para. 1 of the Implementation Law CC "The federal laws and other federal regulations in the fields that fall within the jurisdiction of institutions of Serbia and Montenegro under the Constitutional Charter, shall be applied as legal acts of the State Union of Serbia and Montenegro, except in the parts that are contrary to the provisions of the Constitutional Charter." However, Art. 20 paras. 2 - 4 of the Implementation Law accorded transition periods to the member states and the federal public institutions to bring the law in line with the CC and potentially international agreements. Art. 20 para. 4 stipulated that "The acts referred to in paragraph 1 above, which do not fall within the fields which the Constitutional Charter has defined as the jurisdiction of the State Union of Serbia and Montenegro, shall be applied after the Constitutional Charter goes into effect as general regulations of the Member States until their relevant bodies declare them null and void, except in parts contrary to the provisions of the Constitutional Charter and in fields that have already been regulated by the regulations of a Member State."

1497 It contained only a provision on state property, Art. 24 CC, and a general reference to the protection of property as basis of the economic relations between Serbia and Montenegro in Art. 6 para. 1 CC.

1498 Charter on Human and Minority Rights and Fundamental Freedoms Liberties (26-02.2003) Rev.Int'l Aff. 2002, No. 1108, XII (Serbia and Montenegro).

1499 According to Art. 9 paras. 2, 4 CC the member states shall "govern, ensure and protect" these rights, while the union has only a monitoring and residual competence.

tions could only take place in the public interest, if prescribed by law and against compensation of at least the market value.[1500] Art. 9 para. 5 CC contains a guarantee not to diminish the existing level of human rights protection in the union. That right was elaborated even further in Art. 57 of the Charter, which provided that

> "[t]he achieved level of human and minority rights, individual and collective, may not be reduced.
> This Charter shall not revoke or alter the rights vested in members of national minorities by the regulations that were in force prior to the effective date of this Charter, as well as the rights acquired on the basis of international treaties to which the Federal Republic of Yugoslavia had acceded."

Hence, Art. 57 secured the level of human rights protection acquired on the national as well as on the *international* level, *before* the CC came into effect. That far-reaching continuity is more evident in cases of continuity, such as Serbia and Montenegro continuing the FRY (which purported to continue the SFRY). Finally, pursuant to Art. 10 para. 3 CC, "[t]he ratified international treaties and generally accepted rules of international law shall have precedence over the law of Serbia and Montenegro and the laws of the member states."

b) Montenegro

Art. 25 of the CC of the State Union of Serbia and Montenegro had prepared for a right of separation for both member states of the union and provided that, if Montenegro became independent, it would not continue the personality of the state union. After a new referendum, Montenegro on 3 June 2006 in fact declared its independence[1501] and enacted a new

1500 Art. 34 of the 'Constitution (1990)' (n 1442) in a more general fashion guaranteed the right of property and inheritance. 'Constitution (1992)' in: *Kovačević Collection of Constitutions* (n 1442) 87The Constitution of the Republic of Montenegro (12.10.1992)' in: *Kovačević Collection of Constitutions* (n 1439) 87 contained equivalent guarantees of property and inheritance in Art. 45 and 46.

1501 Cf. Tuerk, 'Montenegro (2007)' (n 673) paras. 19-20; Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) para. 33; Thürer and Burri, 'Secession (2009)' (n 317) para. 36. Since this development was foreseen in the CC, it is open to discussion whether it had to be considered as a secession (in this way Arnauld *Völkerrecht* (n

constitution[1502] and the corresponding constitutional law for its implementation[1503].

aa) International Treaties

Montenegro declared its *succession* (not accession) to international agreements concluded by the State Union.[1504] As already alluded to, under the CC of Serbia and Montenegro, both states had been allowed to conclude own international agreements. Art. 5 of the Implementation Law now stipulated that "[p]rovisions of international agreements on human rights and freedoms, to which Montenegro acceded before 3 June 2006 shall be applied to legal relations that have arisen after the signature."[1505] That stipulation becomes especially significant when read in combination with Art. 9 of the constitution which accords ratified international agreements and "generally accepted rules of international law" not only direct legal force within the Montenegrin national legal order but also supremacy over conflicting national legislation.[1506]

255) para. 105), but it definitely constitutes a case of separation (also Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 406).

1502 'Constitution (2007)' in Gisbert H Flanz and Albert P Blaustein (eds), *Constitutions of the Countries of the World: A Series of Updated Texts, Constitutional Chronologies and Annotated Bibliographies- Vol. 12* (Oceana Publ 2007) 1, with further information by Rainer Grote, 'The Republic of Montenegro: Introductory Note' in: *Flanz/Blaustein Constitutions Vol. 12* (n 1501) 1.

1503 'The Constitutional Law for the Implementation of the Constitution' in: *Flanz/Blaustein Constitutions Vol. 12* (n 1501) 41.

1504 Tuerk, 'Montenegro (2007)' (n 673) para. 22. See also the collection of UNSG depositary notifications, https://treaties.un.org/pages/CNs.aspx?cnTab=tab2&clang=_en.

1505 It has to be borne in mind that the SFRY had been a party to the VCSST which had come into force in 1996. Even if the binding force of this international treaty for Montenegro as a new state is doubtful, it cannot be ruled out that this circumstance played a role in Montenegro's decision.

1506 According to Grote, 'The Republic of Montenegro' (n 1501) 2 this supremacy does not apply with respect to constitutional law.

bb) Domestic Law

With respect to domestic law, it has to be borne in mind that, since 2003 as part of the bargain for remaining within the state union, Montenegro had been accorded far-reaching legislative sovereignty, especially in internal matters, and only few, mostly external, competences had remained in the hands of Serbia and Montenegro.[1507] Article 6 of the Montenegrin Implementation Law[1508] stipulated that "[l]aws and other regulations shall remain into [sic] force until they have been harmonized with the Constitution within the delays stipulated by this Law." In turn, the implementation law sets out a timeline along which several new laws were to be adopted according to their priority. The most "urgent" laws enlisted in Art. 7 were to be adopted within two months of the Implementation Law entering into force.[1509] Other laws should only be "harmonized" with the constitution, which meant they, in principle, remained in place, Art. 8-10 Implementation Law.[1510] In comparison, "[r]egulations of the State Union of Serbia and Montenegro shall be applied with the modifications required by the circumstances, providing they are not contrary to legal order *and interests* of Montenegro, until adequate regulations of Montenegro are adopted", Art. 11 Implementation Law [emphasis added]. That stipulation obviously introduced a sweeping reservation, which, as mentioned, did not become too relevant for the domestic law of Montenegro.

There were no specific provisions on the persistence of individual rights. Art. 58 of the constitution of Montenegro guaranteed the rights to property and made expropriations subject to public interest and "rightful" compensation. Notably, "[n]atural wealth and goods in general use shall be owned by the state". Foreign nationals could also acquire property "in accordance with the law", Art. 61 of the constitution. Art. 60 protected the right to

1507 Tuerk, 'Montenegro (2007)' (n 673) para. 17; cf. Jure Vidmar, 'Montenegro's Path to Independence: A Study of Self-Determination, Statehood and Recognition' (2007), 3(1) Hanse Law Review 73 96.

1508 'The Constitutional Law for the Implementation of the Constitution' (n 1502).

1509 These are *inter alia* laws on citizenship, travel and identification documents and residence.

1510 Amongst the laws which shall be harmonized in the rather short period of three months and therefore with specific urgency, Art. 8, are the "Law on Expropriation" and the "Law on Minority Rights and Freedoms".

inheritance. Reportedly, a social security agreement concerning pensions was concluded with Serbia.[1511]

c) Serbia

Serbia, as the "rump state" of the former state union with Montenegro, is generally seen as continuing the personality of the union,[1512] even if the wording of its official statements was sometimes equivocal and leaves room for interpretation.[1513] It therefore continued the membership in international organizations and international treaties.[1514] Resultingly, no transitional provisions can be found in Serbia's new constitution, adopted in 2006,[1515] which in large parts was in the tradition of the foregoing ones.[1516]

According to Art. 16 paras. 2 and 3 and 194 paras. 4 and 5 of the Serbian constitution, ratified international treaties and "generally accepted rules of international law" were directly applicable within Serbia and stood beyond statutory laws.[1517] Pursuant to Art. 17, in principle, foreigners should have had the same rights as citizens unless the constitution accorded some rights explicitly to Serbian citizens. The long list of "human and minority rights and freedoms"[1518] in Art. 18 *et seqq.* guaranteed the protection of "[p]eaceful tenure of a person's own property and other property rights acquired by the law", Art. 58 para. 1, which "may be revoked or restricted only in the public interest established by the law and with compensation which may not be less than market value", para. 2. The possible usage of property was to be defined by law, para. 3. The same rules applied to the right to inheritance, guaranteed by Art. 59 para. 1. The acquisition of real property

1511 Tuerk, 'Montenegro (2007)' (n 673) para. 21.
1512 Cf. Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) para. 33.
1513 Tuerk, 'Montenegro (2007)' (n 673) para. 21.
1514 Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) para. 52.
1515 'Constitution (2006)' in: *Flanz/Blaustein Constitutions Vol. 16* (n 1378) 1, also available online at . Cf. on the constitution's drafting history and content Rainer Grote, 'The Republic of Serbia: Introductory Note' in: *Flanz/Blaustein Constitutions Vol. 16* (n 1378) 3; Christoph Hofstätter and Marko Stanković, 'Die Verfassung der Republik Serbien' (2006), 62(3) Osteuropa Recht 272.
1516 Grote, 'The Republic of Serbia' (n 1514) 4; Hofstätter and Stanković (n 1514), 274.
1517 Critical because of the missing possibility to refer the question of constitutionality of treaties to a court before ratification Grote, 'The Republic of Serbia' (n 1514) 6–7.
1518 Art. 20 para. 2 of the Serbian constitution (2006) again contains a "non-regression clause", stipulating that the "Attained level of human and minority rights may not be lowered".

by foreigners was possible but subject to regulation by law or "international contract", Art. 85 para. 1. For the acquisition of "concession rights for natural resources and goods", no such requirements were stipulated, Art. 85 para. 2. As mentioned, Serbia also already had the competence to independently regulate its domestic law before Montenegro's independence.

5) The Independence of Kosovo

Under the 1974 SFRY constitution, Kosovo had been accorded the status of an autonomous province within Serbia with far-reaching autonomy rights almost equaling those of the republics.[1519] In particular, Kosovo was in charge of its own property laws.[1520] The independent status was effectively abolished by the Serbian government in 1989-1990,[1521] and the following opposition from the Kosovar population was violently suppressed by the Serbian authorities. That suppression led to the Kosovo war with egregious massacres against Kosovo Albanians, followed by violent retaliation from Kosovo's independence movements,[1522] and again massive flows of refugees and hundreds of thousands of displaced persons.[1523] In March 1999, after cease-fire negotiations with the Serbian regime had failed, NATO states intervened in the conflict without a mandate from the UNSC. Despite that "unilateral" use of force, NATO's actions were not denounced by the UNSC in the aftermath, but UNSC Resolution 1244 (1999) installed the UN Security Force "Kosovo Force" (KFOR) on the territory and established the United Nations Interim Administration Mission in Kosovo (UNMIK).[1524] When it became clear that no consensual solution of the conflict was in sight, Kosovo declared its independence on 17 February 2008.[1525] As

1519 Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) para. 8; Oeter, 'Yugoslavia, Dissolution of (2011)' (n 696) para. 10.

1520 Gashi (n 1195) 159.

1521 Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) paras. 9-11. On the background of the loss of independence Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor' (n 1081), 116–117.

1522 Pickering and Subotić, 'Former Yugoslavia and Its Successor States' (n 1320) 533.

1523 For numbers cf. European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 110.

1524 On the history of the separation Basta Fleiner and Djeric, 'Serbia (2012)' (n 1320) paras. 38-45, 55; Margaret Cordial and Knut Røsandhaug, *Post-Conflict Property Restitution: The Approach in Kosovo and Lessons Learned for Future International Practice (Vol. I)* (Martinus Nijhoff 2009) 20–21; Sterio (n 392) 119–122.

1525 Kosovo Declaration of Independence (n 701).

independence was declared without Serbian consent, the declaration can be referred to as an attempt to secession.[1526] Today, it is still not clear whether the attempt was successful and Kosovo can be considered a new state. According to Kosovar information, so far, 117 states have recognized it as an independent state,[1527] but it has not yet become a UN member state.[1528] An advisory opinion by the ICJ did not conclusively solve the issue.[1529]

Since 2001, authority has gradually been given back from UNMIK to Kosovo.[1530] According to UNMIK Regulation 1999/1, during the time of its deployment, UNMIK was given "[a]ll legislative and executive authority with respect to Kosovo".[1531] According to Section 6 of the same regulation, "UNMIK shall administer movable or immovable property, including monies, bank accounts, and other property of, or registered in the name of the Federal Republic of Yugoslavia or the Republic of Serbia or any of its organs, which is in the territory of Kosovo." Since UNMIK had made ample use of its law-making power during the years of its operation,[1532] over time it had materially changed the legal landscape. Therefore, in the following, even if this book does not deal with occupation scenarios,[1533] a short reference is made to the legal situation under UNMIK deployment in

1526 Arnauld *Völkerrecht* (n 255) § 2 para. 105; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 406.

1527 As of 1 January 2024, cf. https://mfa-ks.net/lista-e-njohjeve/.

1528 On Kosovo's attempts to accede to the Council of Europe Andrew Forde, 'Setting the Cat amongst Pigeons: Kosovo's Application for Membership of the Council of Europe' *EJIL Talk!* (17 May 2022) <https://www.ejiltalk.org/setting-the-cat-amongst-pigeons-kosovos-application-for-membership-of-the-council-of-europe/>.

1529 See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* 22 July 2010, Advisory Opinion, ICJ Rep 2010 403 (ICJ).

1530 Cordial and Røsandhaug (n 1523).

1531 Section 1 of UNMIK, 'Regulation 1991/1: On the Authority of the Interim Administration in Kosovo' (25 July 1999) UN Doc. UNMIK/REG/1999/1. The status of Kosovo under the UNMIK mandate is described as a UN "protectorate" by Cordial and Røsandhaug (n 1523) 20–21. In general on the Interim Administration of Kosovo Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor' (n 1081); Juli Zeh, *Das Übergangsrecht: Zur Rechtsetzungstätigkeit von Übergangsverwaltungen am Beispiel von UNMIK im Kosovo und dem OHR in Bosnien-Herzegowina* (Nomos 2011).

1532 Cf. for an overview of the UNMIK reforms Maj Grasten and Luca J Uberti, 'The Politics of Law in a Post-Conflict UN Protectorate: Privatisation and Property Rights in Kosovo (1999–2008)' (2017), 20(1) JIntRelatDev 162.

1533 *Supra*, Chapter II B) IV).

order to set the frame for the changes after Kosovo's independence, which happened while UNMIK was still on the ground.

a) The Legal Landscape Under UNMIK Administration

aa) Continuity of the Legal Order in General

With respect to international treaties, Section 1.3 of UNMIK Regulation 1999/1 ("On the Authority of the Interim Administration in Kosovo") from July 1999 listed several international human rights treaties that all official authorities were bound to.[1534] It did not refer to further international obligations of Serbia or the SFRY. Furthermore, Section 3 provided that

> "[t]he laws applicable in the territory of Kosovo *prior to 24 March 1999* shall continue to apply in Kosovo insofar as they do not conflict with standards referred to in section 2 [human rights and non-discrimination standards], the fulfillment of the mandate given to UNMIK under United Nations Security Council Resolution 1244 (1999), or the present or any other regulation issued by UNMIK."[1535]

In principle, UNMIK therefore upheld the state of the law prior to the start of the NATO bombing campaign on 24 March 1999. That upholding seems natural given UNMIK's function as an external *interim* administration force. According to Section 7, UNMIK Regulation 1999/1 was supposed to have entered into force on 10 June 1999, the day of adoption of S/RES/1244. Yet, in December 1999, UNMIK Regulation No. 1999/24 "On the Law Applicable in Kosovo" specified in Section 1.1 that

> "the law applicable in Kosovo shall be
> (a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and
> (b) The law in force in Kosovo on *22 March 1989*.

1534 Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor' (n 1081), 163 even insinuates automatic succession of UNMIK into existing human rights treaties.

1535 UNMIK, 'Regulation 1991/1' (n 1530) section 3 [emphasis added].

> In case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence."[1536]

According to Section 1.2 of that Regulation, "Law in force in Kosovo *after* 22 March 1989" [emphasis added] could be applied only on an *exceptional* basis to fill gaps in the domestic legal system and only if the laws were not discriminatory and in line with human rights standards. A further exception was contained in Section 1.4 sentence 2 in criminal matters - the law the most benevolent to the accused/defendant *since* 22 March 1989 had to be applied. Thus, the legal situation changed in two ways. First, it was primarily the regulations by the Special Representative that were relevant and, second, the relevant point in time for Kosovar law dated back to 22 March 1989. On that date, the parliament of the formerly autonomous province of Kosovo approved the loss of its autonomy status. Changes in the law of Kosovo from then on seem to have been considered as illegitimate or even illegal to such an extent that they were not recognized by the international community. The legal order prior to international intervention was not upheld, but, partly comparable to the case of the Baltic states, Kosovo's status was *restituted*. The law enacted by Serbian authorities after Kosovo lost its autonomy was only applicable on the basis of exception.[1537] As Regulation 1999/24 superseded UNMIK Regulation 1999/1,[1538] Serbian law was generally deemed not to have been in force since the UNMIK had authority. Yet, crucially, Section 4 of Regulation 1999/24 stipulated that

> "[a]ll legal acts, including judicial decisions, and the legal effects of events which occurred, during the period from 10 June 1999 up to the date of the present regulation, pursuant to the laws in force during that period under section 3 of UNMIK Regulation No. 1999/1 of 25 July 1999, shall remain valid, insofar as they do not conflict with the standards referred to in section 1 of the present regulation or any UNMIK regulation in force at the time of such acts."

Hence, legal acts emanating from the law applicable at the time they occurred were upheld. While that stipulation was obviously inserted in the

1536 UNMIK, 'Regulation No. 1999/24: On the Law Applicable in Kosovo' (12 December 1999) UN Doc. UNMIK/REG/1999/24 [emphasis added].

1537 This is again in line with the duty of non-recognition of situations brought about by the illegal use of force, see *supra*, Chapter II B) IV).

1538 According to section 3 Regulation 1999/24 was supposed to have entered into force on 10 June 1999.

interest of legal security, it was less a decision concerning acquired rights in a state succession case and more an application of the principle of non-retroactivity of laws.[1539] Section 1.3 of Regulation No. 1999/24 again contains a list of international instruments the administration had to abide by, but did not refer to any previous legal commitments.

Summarily, the UNMIK administration declared its own regulations and the former law enacted during the time of the existence of the Kosovar autonomous province applicable. Thereby UNMIK "restituted" a legal system dating back more than ten years and, in principle, did not recognize the changes in the law made afterwards under Serbian rule, with exceptions in cases of legal lacunae and criminal matters.

bb) Private Rights

Originally, Kosovo's own housing laws knew occupancy rights in the same form as in the Yugoslav republics. i.e. as a law close to ownership.[1540] However, from the time Kosovo lost its autonomy, Kosovar people protesting against Serbia were bereaved of their occupancy rights and could therefore not avail themselves of the privatization process that started in 1992.[1541] Apartments of former occupancy rights holders changed owners.[1542] Furthermore, racial discrimination was widespread when it came to the sale of property, so that many property transactions by Kosovars were conducted outside the official registers.[1543] Additionally, estimates show that about 800,000 Kosovo-Albanians fled their homes during the ethnic conflict in 1999.[1544] When they returned, it was the Serbian minority that was dispelled. Many houses had been destroyed by NATO's bombing campaigns. In the wake of the conflict, again, thousands of people had been displaced,

1539 Neither regulations gave direct insight on how rights acquired between 22 March 1989 and 10 June 1999 were supposed to be handled.

1540 Cordial and Røsandhaug (n 1523) 17–18.

1541 ibid 18–19; European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 113.

1542 Cordial and Røsandhaug (n 1523) 18–19.

1543 ibid 19–20; European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 111.

1544 Cordial and Røsandhaug (n 1523) 20; cf. European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 110.

a myriad of opposing property claims had been filed and illegal occupations of houses and apartments were rampant - a situation only exacerbated by the incomplete property register.[1545]

In S/RES/1244,[1546] the UNSC had already reaffirmed "the right of all refugees and displaced persons to return to their homes in safety". Through regulation 1999/23,[1547] UNMIK installed a mechanism to adjudicate disputes on the restitution of housing premises. The rules on which that mechanism was based were included in UNMIK regulation 2000/60.[1548]

> "Chapter I: Substantive Provisions
> Section 2 General Principles
> 2.1 Any property right which was validly acquired *according to the law applicable at the time of its acquisition remains valid* notwithstanding the change in the applicable law in Kosovo, except where the present regulation provides otherwise.
> 2.2 Any person whose property right was lost between 23 March 1989 and 24 March 1999 *as a result of discrimination* has a *right to restitution* in accordance with the present regulation. Restitution may take the form of restoration of the property right (hereafter "restitution in kind") or compensation.
> 2.3 Any property transaction which took place between 23 March 1989 and 13 October 1999, which was unlawful under [...] *discriminatory law*, and which would otherwise have been a lawful transaction, is valid.
> 2.4 Any person who acquired the ownership of a property *through an informal transaction based on the free will of the parties* between 23 March 1989 and 13 October 1999 is entitled to an order from the Directorate or Commission for the registration of his/her ownership in the appropriate

1545 Cordial and Røsandhaug (n 1523) 23–26; European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 111, 116.

1546 UNSC, 'Resolution 1244: On the Deployment of International Civil and Security Presences in Kosovo' (10 June 1999) UN Doc. S/RES/1244.

1547 UNMIK, 'Regulation 1999/23: On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission' (15 November 1999) UN Doc. UNMIK/REG/1999/23. In detail on the mechanism, working methods and jurisdiction of the commission and in general on property restitution in Kosovo Cordial and Røsandhaug (n 1523).

1548 UNMIK, 'Regulation 2000/60: On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission' (31 October 2000) UN Doc. UNMIK/REG/2000/60.

public record. Such an order does not affect any obligation to pay any tax or charge in connection with the property or the property transaction." [emphasis added]

The term "property right" included "any right of ownership of, lawful possession of, right of use of or occupancy right to, property", Section 1. Hence, the basic principle was that the law in force at the time of acquisition had to be applied unless that law was discriminatory. Restitution was owed when property had been lost "as a result of discrimination" or when its acquisition was denied due to the NATO bombing campaign[1549]. Conversely, legal transactions that had been invalid solely due to discriminating Serbian legislation were to be considered as valid.[1550] By upholding the former law in a limited fashion, the UNMIK Regulation upheld acquired rights. But, at the same time, UNMIK tried to acknowledge rights acquired under the previous Kosovar legal order. Hence, if "the ownership of the property [had] been acquired by a natural person through a valid voluntary transaction for value before the date this regulation entered into force", the former owner was only entitled to compensation instead of restitution.[1551] When occupancy rights had been lost for discriminatory reasons, the protection of the former holders of such occupancy rights went so far that they were entitled to restitution against the new owner if adequate payment was given.[1552] Furthermore, according to Section 2.5, "[a]ny refugee or displaced person with a right to property has a right to return to the property, or to dispose of it in accordance with the law, subject to the present regulation." Restitution *in rem* was preferred, and monetary compensation only awarded where there were competing claims.[1553] The UNMIK Regulation No. 1999/23[1554] established a "Housing and Property Directorate" and a "Housing and Property Claims Commission" to solve the issues pertaining to restitution and to give individuals a forum to enforce those claims.

Therefore, the restitution scheme under UNMIK, while trying to remedy the results of ethnic cleansing and discrimination, did not completely overhaul the property system. Furthermore, rights acquired by new owners

1549 For the latter ibid., section 2.6; see Cordial and Røsandhaug (n 1523) 163–164.
1550 Section 2.3 of UNMIK, 'Regulation 2000/60' (n 1547) .
1551 ibid., section 3.3.
1552 ibid., section 4.2 This, however, did not apply against a second new owner, Cordial and Røsandhaug (n 1523) 175–176.
1553 European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 127.
1554 UNMIK, 'Regulation 1999/23' (n 1546).

under Serbian law were protected or compensation paid in the exceptional cases of restitution of former property. It seems that it was only the excesses of discrimination that were meant to be reversed. Occupancy rights or property acquired under Serbian rule were therefore accepted to a considerable extent, but an attempt was made to distinguish between "politically tainted" and "neutral" acquisitions.

b) The Legal Landscape After Independence

In its "Declaration of Independence", Kosovo vowed to

> "undertake the international obligations of Kosovo, including those *concluded on our behalf by the United Nations Interim Administration Mission in Kosovo* (UNMIK) and treaty and other obligations *of the former Socialist Federal Republic of Yugoslavia* to which we are bound as a former constituent part"[1555].

Hence, first of all, Kosovo considered itself as a successor to the SFRY. Second, it considered that UNMIK had acted on its behalf. But it did not feel bound by international obligations of Serbia, from which it had actually separated. Art. 145 para. 1 of the new Kosovar constitution of 2008[1556] postulated that

> "[i]nternational agreements and other acts relating to international cooperation [...] will continue to be *respected until* such agreements or acts are renegotiated or withdrawn from in accordance with their terms or until they are superseded by new international agreements or acts covering the same subject areas and adopted pursuant to this Constitution" [emphasis added].

The ambiguous phrasing "to respect" leaves open whether Kosovo felt legally bound by the agreements. However, that such international obligations were considered as only terminable consensually with the other treaty partners or in accordance with the terms of the agreement tends to militate in favor of genuine bindingness.[1557]

1555 Kosovo Declaration of Independence (n 701) [emphasis added].
1556 Constitution (15 April 2008) https://www.refworld.org/docid/5b43009f4.html (Kosovo).
1557 Here as well, the SFRY's ratification of the VCSST might have played a role.

That ambiguity mirrors the treatment of legal continuity issues in Kosovar domestic law. For the domestic sphere, pursuant to Art. 145 para. 2 of the constitution, "[l]egislation applicable on the date of the entry into force of this Constitution shall continue to apply to the extent it is in conformity with this Constitution until repealed, superseded or amended in accordance with this Constitution", therefore, providing for qualified continuity of domestic legislation as shaped by UNMIK. More recent domestic Kosovar legislation, i.e. statutory laws enacted after its independence, in fact, assumed the permanence of the previous domestic private order.[1558] Crucially, the respective Kosovar law again connects back to the time of Kosovar autonomy, and therefore assumes the continuity of law adopted at the time of the SFRY, and not Serbian law. Modern Kosovar property law thus consists of a mixture of "old" law, dating back to SFRY times, UNMIK law, and "new" law enacted by the Kosovar authorities. The legal basis with respect to property issues is therefore often confused.[1559] And, to add to the confusion, rights acquired under Serbian rule are not completely ignored but recognized on a case-by-case basis.

As an example, the Kosovar Law No. 03/L-154 on Property and Other Real Rights,[1560] in principle only applies to legal acts taking place *after* its coming into force, Art. 282 para. 1. Yet, part VII ("Transitional Provisions") stipulates that, while deeds to ownership of immovable property issued before 23 March 1989 are recognized, Art. 286 para. 1, and can only be extinguished by a court decision, para. 2, later deeds have to be verified by a court to become recognized, para. 3. Similarly, according to Art. 288 of the law, if property of movable things was involuntarily lost at the time of Serbian rule, no acquisitive prescription could take place. Remarkably, even if the law favored rights or situations existing before 23 March 1989, it did not completely deny the existence of rights acquired under Serbian rule. Those rights were merely subject to review. Therefore, even if the

1558 Roccia (n 1349), 568.

1559 Gashi (n 1195) 193; European Parliament, 'Private Properties Issues Following the Regional Conflict in Bosnia and Herzegovina, Croatia and Kosovo' (n 1393) 122. For an overview of the rather complex legal situation with respect to property rights in Kosovo Roccia (n 1349).

1560 Law on Property and Other Real Rights (4 August 2009) OG of the Republic of Kosovo Year IV/No. 57, Law No. 03/L-154, https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2643 (Kosovo). The document could only be retrieved in original language and was translated by an online translation machine. Thus, the translation could not be checked for its complete accurateness. This disclaimer applies to all content related to Law No. 03/L-154.

new Kosovar law was not completely blind to the political background and may have even rejected rights acquired under a discriminatory policy, it was in principle open to recognition of private rights acquired under the (previous) Serbian legal order. That approach is similar to that of UNMIK.

Art. 7 para. 1 of the constitution of Kosovo denotes the right of property as one of its founding values. Art. 46 protects the "right to own property" (including intellectual property, para. 5), but, as usual, "[u]se of property is regulated by law in accordance with the public interest", para. 2, and the types of property are also defined by law, Art. 121 para. 1. Expropriations are only allowed for a public purpose, if authorized by law, and against "adequate" compensation, Art. 46 para. 3. Foreigners may acquire property and concession rights in Kosovo, Art. 121 paras 2 and 3. Natural resources and goods of "special cultural, historic, economic and ecologic importance" are subject to special protection, Art. 122, para. 2. As one of the diverse provisions contained in Chapter XIV "Transitional Provisions", Art. 156 explicitly requires the promotion and facilitation of "the safe and dignified return of refugees and internally displaced persons" and that they are assisted "in recovering their property and possession".

Art. 160 regulated that all "publicly owned" enterprises should come under the ownership of the state of Kosovo or one of its municipalities. Conversely, all "socially owned" enterprises should be privatized and all "socially owned interests in property and enterprises in Kosovo" should be the property of Kosovo. Here, assessment was again linked to the state of the law at the beginning of privatization in 1989, but transformations conducted by Serbia during 1989-1999 could be recognized if they did not violate relevant human rights law or UNMIK regulations.[1561] Unlike in the other SFRY successor states, there is no Kosovar law on restitution of property nationalized during communist rule, as restitution of property lost due to the war was given priority.[1562] Finally, the fact that the large majority of enterprises in Kosovo have been privatized and that, now, many rights have been acquired in good faith, make further restitution even more improbable.[1563]

1561 Gashi (n 1195) 193–194.

1562 ibid 197–198. That priority, in combination with a lack of clear documentation of property relations, has made it difficult for Kosovo Albanians to recover their property and can again lead to an advantage for the Serbian population (ibid 197–200).

1563 ibid 205.

6) Interim Conclusions

The disintegration of the former SFRY does not constitute a singular situation; it constitutes a process spanning almost two decades replete with controversies about statehood, recognition, and succession. Even though all SFRY successor states shared a common history, their independence took place under extremely disparate circumstances.

There are five direct successor states of the SFRY (the "first wave" of successions): Slovenia, Croatia, Macedonia, Bosnia-Herzegovina, and Serbia-Montenegro (formerly the FRY). All of those states enacted far-reaching continuity clauses and therefore upheld the domestic legal system of the SFRY. However, that continuity was stipulated on a general basis and in broad terms, giving the state authorities much leeway in specific cases. Furthermore, several substantial reservations existed, e.g., that of "congruency" with the new constitutions, sometimes even with the whole new legal order, or reciprocity. Moreover, while all successor states' constitutions contained a fundamental rights catalogue, including a right of property protecting against unlawful expropriation, in fact the definition of those guarantees was subject to significant referrals to statutory law. In practice, in many cases, the successor states did not abide by their generous promises but attempted to restrict rights, especially those of non-nationals. That restriction was an obvious issue since, at the time of the SFRY, much of the population had lived under the common roof of SFRY nationality and only became "foreign" due to SFRY dismemberment. For example, while Slovenia seems to have protected its own nationals before and after succession in a relatively consistent manner, after succession other former SFRY nationals were treated as "alien" residents and subjected to a special legal regime. Yet, the exclusion of large parts of a society from the enjoyment of civil status simply due to a lack of formal re-registration was accepted neither by the Slovenian Constitutional Court nor by the ECtHR. While the constitutional court drew heavily on arguments of legitimate expectation, the ECtHR, in its groundbreaking *Kurić* decision, relied more on proportionality considerations.

Both Croatia and Bosnia-Herzegovina, war-ridden shortly after their independence and simultaneously refuge to thousands of displaced persons, applied discriminatory policies on allocation of property. In those cases, the dwelling aspect of property protection became obvious. That aspect was prevalent against the background of the UNSC arguing for the emergence

of a "right to return" for displaced persons after the end of the war activities.[1564]

Besides the primary object of reversing policies of racial discrimination and ethnic cleansing, such a right also included the idea of restitution of former property relations. Even if the "right to return" was mostly based on human rights guarantees such as Art. 8 ECHR (the right to respect for private and family life), it connotes the general idea of persistence of (property) rights even in cases of upheaval such as those provoked by state successions. Here, not only the connection between the doctrine of acquired rights and minority issues but also the doctrine's relevance and openness in protecting immaterial values become manifest.

Additionally, all five successor states at the time of their independence and in the process of transformation to market economies had to tackle the problem of privatization, partly conducted through restitution, of state or "social" property. Within that process, the question of how to deal with already acquired rights to such property, in particular so-called "occupancy rights", became pivotal. With the exception of Croatia, all SFRY successor states in the end seem to have acknowledged prior rights and to have mediated between opposing interests, even if sometimes only after international intervention. By and large, acquired rights were recognized and protected in the process.

The Agreement on Succession Issues concluded in 2001 between the five successor states is an international instrument of particular importance for this research. It contains an explicit section on "acquired rights", acknowledging the doctrine's relevance under modern international law. That acknowledgement is even more significant in light of the far-reaching domestic legislation providing for continuity of the former legal order in the member states. While primarily endorsing the traditional definition of acquired rights, crucially, the agreement provided for the irrelevance of a *new* nationality after succession for former SFRY nationals and extended the scope of protection beyond pure property rights. A question not settled in the agreement was dealt with by the ECtHR in 2014 - liability for foreign currency accounts "frozen" at the collapse of the SFRY. The

1564 Cf. UNSC, 'Resolution 1088: On Authorization of the Establishment of a Multinational Stabilization Force (SFOR) and Extension of the Mandate of the UN Mission in Bosnia and Herzegovina' (12 December 1996) UN Doc. S/RES/1088, op. para. 11 (on Bosnia-Herzegovina); UNSC, 'Resolution 1145' (n 1402) op. para. 7 (on Croatia); UNSC, 'Resolution 1244' (n 1545) (on Kosovo). On the background and basis of the "right to return" in international law Quigley (n 372).

(not uncontroversial) judgment of the GC in *Ališić* showed vividly how a question of separation of state debts could be dealt with from a "private law" perspective, states being held liable not only to a certain percentage of the state debt of the predecessor but also to specific claims of individuals.

The separation of Serbia and Montenegro can be separated from the first wave of successions. Both constituent members had already been accorded far-reaching autonomy, in particular with respect to private law and property issues, and because Serbia continued the personality of the SFRY, continuity of the domestic legal order was the more natural outcome for both states.

Finally, the secession of the Kosovo from Serbia took place after a devastating war with international involvement and almost a decade of external administration of the territory. Apart from the fact that the international legal status of the Kosovo is still not settled, its peculiar history led to two (intermingled) "anomalies" with respect to attitudes to the previous legal order. First, major changes in the Kosovar legal system were, in fact, brought about by the UNMIK administration. Notably, the interim administration (re-)set in force the law of the formerly autonomous province of the Kosovo, thereby almost completely eclipsing Serbian law. However, UNMIK also installed mechanisms declaring *rights* acquired under the former Serbian legal order still valid and enforceable yet subject to re-assessment for discriminatory intent. The continuity of the "old" Kosovar legal order is reminiscent of the attitudes of the Baltic states. Its relevance for the analysis of acquired rights in cases of *state succession* is therefore diminished. But it is remarkable that, even in that situation, individual rights acquired during Serbian rule were not completely disregarded. When the country regained its sovereign rights, the independent Kosovo, in principle, continued the policy.

Overall, states involved in the dismembering of the SFRY showed a remarkable regard for continuity of their respective domestic legal order. Acquired rights of individuals mostly were protected through the upkeeping of domestic law. That protection was partly due to the republics' far-reaching pre-independence autonomy in internal matters, especially domestic private law. Exceptions, such as in the case of Kosovo, were due to illegal annexation. Those legal continuity provisions were, however, not always followed in practice, their implementation being tainted by political motives and ethnic discrimination.

V) The Dissolution of Czechoslovakia (1992/1993)

1) General Background

Since 1968, the state of the Czech and Slovak Federal Republic (CSFR or Czechoslovakia) had been a federal republic in line with a socialist pattern that had accorded certain autonomy to its constituent republics. In the following years, there were tensions in the political relationship between both parts, especially due to the (perceived) supremacy of the Czech Republic. When it came to new discussions about the federation's future status, especially in the aftermath of elections in June 1992, independence of the Republic of Slovakia was finally considered the most feasible option.[1565] On 17 July 1992, the Slovak parliament declared the sovereignty of Slovakia.[1566] During the negotiation phase leading to the separation of the federation, both members of the federation concluded several bilateral agreements supposed to govern their post-independence relationship.[1567] The "Constitutional Law on the Dissolution of the Czech and Slovak Federal Republic"[1568] in Art. 1 para. 1 set the date for the dissolution of the federation as 31 December 1992 and declared in Art. 1 para. 2 the Czech Republic and the Slovak Republic to be successor states.

1565 On the history of the Czechoslovak state and its dissolution Mahulena Hofmann, 'Czechoslovakia, Dissolution of (2009)' in: *MPEPIL* (n 2) paras. 1-4. On the immediate historical and social background of the dissolution Darina Mackova, 'Some Legal Aspects of the Dissolution of Former Czechslovakia (1993)' (2003), 53(2) Zbornik PFZ 375 375–379; Hošková, 'Die Selbstauflösung der ČSFR. Ausgewählte rechtliche Aspekte' (n 703), 689–690; Sharon L Wolchik, 'The Czech and Slovak Republics' in: *Csergo/Eglitis et al. Central and East European Politics* (n 1320) 333 341.

1566 Hošková, 'Die Selbstauflösung der ČSFR. Ausgewählte rechtliche Aspekte' (n 703), 691.

1567 For an overview of those agreements ibid 693–699.

1568 'Constitutional Law on the Dissolution of the Czech and Slovak Federal Republic (25 November 1992)' in Vratislav Pechota (ed), *Central & Eastern European Legal Materials (CEEL): Vol. 2: Czechoslovakia* (Loose Leaf. Transnational Juris Publishing 1992) Release 19, July 1993.

At the same time, both republics enacted new constitutions.[1569] While the Czech constitution[1570] according to Art. 113 was to come into force on the day of independence, i.e. 1 January 1993, the new Slovak Constitution[1571] came into force on 1 October 1992.[1572] Furthermore, its Art. 152 para. 1 provided for the continuity of previous law *unless* it conflicted with the *new* (Slovak) constitution. That stipulation was at odds with the superiority claim of the - then - still valid CSFR constitution.[1573] While, according to some authors, that chain of events brought the independence of Slovakia closer to a case of separation from the CSFR and the supposition of the Czech state as the continuator of the CSFR,[1574] commonly, the demise of the CSFR is considered as a case of (voluntary) dissolution (or dismem-

1569 For more information on both constitutions Eric Stein, 'Out of the Ashes of a Federation, Two New Constitutions' (1997), 45(1) AmJCompL 45; Pavel Holländer, 'Die Verfassungen der Tschechischen und der Slowakischen Republik im Vergleich' in Joseph Marko and others (eds), *Revolution und Recht: Systemtransformation und Verfassungsentwicklung in der Tschechischen und Slowakischen Republik* (Lang 2000) 285; Hošková, 'Die Selbstauflösung der ČSFR. Ausgewählte rechtliche Aspekte' (n 703), 699–715.

1570 'Constitution (16 December 1992)' in Vratislav Pechota (ed), *Central & Eastern European Legal Materials (CEEL): Vol. 2A: Czech Republic, Slovenia* (Loose Leaf. Transnational Juris Publishing 1992), Release 20, September 1993.

1571 'Constitution of Slovakia' in: *Pechota Central & Eastern European Legal Materials Vol. 2a* (n 1569), Release 17, March 1993.

1572 Holländer, 'Die Verfassungen der Tschechischen und der Slowakischen Republik im Vergleich' (n 1568) 285; Jiri Malenovsky, 'Problèmes Juridiques Liés à la Partition de la Tchécoslovaquie, y Compris Tracé de la Frontière' (1993), 39(1) AFDI 305 315.

1573 Art. 1 of the Constitution (29 February 1920), 12 Current History 727 (Czechoslovakia); Holländer, 'Die Verfassungen der Tschechischen und der Slowakischen Republik im Vergleich' (n 1568) 285; Malenovsky (n 1571), 317.

1574 Cf. e.g. ibid 317–323; for Slovakia as an independent state before 1 January 1993 also Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 5; Pavel Holländer, 'Revolution und Recht in der Tschechoslowakei 1989 bis 1992' in: *Marko/Ableitinger et al. Revolution und Recht* (n 1568) 29 49–50; supposedly also Aleksandar Pavković, 'Peaceful Secessions: Norway, Iceland and Slovakia' in: *Pavković/Radan Secession Research Companion* (n 392), who, however, does not distinguish secession from dissolution. However, while a unilateral separation of Slovakia by way of referendum was foreseen in a constitutional law, apparently both sides consciously avoided this avenue, Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 5.

berment) with two successor states.[1575] That view also aligned with the self-perceptions of the Czech and the Slovak Republics.[1576]

2) The Continuity of the Legal Order in General

After the dissolution, both states as far as possible opted for the continuity of the legal regime.[1577] With respect to international law, Article 153 of the Slovak Constitution determined Slovakia as successor to international treaties of the CSFR "to the extent laid down by a constitutional law of the Czech and Slovak Federal Republic or to the extent agreed between the Slovak Republic and the Czech Republic." The Czech Republic regulated the issue in Art. 4 and 5 para. 2 of the "Constitutional Act on Measures Related to the Dissolution of the Czech and Slovak Federative Republic"[1578], which provided that the Czech Republic would, in principle, succeed to all rights and obligations of the CSFR with respect to the Czech territory. This decision is in line with Art. 34 VCSST. Both the Czech Republic and the Slovak Republic, which became parties to the VCSST in 1999 and 1995, respectively, declared that they would retroactively apply the VCSST

1575 Tancredi, 'Dismemberment of States (2007)' (n 324) para. 7; Crawford *The Creation of States* (n 308) 706; Arnauld *Völkerrecht* (n 255) § 2 para. 104; Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 8; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 520, 529; Hafner and Kornfeind (n 27), 1, 15; Hošková, 'Die Selbstauflösung der ČSFR. Ausgewählte rechtliche Aspekte' (n 703), 716, 732, 733; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 398, 406, 418; ILA, 'Aspects of the Law of State Succession' (n 616) 10,11, 27; Devaney, 'What Happens Next? The Law of State Succession' (n 283) footnote 11; Bedjaoui (n 35); Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 8; Shaw *International Law* (n 266) 980.

1576 As expressed e.g. in Art. 1 paras. 1 and 3 of the 'Constitutional Law on the Dissolution of the Czech and Slovak Federal Republic (25 November 1992)' (n 1567). That the CSFR dissolved was later also the position of Slovakia in the case of *ICJ Gabčíkovo-Nagymaros Project* (n 616) para. 121. On the (consensual) distribution of state debts cf. Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 15.

1577 Also Mackova (n 1564), 381; for Slovakia Lucia Žitňanská, 'Die Wirtschaftsverfassung der Slowakischen Republik' in: *Marko/Ableitinger et al. Revolution und Recht* (n 1568) 207 207.

1578 Constitutional Act on Measures Related to the Dissolution of the Czech and Slovak Federative Republic (15 December 1992) Constitutional Act No. 4-1993 Coll. of the Czech National Council (Czech Republic).

to their own succession.[1579] Both states thus opted for continuity of their multilateral treaties[1580] and all obligations under the human rights treaties of the CSFR were taken over by the two successor states.[1581] The continuity of bilateral treaties, however, was subject to negotiations with the treaty partners.[1582]

The question of what would happen with CSFR *domestic* law was regulated by Slovakia within its new constitution, especially in Chapter IX on "Transitional and Final Provisions". As mentioned above, Art. 152 para. 1 determined that "[c]onstitutional laws, laws, and other generally binding legal regulations remain in force in the Slovak Republic unless they conflict with this Constitution. They can be amended and abolished by the relevant bodies of the Slovak Republic."[1583] The Czech Republic, in Art. 1 para. 1 of the Constitutional Act on Measures Related to the Dissolution of the Czech and Slovak Federative Republic,[1584] stipulated that "[t]he constitutional acts, acts of law and other legal regulations of the Czech and Slovak Federative Republic valid on the date of dissolution of the Czech and Slovak Federative Republic in the territory of the Czech Republic shall remain valid and effective. However, it is not possible to use those provisions which are contingent only on the existence of the Czech and Slovak Federative Republic and on the integration of the Czech Republic in it."

According to Article 2,

> "[i]n the event of any discrepancy between the legal regulations of the Czech Republic adopted before the dissolution of the Czech and Slovak Federative Republic and the legal regulations of the same virtue specified in Article 1, Section 1 herein, the legal regulations of the Czech Republic shall prevail."

1579 See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&clang=_en#EndDec. Both states did not become parties to the VCSSPAD.

1580 Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 10; Hošková, 'Die Selbstauflösung der ČSFR. Ausgewählte rechtliche Aspekte' (n 703), 716–718, 719-720.

1581 Malenovsky (n 1571), 330; for Slovakia Mackova (n 1564), 383.

1582 Malenovsky (n 1571), 330; Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 11; see also (n 965). For further examples Malenovsky (n 1571), 330.

1583 "The interpretation and application of constitutional laws, laws, and other generally binding legal regulations must be in harmony with this Constitution.", Art. 152 para. 4 'Constitution of Slovakia' (n 1570).

1584 (n 1577).

Hence, also domestically, the successor states opted for the continuity of the legal regime while keeping leeway to change the laws.

It has to be noted that, comparable to the case of the SU, changes in private law in the Czech or Slovak territories were connected more to converting the socialist economies into capitalist market economies than to their successions. The change of economic systems and the accompanying privatization measures were a general development starting years before the coming into existence of the two independent states and continuing after the separation.[1585] Restitution of property nationalized under the CSFR authority was one pillar of that privatization.[1586] The comprehensive program favored restitution in kind,[1587] and paid attention to rights acquired in good faith by private persons, who had to be compensated and offered alternative accommodation.[1588] A number of important laws with respect to subjects such as private law, trade law, restitution laws, and investment law were enacted even before the June 1992 elections.[1589] Relevant amendments to the Civil Code took place before dissolution of the CSFR and then again only some years after 1993.[1590]

3) Private Rights

There were no particular provisions on the permanence of private rights of individuals. Under Art. 112 para. 1 of its constitution, the Czech Republic upheld the CSFR "Charter of Fundamental Rights and Freedoms" and hence the protection of property and inheritance under Art. 11 of the Charter. The protection of property in Art. 20 of the Slovak Constitution was

1585 Gashi (n 1195) 66–69, 99-102; Mackova (n 1564), 385; Žitňanská, 'Die Wirtschaftsverfassung der Slowakischen Republik' (n 1576).

1586 For an overview of the privatization process Gashi (n 1195) 66–69.

1587 ibid 99–101.

1588 See statement of the Czech government *Pincová and Pinc v. the Czech Republic,* Appl. No. 36548/97, 5 November 2002, ECHR 2002-VIII 311 para. 54 (ECtHR) but on the unproportionality of the state acts ibid paras. 61-64.

1589 For an overview Holländer, 'Revolution und Recht in der Tschechoslowakei 1989 bis 1992' (n 1573) 29–36; Mahulena Hošková, 'The Evolving Regime of the New Property Law in the Czech and Slovak Federal Republic' (1992), 7(3) AmUJInt'l L& Pol'y 605; cf. also Gashi (n 1195) 100.

1590 Cf. David Falada, 'Codification of Private Law in the Czech Republic' (2009), 15(1) Fundamina 38 64–68.

almost identical to property protection under the Charter.[1591] It underlined the importance of regulation by statutory law, para. 2, the need to exercise the right of property in conformity with society's needs, para. 3, and the possibility of expropriation for public purposes, on a statutory basis and against compensation (without, however, mentioning an explicit standard), para. 4. The constitutional core of property therefore stayed the same as before the dissolution. Art. 11 of the Slovak constitution accorded international human rights treaties priority over its own law.

The split of the CSFR was conducted without any formal vote of one of the parliaments of its constituent republics and without a referendum.[1592] Interestingly enough, the ramifications of that "deficit" for the obligation to uphold individual positions acquired under the CSFR pension system led to a dispute between the highest courts of the Czech Republic eventually involving the CJEU.[1593] After the dissolution of the CSFR, the Czech and Slovak republics had agreed to uphold the pensions claims of citizens formerly employed in the CSFR. Each state was responsible for pensions of employees having worked for an employer that had its headquarters on the respective state's territory "either on the day of the dissolution, or on the last day before that date"[1594]. Due to separate economic development and legislation after 1 January 1993, the "Slovak pensions" were

1591 Hošková, 'Die Selbstauflösung der ČSFR. Ausgewählte rechtliche Aspekte' (n 703), 703. However, the Slovak version of the constitution referred to 'Constitution of Slovakia' (n 1570) does not contain the last paragraph on taxes and fees.

1592 On this "democratic deficit" Mackova (n 1564), 379–380; Malenovsky (n 1571), 323–325.

1593 *Marie Landtová v Česká správa socialního zabezpečení. Nejvyšší správní soud,* C-399/09, 22 June 2011, Reference For a Preliminary Ruling, ECR 2011 I-05573 (CJEU), which was followed by an open refusal of the Czech Constitutional Court to abide by the CJEU judgment which was considered *ultra vires*, see *Slovak Pensions Case,* PL. ÚS 5/12, 31 January 2012 (Constitutional Court of the Czech Republic). In more detail on the "saga" of the "Slovak Pensions Cases" Agata B Capik and Martin Petschko, 'One Says the Things Which One Feels the Need to Say, and Watch the Other Will Not Understand: Slovak Pension Cases before the CJEU and Czech Courts' (2013), 9 Croatian YB Eur L & Pol'y 61; Pavel Molek, 'The Court That Roared: The Czech Constitutional Court Declaring War of Independence against the ECJ' (2012), 6 ELR 162 <https://www.academia.edu/7695251/The_Court_That_Roared_The_Czech_Constitutional_Court_Declaring_War_of_Independence_against_the_ECJ>; Jan Komarek, 'Playing With Matches: The Czech Constitutional Court's Ultra Vires Revolution' *verfassungsblog* (22 February 2012) <https://verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution/>.

1594 Cited after *CJEU Marie Landtová* (n 1592) para. 9.

worth less than those paid by the Czech Republic[1595] and several former CSFR employees living in the Czech Republic but having worked for a company headquartered in the Slovak Republic sued the Czech pension authorities. Reportedly, the Czech Constitutional Court's case law considered the Czech authorities obliged to accord all Czechs living on its territory the same amount of pension no matter which employer they worked for.[1596] It seemed that the finding was implicitly undergirded by the idea that a change in sovereignty not agreed to by the population should not have any negative consequence on individual positions.[1597] In opposition to the finding, the Czech Supreme Administrative Court and the pensions authorities considered the succession into the CSFR's position a manifest reason for justified differential treatment of both parts of the population after independence.[1598] As an aside, the latter opinion seems more in line with the traditional idea of acquired rights protecting merely a *status quo* but not expectations of or opportunities for a certain sum in a later pension; states under international law are, in principle, free to alter legislation with effect for the future. In line with the argumentation of the Supreme Administrative Court and the pensions authorities, the value of the pension installments accrued until dissolution of the CSFR was to be accounted for, but it was not necessary to guarantee that those installments would lead to a certain sum of money in the future. In that respect, it seems important that the claims before the Constitutional Court were based not on the right of property but on the right to social security in old age and on the Czech Constitution's prohibition of discrimination.[1599]

4) Interim Conclusions

Authors have underlined that, especially compared to the cases of the dismemberment of the former SFRY, the dissolution of the CSFR was an

1595 Capik and Petschko (n 1592), 63; however, this changed some years later, see Molek (n 1592), 167; Komarek (n 1592).
1596 *CJEU Marie Landtová* (n 1592) paras. 12-13; Capik and Petschko (n 1592), 64.
1597 Molek (n 1592), 162–163; Capik and Petschko (n 1592), 71.
1598 The CJEU, to which a reference proceeding was launched by the Czech Supreme Administrative Court in *CJEU Marie Landtová* (n 1592) did not comment on the succession issue.
1599 Molek (n 1592), 164.

example of a particular consensual and peaceful succession scenario.[1600] It therefore led to relatively little friction, also within the domestic legal system. Several issues of relevance for individual rights were regulated by bilateral agreement.[1601] Acquired rights thus did not pose as much of a challenge as in other countries under scrutiny.

VI) The Independence of Eritrea from Ethiopia (1993)

1) General Background

In the context of assessing acquired rights and state successions, several difficulties are associated with grasping the significance of the evolution of the Eritrean state in 1993. Historically, power over Eritrea moved in 1941 from Italy to Great Britain.[1602] However, after the Second World War, the victorious powers could not agree on a plan for the territory, and in 1952 the UN installed a loose federation between Eritrea and Ethiopia.[1603] Yet, this installment was thwarted in the following years by Ethiopia, which in 1962 finally incorporated the territory of Eritrea as a republic into its own state.[1604] 30 years of civil war for Eritrean independence followed. Finally, in 1991 the Eritrean armed opposition won the upper hand and erected a *de-facto* autonomous state.[1605] After negotiating the terms of independence with Ethiopia, a UN-monitored referendum took place in which 99.8% of

1600 E.g. Hofmann, 'Czechoslovakia, Dissolution of (2009)' (n 1564) para. 17; Hošková, 'Die Selbstauflösung der ČSFR. Ausgewählte rechtliche Aspekte' (n 703), 733.

1601 For examples Mackova (n 1564), 388–389.

1602 Verena Wiesner, 'Eritrea (2009)' in: *MPEPIL* (n 2) paras. 1-3; Gregory Fox, 'Eritrea' in: *Walter/Ungern-Sternberg Self-Determination and Secession* (n 386) 273 274–275; Raymond Goy, 'L'Indépendance de l'Erythrée' (1993), 39(1) AFDI 337 338–339; Albano A Troco, 'Between Domestic and Global Politics: The Determinants of Eritrea's Successful Secession' (2019), 4(8) Brazilian Journal of African Studies 9 14–15.

1603 Wiesner, 'Eritrea (2009)' (n 1601) paras. 4-15; Goy, 'L'Indépendance de l'Erythrée' (n 1601), 339–340; Troco (n 1601), 15.

1604 Fox, 'Eritrea' (n 1601) 277–278; Goy, 'L'Indépendance de l'Erythrée' (n 1601), 340–341; Troco (n 1601), 15–17. Cf. Wiesner, 'Eritrea (2009)' (n 1601) paras. 19-20, who rejects the term "annexation" in this case as Eritrea at that time was not an independent state.

1605 Fox, 'Eritrea' (n 1601) 278–279; Goy, 'L'Indépendance de l'Erythrée' (n 1601), 341–346; Troco (n 1601), 17–20.

the electorate supported Eritrean independence.[1606] The state of Eritrea was admitted to the UN on 28 May 1993.[1607]

The emergence of Eritrea as an independent state can therefore be considered a separation (or secession), i.e. a typical form of succession,[1608] and Eritreans eligible only to "internal" self-determination.[1609] Yet, because of its particular history - the federation with Ethiopia being forged out of two colonies by the UN, a construction that later was, illegally,[1610] disregarded by Ethiopia - that emergence can also be viewed as the last step of a decolonization process of a people entitled to "external" self-determination.[1611] A comparison with the other cases under scrutiny thus has to be made with caution.

2) The Continuity of the Legal Order in General

The colonial background and the pertaining Eritrean claim to independence based on the principle of self-determination were mirrored in the new state's attitude towards the previous legal order, which had been multi-patterned and influenced by colonial, Eritrean, and Ethiopian law. First, with respect to multilateral international agreements of Ethiopia, succession does not have seemed to be an option for Eritrea - it only *acceded*

1606 Fox, 'Eritrea' (n 1601) 279–280; Goy, 'L'Indépendance de l'Erythrée' (n 1601), 346–348. In more detail on the reasons for the separation's success Troco (n 1601), 20–27.

1607 UNGA, 'Resolution 47/230: Admission of Eritrea to Membership in the United Nations' (28 May 1993) UN Doc. A/RES/47/230.

1608 Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294) 852; Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 519, 526; Hafner and Novak, 'State Succession in Respect of Treaties' (n 294) 406; Crawford *The Creation of States* (n 308) 375, 402.

1609 This seems to have been the position of the UN, see Wiesner, 'Eritrea (2009)' (n 1601) paras. 27-30.

1610 On the legality and especially on the binding force of the GA Resolution for Ethiopia ibid paras. 16-18, 20-25.

1611 Sterio (n 392) 72–73 "sui generis" or "de facto secession"; cf. Thürer and Burri, 'Secession (2009)' (n 317) para. 32 with further arguments; Kathryn Sturman, 'Eritrea: A Belated Post-Colonial Secession' in: *Pavković/Radan Secession Research Companion* (n 392); Goy, 'L'Indépendance de l'Erythrée' (n 1601), 338, 342-343; cp. also Wiesner, 'Eritrea (2009)' (n 1601) paras. 27-30. On the different basis of Eritrean claims to self-determination Fox, 'Eritrea' (n 1601) 280–289.

to *some* of the conventions.[1612] For bilateral treaties, continuity depended on the attitude of the other state party and was considered on a case-by-case basis.[1613] In general, the domestic status of international law in the Eritrean legal system is not settled.[1614]

Furthermore, Eritrea's *domestic* legal order did not provide much reliable information on the actual state of the law. There was no explicit provision discernible in Eritrean law dealing with the relation to the former legal order. The law-making process in Eritrea is marked by intransparency and obfuscation of competences.[1615] A constitution enacted in 1997[1616] provided for a right of property in Art. 23 para. 1. According to Art. 23 para. 3 of the constitution "[t]he State may, in the national or public interest, take property, subject to the payment of just compensation and in accordance with due process of law". However, the constitution has not yet been implemented, and the announced revision process has, so far, not yielded tangible results.[1617] Transitional civil and criminal laws were adopted in 1991,[1618] i.e.

1612 Cf. on non-succession to the Geneva Conventions *EECC - Award on Prisoners of War* (n 616) paras. 33-35. The UN database on UNSG depositary notifications does not contain one hit with respect to succession of Eritrea to a multilateral convention. There was even no accession to the Genocide Convention (n 518) to which Ethiopia at the time of independence had been a party. Additionally, many accessions only took place long after independence, e.g. to the CAT (n 516) in 2014; cf. also Zimmermann and Devaney, 'Succession to Treaties and the Inherent Limits of International Law' (n 283) 526.

1613 The US opted for a provisional continuity of bilateral treaties concluded with Ethiopia as towards Eritrea, cf. US Department of State (Nash, Marian), 'Contemporary Practice of the United States relating to International Law' (1993), 87(4) AJIL 95 598.

1614 Luwam Dirar and Tesfagabir K Teweldebirhan, 'Introduction to Eritrean Legal System and Research' (07/2023) at 8.5 <https://www.nyulawglobal.org/globalex/Eritrea1.html>. See also with respect to the procedure of ratification and incorporation Simon M Weldehaimanot and Daniel R Mekonnen, 'The Nebulous Lawmaking Process in Eritrea' (2009), 53(2) J Afr L 171 186–189.

1615 ibid especially 179-184.

1616 Constitution (23 May 1997) https://www.servat.unibe.ch/icl/er00000_.html (Eritrea).

1617 Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Eritrea' (1 June 2015) UN Doc. A/HRC/29/41 para. 19; Human Rights Committee, 'Concluding Observations on Eritrea in the Absence of its Initial Report' (3 May 2019) UN Doc. CCPR/C/ERI/CO/1 para. 7; *see also* Dirar and Teweldebirhan (n 1613) at 6.1.

1618 E.g. the Transitional Civil Law 2/1991 (15 September 1991) (Eritrea); Transitional Civil Procedure Law 3/1991 (15 September 1991) (Eritrea); Transitional Criminal Law 4/1991 (15 September 1991) (Eritrea); Transitional Criminal Procedure Law

before formal independence. Crucially, those laws were based on *Ethiopian* codifications from the 1960s.[1619] Even if they were enacted on a transitional basis only, they reportedly stayed in place until 2015.[1620] Hence, there was at least some measure of factual continuity under domestic law.

3) Private Rights

a) Land Reform

The land tenure system before independence was surprisingly steadfast and survived colonial times, occupation, and federation with only a few changes.[1621] That constancy might also have been due to the land tenure's customary basis, in which land was attributed to tribes and communities.[1622] Shortly after independence, Eritrea proclaimed an important land reform abolishing the customary land tenure system.[1623] The relevant Proclamation No. 58/1994[1624] involved a purely governmental act not in-

5/1991 (15 September 1991) (Eritrea); Transitional Commercial Law 6/1991 (15 September 1991) (Eritrea); Transitional Maritime Law 7/1991 (15 September 1991) (Eritrea); Transitional Labor Law 8/1991 (15 September 1991) (Eritrea); all available (only in Eritrean language) online at the website of the Library of Congress https://www.loc.gov/.

1619 Dirar and Teweldebirhan (n 1613) at 6.5; Weldehaimanot and Mekonnen (n 1613), 180.

1620 Dirar and Teweldebirhan (n 1613) at 6.5.

1621 Gaim Kibreab, 'Land Policy in Post-Independence Eritrea: A Critical Reflection' (2009), 27(1) Journal of Contemporary African Studies 37 39–40; Jason R Wilson, 'Eritrean Land Reform: The Forgotten Masses' (1999), 24(2) NCJ Int'l L 497 502–507.

1622 Cf. in detail on the customary systems Kibreab (n 1620), 37–39; Wilson (n 1620), 497–502.

1623 In more detail Kibreab (n 1620), especially 40-42.

1624 Proclamation No. 58/1994 - A Proclamation to Reform the Sytem of Land Tenure in Eritrea, to Determine the Manner of Exprorpriating Land for Purposes of Developmet and National Reconstruction, and to Determine the Powers and Duties of the Land Commission (24 August 1994) http://extwprlegs1.fao.org/docs/pdf/eri8227.pdf (Eritrea), also available at the website of the International Labour Organization https://natlex.ilo.org/dyn/natlex2/r/natlex/fe/details?p3_isn=91368&cs=1sU7YfgkZYalqerwVDaUvHjIUZBgfkRF7H50CnC6vuHvlaoAQ_amWThxdQ2O-C-l8_RHvXC8G_i2Ny8v8jdbUlA; or (in Eritrean language) at the website of the Library of Congress https://www.loc.gov/.

volving parliament.[1625] It was to "supersede all laws, regulations, customs, and systems pertaining to land, Art. 58 para. 1: "All laws, regulations, directives, and systems which are inconsistent with the content and spirit of this Proclamation shall be repealed", Art. 58 para. 2.[1626] Most importantly, and as also envisaged by Art. 23 para. 2 of the later Eritrean constitution,[1627] the proclamation stipulated that land could only be owned by the state, Art. 3 para. 1. While individuals could acquire usufruct rights to land, such rights were dependent on government approval, Art. 4 para. 1, Art. 3 paras. 2 and 3. Usufructuary rights could be expropriated by the government against payment of a compensation, Art. 50, 51. The decision to expropriate was final and not subject to appeal, Art. 50 para. 3. In any case, "[i]llegally acquired state land", which was defined as land *inter alia* "illegally allotted due to war or the past colonial regime" under Art. 53 para. 1, had to be surrendered to the government without any prospect of compensation. That stipulation meant that Eritrea would not recognize many formerly granted usufructuary or ownership rights or at least paid no compensation when land was expropriated.[1628] For urban land, Art. 5 para. 3 of the proclamation even states that compensation was only due for expropriation of usufruct rights granted under the proclamation. Hence, all former usufruct rights seemingly could be abolished without compensation. Finally, Art. 43 para. 2 contains a rather peculiar provision making the proclamation's legal force dependent upon its factual implementation:

> "The land laws and tenure system that existed at the time of Eritrean independence shall remain in force until such time that the proclamation

1625 See also Dirar and Teweldebirhan (n 1613) under 6.3 explaining the "disappearance" of the national (legislative) assembly.

1626 Somehow redundantly, Art. 39 para. 2 of Proclamation No. 58/1994 maintained that "[e]xcept for laws, customs and systems explicitly preserved by this proclamation, all land tenure systems previously in application, […] together with their laws and customary procedures are hereby repealed and replaced by this proclamation." and in para. 2 that "[a]ll improvements or systems pertaining to land distribution or administration introduced on the prior system of land tenure in Eritrea by colonial regimes or forces of the Eritrean revolution shall be repealed by this proclamation". See also Art. 42 of the proclamation that contains further repealed provisions.

1627 Constitution of Eritra (n 1615) "All land and all natural resources below and above the surface of the territory of Eritrea belongs [sic] to the State."

1628 Furthermore, there seems to be no independent judicial review process, but the final appeal will go to the "Land Commission", which is directly accountable to the President, Art. 44 and Art. 57 para. 1 Proclamation No. 58/1994.

is implemented in areas of the country in which this proclamation has not yet been implemented".

That regulation, taken at face value, would mean that Eritrea did not consider pre-independence law to have fallen by the way automatically but that it persisted until the new law was implemented. Whether such a provision is in line with the principle of legal security can be questioned. Beyond that, there are serious doubts whether the general procedure of land reform was in line with due process of law. The extent to which practice followed formal law is not clear, and arbitrary execution of the law seemed to be frequent.[1629] In the same vein, Eritrea did not feel bound by concession agreements concluded by Ethiopia and cancelled or re-negotiated them.[1630]

b) Other Issues before the Eritrea-Ethiopia Claims Commission

In 1998, a border war erupted between Eritrea and Ethiopia. To settle civil claims after the conflict, the Eritrea-Ethiopia Claims Commission[1631] (EECC) was established in 2000. As its jurisdiction was confined to the armed conflict, and the commission therefore looked at the cases through

1629 Cf. also critical Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Eritrea' (n 1616) para. 39 "without a clear definition of the purposes and the recognition of applicable human rights standards, reference to prior notification, legal recourse for disputing land expropriation, recognition of the need to find alternatives especially in situations where people are rendered homeless or vulnerable, as well as a process of transparency and participation amongst others, the practice of land expropriations have been rampant and arbitrary in Eritrea." The named legislation has led to serious shortages in an already tense market for accommodation. For an overview see Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Eritrea' (11 May 2020) UN Doc. A/HRC/44/23 paras. 40-42.

1630 Goy, 'L'Indépendance de l'Erythrée' (n 1601), 355. Relevant laws did not contain conclusive provisions for former concessions, but only general rules, see Legal Notice No. 24/1999 Regulations on Petroleum Operations (22 July 1995) OG of Eritrea 5/1995 No. 8 (Eritrea); Legal Notice No. 19/1995 Regulations on Mining Operations (20 March 1995) (Eritrea); Proclamation No. 40/1993 to Govern Petroleum Operations (1 August 1993) (Eritrea); see also Investment Proclamation 18/1991 (31 December 1991) Gazette of Eritrean Laws 1/1991 No. 4 (Eritrea), all available on the website of the Library of Congress https://www.loc.gov/.

1631 For an overview on the Commission Natalie Klein, 'Eritrea-Ethiopia Claims Commission (2013)' in: *MPEPIL* (n 2).

the particular *ius in bello* glasses,[1632] the insights with respect to state succession issues are often limited. Yet, during the war, both states enforced some of the laws they had enacted before or only shortly after independence, i.e. in peace times: The states had been awaiting agreement on final legislation, which was prevented by the outbreak of the war. They thus independently reverted to (previous) laws, which, however, curtailed rights and freedom of individuals and, hence, also came under EECC scrutiny although they had a legal basis outside the war, too. Two points especially are of potential relevance to the topic of acquired rights: property rights of Eritrean and Ethiopian nationals and pensions of Ethiopian civil servants.

aa) Citizenship and Property Rights

When Eritrea was still part of Ethiopia, populations of both entities intermingled on the territory - Eritreans on Ethiopian territory often generating and gaining considerable wealth,[1633] while the economic situation of Ethiopians in Eritrea seems to have been mixed.[1634] Although exact numbers are disputed, it is estimated that, at the beginning of the war, about 100,000 Ethiopians were living on Eritrean territory[1635] and about 500,000 persons of Eritrean ancestry were in the territory of today's Ethiopia[1636]. During the border conflict, both states forcefully evicted thousands of people of the other ethnicity from their territory.[1637] Routinely associated with the evictions were severe restrictions on the property of those deported,[1638] such as the obligation to sell immovable property within short notice as, according to an Ethiopian law from the 1960s, foreigners were not allowed

1632 Cf. *Decision No. 1: The Commission's Mandate/ Temporal Scope of Jurisdiction,* 15 August 2001, UNRIAA XXVI 3 (EECC); *Civilians Claims, Ethiopia's Claim 5,* Partial Award of 17 December 2004, UNRIAA XXVI 249 para. 17 (EECC).

1633 *Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32,* Partial Award of 17 December 2004, UNRIAA XXVI 195 paras. 8-9 (EECC).

1634 *EECC Civilians Claims, Ethiopia's Claim* (n 1631) para. 11.

1635 ibid paras. 6, 71.

1636 *EECC Civilians Claims, Eritrea's Claims* (n 1632) para. 8.

1637 Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Eritrea' (n 1616) para. 46; *EECC Civilians Claims, Eritrea's Claims* (n 1632) paras. 10-11; *EECC Civilians Claims, Ethiopia's Claim* (n 1631) para. 121.

1638 For an overview of all restrictions on property *EECC Civilians Claims, Eritrea's Claims* (n 1632) paras. 123-157.

to own immovable property in Ethiopia.[1639] Sometimes, a 100% "location tax" was imposed on the sales price.[1640] That tax was partly justified by arguing that "persons who acquired land in the course of privatization after the fall of the Mengistu regime in 1991 did not pay for it and so should not benefit from its sale."[1641] When Eritrea complained before the EECC about Ethiopia's ill-treatment of individuals, Ethiopia justified such actions by

> "contend[ing] that, pursuant to its law, the Ethiopian nationality of all Ethiopians who had obtained Eritrean nationality had been terminated and that those expelled were Eritrean nationals, and hence nationals of an enemy State in a time of international armed conflict. It contended that all of those expelled had acquired Eritrean nationality, most by qualifying to participate in the 1993 Referendum. […] its security services identified each expellee as having belonged to certain organizations or engaged in certain types of activities that justified regarding the person as a threat to Ethiopia's security."[1642]

The EECC also found that "[k]ey issues in this claim are rooted in the emergence of the new State of Eritrea, particularly the April 1993 Referendum on Eritrean independence."[1643] Eritrea argued that the mere application for and receipt of the required "Eritrean Nationality Identity Card"[1644] in order to take part in the referendum could not confer nationality on the applicants as Eritrea, at that time, was no independent state.[1645] Furthermore, Ethiopia had actively encouraged participation in the referendum without pointing to the supposed legal consequences.[1646] In fact, until the outbreak of the war, Ethiopia had not attached any consequences to the voting and did not enforce its nationality law.[1647]

The EECC found that the cumulative effects of those measures in many cases meant that people lost virtually all property they had previously owned.[1648] Despite the massive human plight experienced by many deport-

1639 ibid para. 134.
1640 ibid paras. 137-138.
1641 ibid para. 139.
1642 ibid para. 11.
1643 ibid para. 39.
1644 On the background ibid paras. 39-42.
1645 ibid para. 44.
1646 ibid para. 46.
1647 ibid paras. 46, 47.
1648 ibid para. 152.

ed individuals, some of whom had spent their entire lives in the territory of later Ethiopia and had not foreseen the consequences of their participation in the referendum, the commission came to the conclusion that "nationality is ultimately a legal status"[1649] and found that those participating in the referendum had become dual nationals.[1650] Determining that states are free to deport foreigners, also bi-nationals, in times of war, the EECC did not find the deportations themselves to have violated international law, but specific surrounding circumstances to be in violation of international law.[1651] For the property restrictions, the EECC finally concluded that the "cumulative effect" of all of them was contrary to international law.[1652]

Regrettably, as mentioned, the EECC only looked at the measures from the perspective of their legality in wartime, even if many of the laws were adopted years before. In principle, it did not challenge the obligation to sell one's property because of the acquisition of a second nationality. However, even if one agrees with the EECC that every state was free to reserve the right to own property to its own nationals,[1653] that rationale does not automatically justify the *taking* of *already acquired* property merely because a property owner had acquired another nationality. It is thus unfortunate that the EECC did not differentiate between (new) acquisition and (already existing) possession of property, also in war times.

bb) Pensions of Ethiopian Civil Servants

Before separation, several contributory pension schemes had existed for civil servants in Ethiopia. After independence, Eritrea and Ethiopia seemingly cooperated and negotiated to secure the pensions for former Ethiopian state officials now living in Eritrea.[1654] During negotiations on a permanent solution, Ethiopia, under an agreed protocol, paid money to Eritrea, which then paid pensions to the former employees.[1655] Yet, when war broke

1649 ibid para. 51.
1650 ibid.
1651 Cf. ibid para. 82; *EECC Civilians Claims, Ethiopia's Claim* (n 1631) para. 121.
1652 *EECC Civilians Claims, Eritrea's Claims* (n 1632) paras. 151, 152.
1653 ibid para. 135.
1654 *Pensions (Eritrea's Claims 15, 19 & 23),* Final Award of 19 December 2005, UNRIAA XXVI 471 paras. 1-3, 11-12 (EECC).
1655 ibid paras. 13-15.

out, Ethiopia ceased payments.[1656] Before the EECC, Eritrea, besides relying on the existence of a binding international agreement,[1657] considered that withholding the payments to the fund amounted to an unlawful taking of property,[1658] and to unjust enrichment of Ethiopia,[1659] and "that its obligation to pay pensions arose pursuant to customary international law obligations regulating the succession of States"[1660]. Eritrea had argued "that those who paid into these programs acquired rights under Ethiopian law and were 'entitled to the funds accumulated by their years of hard work'."[1661] However, the EECC dismissed that argument. The purported property rights were not considered as concrete enough to be protected by international law, as there was, arguably, no individual right to payment of a pension under Ethiopian domestic law.[1662] With respect to the succession claim, the EECC was "not persuaded that customary international law applicable in situations of State succession allocates to the predecessor State primary responsibility for official pensions when unitary States divide. State practice varies."[1663] Finally, the claim based on unjust enrichment was also dismissed for essentially the same reasons.[1664] The EECC underlined that "[g]iven the doctrine's imprecise and subjective character, it must be applied cautiously".[1665] Eventually, the EECC rejected Eritrea's pension claims in total.

It is important to see that the EECC based its rejection first and foremost on considerations emanating from the laws of war, and not applicable in times of peace. Bearing in mind the violent background of Eritrea's independence, it has to be considered a significant step that the countries agreed on the importance of upholding pensions rights formerly acquired, negotiated a fund, and made the system work for years. Ethiopia repeatedly declared its commitment to the payments had it not been for the war.[1666]

1656 ibid para. 15.
1657 ibid paras. 16-17.
1658 ibid para. 18.
1659 ibid para. 19.
1660 ibid paras. 19, 40.
1661 ibid para. 35.
1662 ibid paras. 35-36. As a second argument, the EECC argued that the termination of the payment was justified by the exigencies of war and therefore not "unlawful". On property rights of the state of Eritrea, ibid paras. 37-38.
1663 ibid para. 41.
1664 ibid para. 43.
1665 ibid.
1666 ibid paras. 20, 44.

The EECC's finding of an insufficient basis of the pension claims in national law could also be seen as an affirmation of a guarantee for private claims that were unambiguously consolidated in national law - a requirement completely in line with the traditional acquired rights theory. Finally, the conclusion that there was no custom obligating *primarily* the continuing state to pay the pensions also does not necessarily militate against a rule of acquired rights. It does not force the conclusion that (potential) private rights have simply disappeared; it simply denies any steadfast customary rule with respect to the partition of debts or responsibility for private claims between the parties.

4) Interim Conclusions

In summary, Eritrea probably assumed continuity of laws and regulations in force on its territory before independence but did not feel bound by it. Especially for land rights, it felt free to enact new laws and to repudiate and abrogate former individual positions under domestic law without compensation - be they individual (customary) land rights or concessions. It seems to have insisted on freeing itself from the perceived colonial bonds and domination by not recognizing former legal positions and keeping as much leeway as possible. Ethiopia, on the other hand, in times of war, disenfranchised many of its (former) nationals by ripping them of the privileges associated with Ethiopian nationality. Yet, until the war broke out, it seemed that both states were aware of the need to negotiate for and agree on regulations protecting individual status, even after separation. Nevertheless, the legal situation in Eritrea remains obscure, due process rights are not in place and law enforcement is arbitrary. In general

> "Eritrea remains a one-man dictatorship [...] with no legislature, no independent civil society organizations or media outlets, and no independent judiciary. Elections have never been held in the country since it gained independence in 1993".[1667]

1667 Human Rights Watch, 'World Report 2021: Eritrea' <https://www.hrw.org/world-report/2021/country-chapters/eritrea>.

The human rights situation in general is distressing.[1668] A new war around the border province of Tigray started in 2020, and it has still not been possible to prevent the conflict from escalating.[1669] Thus, the insights provided by the Eritrean case are limited. Besides the independence of Eritrea constituting a special case close to decolonization scenarios, which brings Eritrea's rejection of former individual rights into the realm of the clean-slate doctrine of newly independent states, a general deficit in the rule of law depicts official actions less as principled measures and more as political *ad-hoc* decisions. That deficit makes general inferences hard to sustain. Neither are the findings of the EECC of great avail to the analysis as the EECC attached much weight to its supposed jurisdiction - the laws of war - and justified many state acts under the *ius in bello* without inquiring into whether those measures were taken as measures of war or were general policies enforced during the war. Yet, its dealing with the question of pension rights of former civil servants showed a certain acknowledgement of protection of rights vested under a national legal order.

VII) The Transfer of Walvis Bay (1994)

1) General Background

Walvis Bay, a deep-sea port on the west of the Namibian coast and its surrounding territory,[1670] was subject to a turbulent colonial history before it was finally made part of Namibia's territory. Annexed by Great Britain in the 19th century, the territory constituted an enclave surrounded by the German colony of South-West Africa and later became part of the Union

1668 ibid.; Human Rights Committee, 'Concluding Observations on Eritrea in the Absence of its Initial Report' (n 1616); Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Eritrea' (n 1628).

1669 Al Jazeera, 'UN Chief Calls for Immediate End to Fighting in Ethiopia: Call Comes with Prime Minister Abiy Ahmed Reportedly on the Front Lines and Men Flocking to Join Military.' (25 November 2021) <https://www.aljazeera.com/news/2021/11/25/un-chief-calls-for-immediate-end-to-fighting-in-ethiopia>.

1670 A detailed definition of the transferred territory, which also included some outlaying islands, is given in Art. 1 of the Treaty on Walvis Bay (28 February 1994), 33 ILM 1528 (Namibia/South Africa) and Art. 1 lit. a) and b) of the Walvis Bay and Off-Shore Islands Act (24 February 1994) OG of Namibia, No. 805 1, 33(6) (1994) ILM 1557 (Namibia).

of South Africa.[1671] After the First World War, Germany had to renounce all titles to its overseas territories, and the mandate for administration over former South-West Africa was given to Great Britain and executed in its name by the Union of South Africa.[1672] When the mandate was revoked in 1966, the question of sovereignty over Walvis Bay became a matter of contention between South Africa, which considered it to be part of its territory, and the UN, which declared Walvis Bay to belong to Namibia, which itself was eligible to self-determination and independence.[1673]

Namibia gained independence from South Africa on 21 March 1990.[1674] Namibia's first constitution[1675] (NC) came into force on the day of its independence, Art. 130 NC. Even then, Art. 1 para. 4 NC defined the Namibian territory as consisting of "the whole of the territory recognised by the international community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis Bay". In the following years, South Africa and Namibia developed diplomatic relations.

1671 Albert J Hoffmann, 'Walvis Bay (2009)' in: *MPEPIL* (n 2) paras. 2-6; Graham Evans, 'Walvis Bay: South Africa, Namibia and the Question of Sovereignty' (1990), 66(3) IA 559 563.

1672 Nele Matz-Lück, 'Namibia (2009)' in: *MPEPIL* (n 2) para. 14; Hoffmann, 'Walvis Bay (2009)' (n 1670) para. 7.

1673 ibid para. 10. On the arguments for both positions John Dugard, 'Walvis Bay and International Law: Reflections on a Recent Study' (1991), 108(1) SALJ 82; Evans, 'Walvis Bay: South Africa, Namibia and the Question of Sovereignty' (n 1670), 563–566. For the UN position cf. UNGA, 'Resolution 32/9 D: Situation in Namibia Resulting from the Illegal Occupation of the Territory by South Africa' (4 November 1977) UN Doc. A/RES/32/9 D especially paras. 6-8; UNSC, 'Resolution 432: On Territorial Integrity of Namibia and Reintegration of Walvis Bay into Namibia' (27 July 1978) UN Doc. S/RES/432. Comprehensively on the status of Namibia after 1945 Matz-Lück, 'Namibia (2009)' (n 1671) paras. 5, 16-40. On the condemnation of South African presence in Namibia UNSC, 'Resolution 276: On Establishment of an Ad Hoc Subcommittee of the Council to Study Ways to Implement Council Resolutions Regarding Namibia' (30 January 1970) UN Doc. S/RES/276; *ICJ South West Africa (Advisory Opinion)* (n 363). See also Graham Evans, 'A Small State with a Powerful Neighbour: Namibia/South Africa Relations Since Independence' (1993), 31(1) The Journal of Modem African Studies 131 133 "The dispute over Walvis Bay [was], in legal terms, basically a conflict between colonial and post-colonial conceptions of the proper mode of territorial acquisition." [footnote omitted].

1674 Matz-Lück, 'Namibia (2009)' (n 1671) para. 52; Hoffmann, 'Walvis Bay (2009)' (n 1670) para. 11; D. J Devine, 'The Relationship between International Law and Municipal Law in Light of the Constitution of the Republic of Namibia' (1994), 26(2) Case W Res J Int'l L 295 297.

1675 Constitution (21 March 1990) OG of Namibia No. 2 1 (Namibia).

They agreed on a joint administration of the Walvis Bay territory from 1992 onwards.[1676] Apparently, a major concern during the negotiations on a transfer was the safeguarding of individual rights of the people living in the Walvis Bay area.[1677] The Treaty on Walvis Bay finally gave the territory to Namibia with effect from 1 March 1994.[1678] Yet, the brief instrument left "any matter relating to or arising from the incorporation/reintegration […] which may require to be regulated and any such matter which has not been settled or finalized by the date of incorporation/reintegration" to future settlement by the parties.[1679] Its provisions were implemented domestically by the Namibian "Walvis Bay and Off-Shore Islands Act" (WB Act)[1680] and the South African "Act to Provide for the Transfer to Namibia of the Territory of and Sovereignty Over Walvis Bay and Certain Islands" (WB Transfer Act),[1681] which elaborated the process in more detail.

2) Domestic Law in Walvis Bay

What is striking is the difference between Namibia's approach towards the "old" South African law in the case of the integration of Walvis Bay and its actions when it became independent from South Africa. According to Art. 2 of the WB Act, unless an exception applied, no other law than Namibian law was to be applied to Walvis Bay. Hence, the default rule did not provide for continuity of the (South African) legal system; it extended Namibia's law to the new territory. That rule largely accorded with the "moving treaty frontiers" rule taken from Art. 15 VCSST. Yet, any potential rupture in the legal environment of those living on the territory was alleviated through several circumstances.

1676 Agreement on the Joint Administration of Walvis Bay and the Off-Shore Islands (1992), 32 ILM 1154 (Namibia/South Africa); cf. Hoffmann, 'Walvis Bay (2009)' (n 1670) para. 12.
1677 ibid para. 13; see also Art. 8-10 Agreement on the Joint Administration (n 1675).
1678 Art. 2 Treaty on Walvis Bay (n 1669).
1679 Art. 4 ibid.
1680 WB Act (n 1669).
1681 Act to Provide for the Transfer to Namibia of the Territory of and Sovereignty Over Walvis Bay and Certain Islands (14 January 1994), 33 1573 (South Africa).

a) The Legacy of the South African Legal Order

First, only four years before the transfer of Walvis Bay, Namibia, when becoming independent, largely adopted the existing (South African) legal order and only adapted it to the new circumstances. According to Art. 143 NC, all international agreements "binding upon Namibia" at the time of independence remained in force for Namibia, subject to contrary decisions by the parliament.[1682] Additionally, in Art. 144,[1683] the NC adopted an "international law friendly" attitude,[1684] in principle directly incorporating general rules of international law and international agreements into the domestic legal order.[1685]

The NC dedicated a whole chapter (Chapter 20, Art. 133-143) to the question of the law in force at the time of independence and transitional provisions. For the domestic legal order, Namibia opted for continuity: Art. 140 para. 1 NC explicitly stipulated that

> "[s]ubject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court".

The stipulation included "South African legislation applicable in Namibia, and the common and customary law then applicable."[1686] Furthermore, powers vested in the official authorities of South Africa were to "be deemed

1682 Cf. Art. 63 para. 2 (d) NC (n 1674). The omission of general rules of public international law from Art. 63 para. 2 (d) may support the view that Namibia assumed to be bound by the customary law existing at the time of its inception regardless of its consent. In more detail Devine (n 1673), 300–303 who apparently assumes that a positive act of the Namibian parliament is required to succeed to international treaties concluded by South Africa. However, the wording of Art. 143 NC (n 1674) "existing international agreements […] remain in force, *unless and until* the National Assembly […] otherwise decides" [emphasis added] leads more to the conclusion that an active act of parliament is requierd for non-continuity.

1683 For more details cf. Devine (n 1673), 306–311.

1684 Cf. ibid 313–314.

1685 But see also the "savings-clause" in Art. 145 para. 2 NC (n 1674), stipulating that "[n]othing contained in this Constitution shall be construed as recognizing in any way the validity of the Administration of Namibia by the Government of the Republic of South Africa or by the Administrator-General appointed by the Government of the Republic of South Africa to administer Namibia." On the pre-independence state of the law Devine (n 1673), 298–299.

1686 ibid 297 [footnote omitted].

to vest" in the respective authorities of Namibia, Art. 140 para. 2 NC, and "[a]nything done under such laws prior to the date of Independence" by the South African authorities was to "be deemed to have been done" by Namibia, Art. 140 para. 3 NC, unless the Namibian parliament repudiated the acts.[1687] That norm was applied in 1991 by the Supreme Court of Namibia in *Minister of Defence v. Mwandinghi*.[1688] The case concerned an appeal against a judgment by the High Court of Namibia[1689] that had held that the new state of Namibia was liable to compensate the respondent for damages sustained due to delicts allegedly perpetrated by South African public officials before independence. The three sitting Supreme Court judges upheld that finding and opined that

> "[t]here can be no doubt that when the delict was committed, the respondent acquired a private right to compensation for damages against the Administration, then in control, of the country. Such private rights do not cease on a change of sovereignty [...] Article 140 of the Constitution of Namibia puts the question of succession beyond any doubt. It makes it clear that the Republic of Namibia is the successor to the administration of the Republic of South Africa in Namibia."[1690]

In light of the situation of Namibia, which had just freed itself from South African occupation, that decision was remarkable. Notably, the court considered state liability claims as civil claims eligible for succession.[1691] On the other hand, it has to be underlined that the court arguably qualified the process of Namibian independence not as a change of sovereignty but as

1687 Accordingly, textual references to South African authorities are deemed to refer to the organs of the new Namibian state, Art. 140 para. 4 NC (n 1674). H. A Strydom, 'Namibian Independence and the Question of the Contractual and Delictual Liability of the Predecessor and Successor Governments' [1989] SAYbIL 111, 113–114 reported that this rule was applied to concessionary contracts as well.

1688 *Minister of Defence v. Mwandinghi* , 1992 (2) SA 355 (NmS), [1993], 25 October 1991, Appeal, ILR, 91 258 (Supreme Court of Namibia).

1689 *Mwandingi v. Minister of Defence* , 1991 (1) SA 851 (Nm), [1993], 14 December 1990, ILR, 91 341 (High Court of Namibia).

1690 *Supreme Court of Namibia Mwandinghi* (n 1687) 359.

1691 Against the background of long opposition against the idea of succession into obligations of state responsibility (see e.g. *Robert E. Brown (US v. GB),* Award of 23 November 1912, UNRIAA, VI 120 (American and British Claims Arbitration Tribunal); Reinisch and Hafner (n 2) 60; Herdegen (n 255) § 30 para. 2), this constitutes a notable finding. For more recent work on the topic of succession to state responsibility see *supra*, footnote 43.

a change of government,[1692] which would indicate state continuity and not state succession.[1693]

Analogous provisions were made for the organization of courts, procedural law, pending actions and the positions of state officials, see, e.g., Art. 138, 141 para. 1 NC. Art. 66 NC clarifies that "[b]oth the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law" unless otherwise regulated by parliament. The list of laws to be repealed contained in Art. 147 NC in combination with Schedule 8 was fairly short and exclusively included "highly political" laws. However, as continuously foreseen in the NC, the legislature after independence was free to alter the *status quo*. Art. 124 NC, in combination with Schedule 5 paras. 1-3, provided for the transfer of government assets, encompassing "movable and immovable property, whether corporeal or incorporeal and wheresoever situate[d]" including "any right or interest therein" originally belonging to South West Africa or other mentioned representative authorities to the new Namibian state "without payment of transfer duty, stamp duty or any other fee or charge". Yet, crucially, "any existing right, charge, obligation or trust on or over such property" was to be maintained and respected, Schedule 5 para. 3.

Hence, the Namibian and the South African legal systems were already fairly similar when Walvis Bay changed from one sovereignty to the other. In fact, the Namibian law that was extended to Walvis Bay under the moving treaty frontiers rule was, in certain areas, probably the same as the law in force in Walvis Bay before.

b) Continuity of Private Rights

The institution of and the subjective right of private property were recognized by Art. 98 para. 2 (b) NC and Art. 16 para. 1 NC, respectively.[1694] Art. 16 para. 2 NC governed expropriations.

1692 *Supreme Court of Namibia Mwandinghi* (n 1687) 360; see also the court's reference there to the ILC's Art. 15 para. 1 Draft Articles on State Reponsiblity that deals with attribution of liability for conduct of an insurrectional movement and the previous state to the new state ibid 360.

1693 See *supra*, Chapter II B) III).

1694 "Foreign investments shall be encouraged within Namibia", Art. 99 NC (n 1674).

Additionally, several provisions of Namibian domestic legislation, especially the WB Act, secured the continuity of rights of individuals living in Walvis Bay. For example, all South African citizens or holders of a legal and valid permanent residence permit ordinarily resident in Walvis Bay on the date of transfer were eligible for a permanent residence permit, Art. 3 para. 1 WB Act. Temporary residence permits for Walvis Bay in force on the date of transfer also remained valid under Namibian law, Art. 3 para. 9 WB Act. Civil and criminal law matters pending at the time of transfer were to be continued, Art. 4 - 6 WB Act. Court acts were to be respected and implemented in Namibia, Art. 8 para. 1 WB Act. That stipulation also held true for acts of South African state officials made before the transfer, Art. 8 para. 2 WB Act, or any "punishment, penalty or forfeiture incurred by or imposed on any person" under the "old" law, Art. 9 WB Act. In particular Art. 11 and 12 of the WB Act provided for a far-reaching upkeep of individual positions. Both articles were lengthy, overly detailed, and seemingly all-encompassing. They explained in broad and possibly partly overlapping provisions a panoply of rights or authorizations conferred under the "old" law to be valid and enforceable under the "new" law. The formalities required under Namibian law were to be approved or accorded by the Namibian authorities, Art. 12 paras. 2, 3 WB Act.[1695] Finally, according to Art. 13 WB Act, also appointments made prior to the effective date

> "of any person under any provision of any such [former] law, except a law governing the government service, […] shall […] continue to remain in force […] *provided the person concerned* […] *continues* […] the trade, profession or occupation in connection with which the appointment was made" [emphasis added].

Those provisions could be evidence of the conviction to uphold as many individual positions as possible. In a sweeping fashion, the continuity of an individual status was guaranteed as long as some minimum requirements were met, e.g., the actual, lawful acquisition of the right under the former law or, to a certain extent, the display of good faith in the stability of that position.

The South African law on implementing the Treaty of Walvis Bay, the WB Transfer Act,[1696] showed remarkably less eloquence on the question of

1695 Any person contemplated there was allowed to make use of the status or right until such authorization is issued, Art. 12 para. 4 WB Act (n 1669).

1696 WB Transfer Act (n 1680).

the fate of individual rights after the transfer. Its reticence is only logical given the circumstance that Art. 3 WB Transfer Act pronounced

> "(a) Walvis Bay shall from the date of transfer cease to be part of South Africa;
> (b) South Africa shall from that date cease to have sovereignty over Walvis Bay; and
> (c) South Africa shall from that date cease to exercise authority in Walvis Bay, except in so far as the Governments may agree otherwise."

In line with those stipulations, "[a]ny legal provision, including any Act of Parliament, in force in Walvis Bay immediately prior to the date of transfer shall, in so far as South Africa is concerned, cease to be of force in Walvis Bay as from that date", Art. 6 WB Transfer Act. Hence, South Africa acknowledged that, from that date, it was in no position to regulate domestic issues in Walvis Bay.[1697]

3) Interim Conclusions

The transfer of Walvis Bay to Namibia is commonly considered a cession of territory. Nevertheless, similar to Hong Kong and Macau, it cannot be understood without knowledge of the country's colonial history. Different to those two latter cases, the legal system in Walvis Bay was not sustained by the Namibian system; it was supplanted by it. However, while in Hong Kong and Macau independent legal systems had emerged over the years, Namibia and South Africa shared a common, oppressive, history and, in particular, a panoply of economic links and interdependencies not easy to

1697 The only provision concerning individual rights was Art. 5 WB Transfer Act concerning South African(!) citizenship. This provision did not contradict the Namibian regulations that only granted the right, not an obligation, to opt for Namibian citizenship. Art. 4 WB Transfer Act, entitled "Saving of certain rights" stipulated that "Land and immovable property situated in Walvis Bay, and any right or interest in such land or property, which on the date of transfer *vest in South Africa* shall continue so to vest until such time as the matter is resolved by the Governments in accordance with internationally recognized laws of State succession and agreements entered into by the Governments" [emphasis added]. Of course, this provision only concerns state property of South Africa and is therefore out of scope of this analysis. Yet, it is interesting that South Africa seemed to have tried to underline its claim to the persistence of its rights.

untangle.[1698] For a long time, the transfer of Walvis Bay was not considered probable.[1699] Furthermore, the friction in the legal system was only minor as Namibia had taken over large parts of the South African law shortly before its own independence. Bearing in mind the violent, colonial historical relationship between the two states and comparable cases of other states' independences (cf. the Kosovo or Eritrea above), it is striking how openly Namibia embraced continuity of a "foreign" system. Furthermore, Namibia showed utmost consideration for legal positions acquired under the former legal order.

VIII) The Transfers of Hong Kong (1997) and Macau (1999)

1) Hong Kong

a) General Background

The territory of Hong Kong, consisting of Hong Kong Island, the Kowloon Peninsula, and the so-called "New Territories", was a British crown colony until 1997.[1700] The (re-) transfer of the territory to the People's Republic of China (PRC) is often considered a case of state succession.[1701] However, as the lawfulness and measure of the British exercise of power over the area is controversial, so is the qualification of the transfer: Chinese authorities

1698 On the relationship between South Africa and Namibia Chris Saunders, 'South Africa and Namibia: Aspects of a Relationship, Historical and Contemporary' (2016), 23(3) SAJIA 347.

1699 Cf. on the relationship still in 1993 Evans, 'A Small State with a Powerful Neighbour: Namibia/South Africa Relations Since Independence' (n 1672).

1700 On the geopolitical and historical background until 1997 Malanczuk, 'Hong Kong (2010)' (n 806) paras. 1-3, 5-36. On the historical development of Hong Kong's autonomy before the transfer, especially with respect to economic and trade concerns Langer (n 810), 314–319. On the law applicable in Hong Kong upon colonization Lo, Cheng and Chui (n 803) 16–24.

1701 *Sanum Investments (PCA)* (n 401) para. 237 with reference to Mushkat (n 616), 191, 193 who, however, considers the HKSAR a "successor" of the UK and does not distinguish between state succession as a replacement of responsibility and a replacement of sovereignty. Yun-Bor Wong, *The Protection of Fundamental Rights in the Hong Kong Special Administrative Region: An Analysis of Transition* (2006) 183; arguably Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294) 432–443; unclear Dörr, 'Cession (2019)' (n 400) paras. 4, 22 "only in part a proper cession".

evaluated the treaty of Nanking ceding the territory of Hong Kong island and following treaties as well as the lease agreements with respect to the other territories to constitute "unequal treaties" not lawfully conferring sovereignty.[1702] After it became clear that the British would not be able to sustain their claim to infinite power over the territory of Hong Kong Island after the lapse of the 99-year lease agreement with China with respect to the "New Territories" in 1997, diplomatic negotiations on a regulated transfer of Hong Kong were initiated.[1703] Those discussions culminated in the 1984 Sino-British Joint Declaration,[1704] a bilateral treaty[1705] between the two states. The declaration speaks of "recovery" of the Hong Kong area and of the "resumption" of sovereignty over Hong Kong by the PRC and that the UK will "restore" Hong Kong to the PRC on 1 July 1997.[1706] That vocabulary did not speak for a real transfer of sovereignty.[1707] Yet, apart from the point that the wording might have been chosen for political and diplomatic reasons, the transfer still falls under the wide definition of succession as contemplated in Art. 2 para. 1 lit. b VCSST.[1708]

The inclusion of Hong Kong within the territory of the PRC again brought up the question of how to cope with the reconciliation of two diametrically different economic and social systems - Hong Kong, one of the most flourishing investment and financial centers of western market economies, and socialist China. The solution chosen in this case has rightly been seen as remarkable and singular: In the Joint Declaration and its annexes, the circumstances of the transfer were hammered out in some detail more than a decade before it actually took place. Under para. 3 of

1702 Cf. Malanczuk, 'Hong Kong (2010)' (n 806) paras. 7-10; Wong (n 1700) 3–19 (both contending that the cessions were legally valid); Langer (n 810), 320; Yunxin Tu, 'The Question of 2047: Constitutional Fate of "One Country, Two Systems" in Hong Kong' (2020), 21(8) German Law Journal 1481 1489–1490.

1703 Malanczuk, 'Hong Kong (2010)' (n 806) para. 31; Lo, Cheng and Chui (n 803) 24. On the history of the (re)-transfer Tu (n 1701), 1484–1490.

1704 Sino-British Joint Declaration (n 709).

1705 Malanczuk, 'Hong Kong (2010)' (n 806) para. 37; Lo, Cheng and Chui (n 803) 24; Wong (n 1700) 20–22, 28; Georg Ress, 'The Legal Status of Hong Kong after 1997: The Consequences of the Transfer of Sovereignty according to the Joint Declaration of December 19, 1984' (1986), 46 ZaöRV 647-699 648; Langer (n 810), 320, 324 with references for the opposite position.

1706 Sino-British Joint Declaration (n 709) 61, paras. 1, 2.

1707 Apparently differently Yash Ghai, 'The Basic Law of the Special Administrative Region of Macau: Some Reflections' (2000), 49(1) ICLQ 183 187 who contends that in this para. the UK would rather have insisted on its claim to sovereignty.

1708 Cf. *supra*, Chapter II B) I).

the declaration, China declared 12 policies to be applicable to Hong Kong: Hong Kong was accorded the status of a "Special Administrative Region" (HKSAR) of mainland China under Art. 31 of the Chinese constitution with its own government.[1709] That autonomous status included far-reaching autonomy rights, such as "executive, legislative and independent judicial power",[1710] but only limited autonomy with respect to "foreign and defence affairs".[1711] Under the "one country - two systems" doctrine,[1712] until 2047, the HKSAR is subject to a special legal regime and insofar not incorporated into the legal and political system of mainland China.[1713] The HKSAR "shall maintain the capitalist economic and trade systems previously practiced".[1714] Obligations deriving from the declaration were implemented domestically by the PRC through the "Hong Kong Basic Law" (HKBL),[1715] a Chinese law ranking below the Chinese constitution, and which partly replicates and partly details the provisions of the declaration.[1716]

1709 Sino-British Joint Declaration (n 709) 61, para. 3(1) (4); cf. also Art. 12 HKBL "The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government."

1710 ibid 61, para. 3(3). On the limitations of this autonomy, especially with respect to the institution of an independent judiciary Björn Ahl, 'Justitielle und legislative Auslegung des Basic Law von Hong Kong: Anmerkung zu den Urteilen des Court of Final Appeal des Sonderverwaltungsgebietes Hongkong vom 29. Januar und 3. Dezember 1999' (2000), 60 ZaöRV 511.

1711 Sino-British Joint Declaration (n 709) 61, para. 3(2); ibid 63–64 Annex I part I, ibid 64 Annex I part II; ibid 64–65 Annex I part III; ibid 68-69 Annex I part XI.

1712 This doctrine was originally invented for Taiwan, but due to the failed attempts to integrate Taiwan into China was then applied to Hong Kong and Macau, Ghai (n 1706), 183; Paulo Cardinal, 'The Judicial Guarantees of Fundamental Rights in the Macau Legal System: A Parcours Under the Focus of *Continuity* and of *Autonomy*' in Jorge C Oliveira and Paulo Cardinal (eds), *One Country, Two Systems, Three Legal Orders - Perspectives of Evolution: Essays on Macau's Autonomy After the Resumption of Sovereignty by China* (Springer 2009) footnote 28.

1713 Lo, Cheng and Chui (n 803) 367–368 even speak of a separate international personality of Hong Kong.

1714 Annex I part VI Sino-British Joint Declaration (n 709).

1715 Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (4 April 1990), 29(6) ILM 1519 (PRC). Cf. for an overview Charlotte Ku, 'Introductory Note' (1990), 29(6) ILM 1511-1513.

1716 Tu (n 1701), 1491–1492; Lo, Cheng and Chui (n 803) 91–98; *HKSAR v. Ma Wai-Kwan et al.* 29 July 1997, 1997 HKLRD 761 (High Court of the Hong Kong Special Administrative Region Court of Appeal) "The Basic Law is not only a brainchild of an international treaty, the Joint Declaration. It is also a national law of the PRC

b) The Continuity of the Hong Kong Legal Order in General

Of special interest for our topicis the declared intent of the Chinese government to leave "[t]he current social and economic systems in Hong Kong [...] and [...] the life-style"[1717] unchanged. Besides a guarantee for compliance to human rights treaties already implemented in Hong Kong, especially the ICCPR and the ICESCR,[1718] the domestic pre-1997 legal system was also, in principle, continued.[1719] Annex I part II to the Joint Declaration, replicated by Art. 8 HKBL,[1720] explains

> "[a]fter the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong (i.e., the common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Hong Kong Special Administrative Region legislature."[1721]

What seems important, but is not obvious from a first unbiased reading of Annex I part II and Art. 8 HKBL, is what is excluded from that take-over: British laws that were not "localized" in Hong Kong, i.e. had not been enacted by Hong Kong authorities.[1722] That limitation becomes more obvious through a comparison with the Sino-Portuguese Declaration signed some years later and discussed below.

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and the constitution of the HKSAR". On possible frictions between the HKBL and the Joint Declaration, Ahl (n 1709).

1717 Sino-British Joint Declaration (n 709) 62, para. 3(5). Cf. also ibid 63 Annex I part I "Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years".

1718 Lo, Cheng and Chui (n 803) 370 speak of "over 300 multilateral treaties that were applicable to Hong Kong prior to the handover". See on the domestic implementation of international treaties *supra*, Chapter III C) II) 4) a) and for bilateral treaties, especially BITs, *supra*, Chapter III C) III) 2) a) ff).

1719 Sino-British Joint Declaration (n 709) 61, para. 3(3) "The laws currently in force in Hong Kong will remain basically unchanged".

1720 On this provision Lo, Cheng and Chui (n 803) 98, 112-113.

1721 Annex I part II Sino-British Joint Declaration (n 709) 64. Cf. also ibid Annex I part II ibid. "The laws of the Hong Kong Special Administrative Region shall be the Basic Law, and the laws previously in force in Hong Kong and laws enacted by the Hong Kong Special Administrative Region legislature as above" and Art. 18 HKBL. The laws in contravention of the Basic Law have to be declared so by the Standing Committee of the National People's Congress, Art. 160 HKBL.

1722 Lo, Cheng and Chui (n 803) 100–101.

According to Art. 160 HKBL, those laws previously in force in Hong Kong "shall be adopted as laws of the Region" and "[d]ocuments, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected".[1723] That wording has been the subject of a major constitutional decision by the Hong Kong High Court in the case of *HKSAR v. Ma Wai-Kwan et al*.[1724] The claimants had argued that, lacking a formal act of adoption, the previously valid common law had not become part of the law of the newly created HKSAR. All three judges in their opinions rejected that argument and held that the law previously in force in Hong Kong was maintained and valid as from 1 July 1997 without any further act of adoption.[1725] A reading of all relevant provisions of the Joint Declaration as well as the HKBL revealed that, by concluding the international agreement and enacting the HKBL, the previous laws were adopted. The word "shall" therefore had to be read "in the mandatory and declaratory sense", not as a future obligation. The court opined that Art. 160 HKBL must not be interpreted in isolation but in conjunction with the other provisions and in light of the general intent of the parties to the Joint Declaration and the object of the Basic Law:

> "[T]he intention of the Basic Law is clear. There is to be no change in our laws and legal system (except those which contravene the Basic Law). These are the very fabric of our society. Continuity is the key to stability. Any disruption will be disastrous. Even one moment of legal vacuum may lead to chaos. Everything relating to the laws and the legal system except those provisions which contravene the Basic Law has to continue to be in force. The existing system must already be in place on 1st July 1997. That must be the intention of the Basic Law."[1726]

Furthermore, notably, the Sino-British Joint Declaration provided for maintaining the whole judicial system except for the to be erected HKSAR

1723 See also Article 144 HKBL "Staff members previously serving in subvented organizations in Hong Kong may remain in their employment in accordance with the previous system". Cp. also Article 142 HKBL on the recognition of professions and professional qualifications.

1724 *HKSAR v. Ma Wai-Kwan* (n 1715).

1725 Arguably differently Tu (n 1701), 1496.

1726 *HKSAR v. Ma Wai-Kwan* (n 1715).

Court of Final Appeal.[1727] According to the aforementioned decision, *HKSAR v. Ma Wai-Kwan et al.*, that maintenance meant keeping in place indictments rendered before the transfer.[1728] Art. 18 HKBL set out that, in principle, national Chinese law "shall not be applied" in the HKSAR. Exceptions were listed in Annex III to the HKBL and were meant to mainly concern matters "outside the limits of the autonomy of the Region" such as "defence and foreign affairs".[1729] Only in circumstances of "a state of war or a turmoil within the Hong Kong Special Administrative Region which endangers national unity or security" could the PCR's government intervene directly.[1730]

c) Individual Rights

Continuity of the legal order included that "[r]ights and freedoms, […] [p]rivate property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law."[1731] In many cases, the Joint Declaration protected rights or legal positions *irrespective* of nationality or even residence. Annex I part XIII of the Joint Declaration stipulated that "[t]he Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and *other persons* in the

1727 Sino-British Joint Declaration (n 709) 64; cf. also Art. 81, 84, 86, 87, 91 HKBL (n 1714).

1728 *HKSAR v. Ma Wai-Kwan* (n 1715).

1729 In fact, the laws enlisted originally in Annex III often less concerned matters of defence or foreign affairs than subjects which "naturally" can only be regulated on the national, not the regional level, such as provisions on the capital, calendar, national anthem and national flag of the PRC and the nationality law of the PRC. Yet, in recent times that list was extended by adding laws such as the Law on Safeguarding National Security in the Hong Kong Special Administrative Region (30 June 2020) G.N. (E.) 72 of 2020, https://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf (PRC)" the lawfulness of which is highly controversial, see e.g. Johannes Chan, 'Five Reasons to Question the Legality of a National Security Law for Hong Kong' *verfassungsblog* (1 June 2020) <https://verfassungsblog.de/five-reasons-to-question-the-legality-of-a-national-security-law-for-hong-kong/>. These are, however, no questions of succession, but of the legality of a later reversal of decisions made at the time of the transfer.

1730 In how far this is currently the case, is a matter of intense debate, see references in ibid.

1731 Sino-British Joint Declaration (n 709) 62, para. 3(5).

Hong Kong Special Administrative Region" [emphasis added].[1732] While only permanent residents held political participation rights, i.e. rights normally reserved to citizens, Art. 26 HKBL, all residents enjoyed the panoply of rights contained in Art. 25, 27-38 HKBL.[1733] As elaborated on in Annex I part IV, pension rights of civil servants were also to be paid "irrespective of their nationality or place of residence".[1734] Interestingly, Art. 40 HKBL dealt with the "lawful traditional rights and interests of the indigenous inhabitants of the "New Territories", which "shall be protected". Hence, many rights, especially civil and social rights of private persons, were guaranteed irrespective of nationality or even the status as a Hong Kong resident.[1735]

The Joint Declaration explicitly, and elaborately, mentioned the continued protection of the right of private property:

> "Rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation (corresponding to the real value of the property concerned, freely convertible and paid without undue delay) shall continue to be protected by law".[1736]

That guarantee was implemented by Art. 6 and 105 HKBL. The latter explicitly extended protection to the "ownership of enterprises and the investments from outside the Region". Yet, surprisingly against that background, Art. 7 HKBL prescribed that all "land and natural resources" within the HKSAR were to be property of the state, and Hong Kong was entitled to grant leases and collect revenues. It foresaw no exceptions to the rule, especially not for the Anglican church, the only private landowner in Hong

1732 Art. 4 HKBL (n 1714) repeats the guarantee. Cf. also Art. 41 HKBL "Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter."

1733 In Hong Kong equal implementation of these rights is in principle guaranteed by the implementation of the ICCPR through the Bill of Rights Ordinance. For the different situation in Macau see *infra*.

1734 Sino-British Joint Declaration (n 709) 65; cf. Article 93, 100, 102 HKBL. This seeming generosity had its reasons in the liberal approach to the takeover of public employees, including foreigners, cf. ibid 65; Joint Declaration goal 4.

1735 On the differences between Macau and Hong Kong in this respect Wang (n 811).

1736 Annex I part VI Sino-British Joint Declaration (n 709). The verbatim reference to the Hull-compensation-standard is striking; cf. also ibid 62, para. 3(5) 5.

Kong.[1737] Para. 6 of the Declaration and its Annex III were dedicated to land leases,[1738] the topic that had been one of the issues originally prompting[1739] the discourse over the fate of Hong Kong after 1997. Para. 1 of Annex III basically provided that

> "[a]ll leases of land granted or decided upon before the entry into force of the Joint Declaration and those granted thereafter in accordance with paragraph 2 or 3 of this annex, and which extend beyond 30 June 1997, and all rights in relation to such leases shall continue to be recognised and protected under the law of the Hong Kong Special Administrative Region."

Paragraphs 2 to 3 of the Annex concerned leases by the British Hong Kong government to be decided after the entry into force of the Joint Declaration. If a lease had expired before 30 June 1997, it could be renewed and should, in principle, be subject to a rent, para. 2, sentences 1-3.[1740] New leases granted before 30 June 1997 were also subject to a rent, para. 3. In no case was such a lease to extend beyond 30 June 2047.[1741] If a lease expired after the date of re-transfer, the law of the HKSAR was to regulate them, para. 2 sentence 4.

As no general (public) pension scheme was implemented in Hong Kong in 1997, pertaining acquired rights issues did not become apparent. The already existing social welfare system was by and large upheld and only reformed in the wake of introducing the general Mandatory Provident

1737 Ghai (n 1706), 188; Paul Fifoot, 'One Country, Two Systems - Mark II: From Hong Kong to Macao' (1994), 12(1) International Relations 25 34. But see also Art. 141 HKBL which determines that "religious organizations shall, in accordance with law, enjoy the rights to acquire, use, dispose of and inherit property and the right to receive financial assistance. Their previous property rights and interests shall be maintained and protected." On the different approach in Macau see *infra*.

1738 Cf. also Artt. 120-123 HKBL.

1739 Malanczuk, 'Hong Kong (2010)' (n 806) para. 33; Tu (n 1701), 1489.

1740 For exceptions cf. Sino-British Joint Declaration (n 709) Annex III para. 2, Art. 123 HKBL.

1741 With this provision the PRC secured its leeway with respect to the territory under state lease.

Fund Schemes Authority in 2000.[1742] The issue was not separately dealt with in the Joint Declaration or the Basic Law.[1743]

2) Macau

a) General Background

Since the 16th century, Macau had been a Portuguese settlement on Chinese soil, therefore even preceding the British presence in Hong Kong. Over the centuries, the relationship of factual power between the PRC and Portugal with respect to the territory shifted and remained largely unsettled.[1744] Analogous to the Hong Kong case, the re-transfer of the territory consisting of the Macau peninsula and the islands of Taipa and Coloane was agreed on and its circumstances settled in a bilateral international agreement, the Joint Declaration on the Question of Macau.[1745] That transfer as well is often discussed under the heading of state succession.[1746] Yet (contrary to

1742 On the Hong Kong pensions and welfare systems Wai K YU, 'Pension Reforms in Urban China and Hong Kong' (2007), 27(2) Ageing and Society 249; Sam W-K Yu, 'Pension reforms in Hong Kong: Using Residual and Collaborative Strategies to Deal with the Government's Financial Responsibility in Providing Retirement Protection' (2008), 20(4) Journal of Aging & Social Policy 493; Nelson Chow and Kee-Lee Chou, 'Sustainable Pensions and Retirement Schemes in Hong Kong' (2005), 10(2) Pensions 137. The pension arrangements for state officials were rather generous, see Annex I part IV Sino-British Joint Declaration (n 709) 65; cf. Article 93, 100, 102 HKBL (n 1714). This is also remarkable as the HKSAR showed a very liberal approach to the takeover of public employees, including foreigners, cf. Sino-British Joint Declaration (n 709) 65 goal 4. Merely the highest official ranks in the public service of the newly built HKSAR could not be held by foreigners; cf. Art. 44, 55, 61, 67, 71, 90, 101 HKBL.

1743 But cf. Art. 36 HKBL "Hong Kong residents shall have the right to social welfare in accordance with law. The welfare benefits and retirement security of the labour force shall be protected by law."

1744 On the history of the Portuguese presence in Macau F. G Pereira, 'Towards 1999: The Political Status of Macau in the Nineteenth and Twentieth Centuries' in Rolf D Cremer (ed), *Macau: City of Commerce and Culture* (2nd ed. API Press 1991) 261; Arnoldo Gonçalvès, 'Les Implications Juridico-Constitutionnelles du Transfert de la Souveraineté de Macao à la République Populaire de Chine' (1993), 45(4) RIDC 817 818–821; Fifoot (n 1736), 25–28; Ghai (n 1706), 185–187; Dieter Kugelmann, 'Macau (2009)' in: *MPEPIL* (n 2) paras. 2-5; Cardinal, 'The Judicial Guarantees of Fundamental Rights in the Macau Legal System' (n 1711) 224–226.

1745 Sino-Portuguese Joint Declaration (n 709) 229, para. 1.

1746 *Sanum Investments (PCA)* (n 401) para. 237; Kugelmann, 'Macau (2009)' (n 1743) para. 13, but under the assumption that no transfer of sovereignty took place.

the Hong Kong case), at least at the time of negotiations about the re-transfer, both parties agreed that Portugal did not possess sovereignty over the territory.[1747] In the Sino-Portuguese Joint Declaration both[1748] countries declare that China "will resume the exercise of sovereignty over Macau with effect from 20 December 1999".[1749] Thus, if succession is understood as a change of sovereignty over a territory,[1750] Macau would not qualify as a case of state succession. It could better be described as a negotiated, consensual solution of a particular remaining from colonial history. Nevertheless, the situation still fits under the wide definition advanced by Art. 2 para. 1 lit. b) VCSST.

The transfer of Macau took place only shortly after the Chinese recovery of Hong Kong and the whole process was closely modelled on that example.[1751] Under explicit reference to the "one country, two systems principle", Macau was also granted the status of a "special administrative region" (MSAR) under Art. 31 of the Chinese constitution and guaranteed far-reaching autonomy rights.[1752] The PRC, again, declared 12 principles as applicable to the territory, principles guaranteed for 50 years.[1753] The PRC introduced a national law, the "Basic Law of the Macau Special Administrative Region of the People's Republic of China" (MBL),[1754] with a drafting process similar to that of the HKBL[1755] implementing the aforesaid goals into the domestic legal order.[1756] Therefore, literature often deals with the

1747 "Chinese territory under Portuguese administration", Pereira, 'Towards 1999: The Political Status of Macau in the Nineteenth and Twentieth Centuries' (n 1743) 273–275; Kugelmann, 'Macau (2009)' (n 1743) para. 7; Ghai (n 1706), 185, 187; Fifoot (n 1736), 25.

1748 In the Sino-British Joint Declaration (n 709) only China had declared that "to recover the Hong Kong area […] is the common aspiration of the entire Chinese people, and that it has decided to resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997."

1749 Sino-Portuguese Joint Declaration (n 709) 229, para. 1.

1750 *Supra*, Chapter II B) IV).

1751 Ghai (n 1706), 183-184, 187; Cardinal, 'The Judicial Guarantees of Fundamental Rights in the Macau Legal System' (n 1711) footnote 28; cf. Fifoot (n 1736), 31.

1752 Sino-Portuguese Joint Declaration (n 709) para. 2 no. 1; ibid Annex I part I.

1753 ibid para. 2 no. 12; ibid Annex I Part I.

1754 Basic Law of the Macau Special Administrative Region of the People's Republic of China (31 March 1993) http://bo.io.gov.mo/bo/i/1999/leibasica/index.asp [in Portuguese]; English version available at https://www.refworld.org/docid/3ae6b53a0.html (PRC).

1755 Tu (n 1701), 1491.

1756 Sino-Portuguese Joint Declaration (n 709) para. 1 no. 12.

cases of Hong Kong and Macau together and highlights their similarities. Yet, it seems important not to neglect that, in each case, negotiations were conducted independently and did not lead to exactly the same outcomes. Both bilateral agreements account for the specificities and distinctive historical facts of the former colonies.[1757] In some respects, the differences are particularly evident in relation to the question of the maintenance of the domestic legal system. The following, therefore, concentrates on the discrepancies of both cases with relevance to the topic of acquired rights and does not reiterate in detail all of the basically analogous provisions.

b) The Continuity of the Macau Legal Order and Individual Rights

With respect to the continuity of the legal order, the Sino-Portuguese Joint Declaration also provides that

> "[t]he current social and economic systems in Macau will remain unchanged, as shall the existing way of life. *The laws in force will remain basically unchanged*. The Macau Special Administrative Region will, in accordance with the law, ensure all the rights and freedoms of the inhabitants and other individuals in Macau."[1758]

While Portugal, at the time of negotiations, had been a party to the ICCPR and ICESCR, it extended, with reservations,[1759] the protection of both covenants to Macau only after the conclusion of the Joint Declaration.[1760] Accordingly, contrary to the Sino-British Declaration, no explicit reference to the two covenants can be found in the Sino-Portuguese Declaration.

1757 For a general overview of the similarities and differences in the legal treatment of both cases see Ghai (n 1706); Fifoot (n 1736).

1758 Sino-Portuguese Joint Declaration (n 709) para. 2 no. 4 [emphasis added]. In Annex I part V, these rights are again enumerated, *inter alia* "the right to own private property, including business undertakings, rights relating to the transfer and inheritance of property and compensation for lawful expropriation".

1759 The reservations concerned in particular the right to self-determination, universal suffrage and immigration policy, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en#6; cf. also Wang (n 811), 568–569.

1760 https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en#6, cf. also Ghai (n 1706), 189; Fifoot (n 1736), 52. This had repercussions for the later MBL (n 1753) and its implementation provisions, see Wang (n 811), 568.

Nevertheless, and insofar in parallel to the Hong Kong example, Annex I part VIII of the declaration provides that "[i]nternational agreements to which the People's Republic of China is not a party but which are implemented in Macau may continue to be implemented".[1761] Art. 40 MBL then makes explicit reference to ICCPR and ICESCR by stipulating, *inter alia*, that

> "[t]he provisions of International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Macao shall remain in force and shall be implemented through the laws of the Macao Special Administrative Region."

While, in principle, Macau follows the Portuguese tradition of a monist system, which directly implements international law,[1762] the provision is interpreted to - exceptionally - require explicit statutory implementation ("transformation") of those conventions to become domestically binding.[1763]

Art. 25 to 39, 41 MBL also guaranteed several individual rights.[1764] Even if Art. 43 MBL provided that "[p]ersons in the Macao Special Administrative Region other than Macao residents shall, in accordance with law, enjoy the rights and freedoms of Macao residents prescribed in this Chapter", in practice, the local implementation of basic rights of foreigners ("non-residents") varied significantly.[1765] The difference arose because local administration interpreted Art. 43 MBL as granting rights to non-residents only if they were explicitly mentioned in the provision.[1766] Persons of Portuguese descent were subject to special protection,[1767] but there was no explicit provision protecting the interests of native inhabitants, as was the case in Hong Kong.

1761 Also Art. 138 MBL (n 1753).
1762 Wang (n 811), 565 with a comparison to Hong Kong.
1763 ibid 566 on the historical background ibid 568, 571.
1764 Even some more than in Hong Kong, cf. Ghai (n 1706), 189. Cf. for a short comparison also Cardinal, 'The Judicial Guarantees of Fundamental Rights in the Macau Legal System' (n 1711) 258. But on the lacunae of that catalogue of rights ibid 253–257.
1765 In detail on the reasons Wang (n 811).
1766 ibid 562, 576.
1767 Sino-Portuguese Joint Declaration (n 709) para. 2 no. 6, Art. 42 MBL (n 1753); see Ghai (n 1706), 194. On the protection of cultural rights cf. Art. 125 MBL.

With respect to which parts of *domestic* law would survive the transfer, the Sino-Portuguese Joint Declaration, in principle, also opted for continuity,[1768] but a slight deviation from the Hong Kong model can be detected:

> "[T]he laws, decree-laws, administrative regulations *and other provisions previously in force* in Macau shall be maintained, save for any that contravene the Basic Law and subject to any amendment by the Macau Special Administrative Region legislature."[1769]

The Sino-*British* Declaration had only maintained "the common law, rules of equity, ordinances, subordinate legislation and customary law" - hence, "localized" laws.[1770] In comparison, the clause in the Sino-*Portuguese* Declaration is broader. The difference can be explained by the circumstance that, in Macau, there were few "local laws" at the time the Sino-Portuguese Declaration was concluded and thus, with only a few exceptions, Portuguese civil law was applied - many of the legislative acts had not even been translated into Chinese.[1771] Hence, while for Hong Kong it was possible to insist on severing the links to the UK's legal order, the continuity of the Macau legal order could only be protected by guaranteeing the survival of (some) Portuguese laws.[1772] Article 145 MBL was an analogous provision to Art. 160 HKBL, setting out that, in principle,

> "the laws previously in force in Macao shall be adopted as laws of the Region […] [d]ocuments, certificates and contracts valid under the laws

1768 Cf. Cardinal, 'The Judicial Guarantees of Fundamental Rights in the Macau Legal System' (n 1711) 231–233. For Chinese laws (exceptionally) applicable to Macau see Annex X to the MBL (n 1753).

1769 Sino-Portuguese Joint Declaration (n 709) Annex I part III [emphasis added]. Cf. in this respect also the wording of Art. 8 MBL (to which Art. 18 MBL referred): "The laws, decrees, administrative regulations and other normative acts previously in force in Macao shall be maintained, except for any that contravenes this Law, or subject to any amendment by the legislature or other relevant organs of the Macao Special Administrative Region in accordance with legal procedures."

1770 Ghai (n 1706), 193 "Acts of the UK Parliament and Orders in Council were excluded"; Jorge C Oliveira and others, 'An Outline of the Macau Legal System' (1993), 23(3) HKLJ 358 374.

1771 Ghai (n 1706), 193; R. Afonso and F. G Pereira, 'The Constitution and Legal System' in: *Cremer Macau* (n 1743) 283 295–296. On the language question still in 1993 Oliveira and others (n 1769), 385–389; cf. Fifoot (n 1736), 32.

1772 However, apparently the Chinese side later insisted on prior consultations and later "approval" of the Portuguese laws, see Oliveira and others (n 1769), 390–391; Afonso and Pereira, 'The Constitution and Legal System' (n 1770) 297.

previously in force in Macao, and the rights and obligations provided for in such documents, certificates or contracts shall continue to be valid and be recognized and protected".[1773]

Again, already concluded land leases were individually mentioned and protected in the declaration and regulated separately in an annex.[1774] Contrary to Hong Kong, in Macau more land was in the hand of private persons. That difference is acknowledged by Art. 7 MBL, which, while also granting the state property to all "land and natural resources", explicitly called for respect of private titles to land recognized before the MSAR was established.[1775] Art. 6 and 103 MBL protected the right to own private property in a broad manner.[1776]

3) Interim Conclusions

In sum, the understanding in the cases of Hong Kong and Macau is not only that these two territories were subject to a special regime but that they, with certain exceptions, continued the preceding legal systems.

1773 Interestingly, contrary to the Hong Kong provision, Art. 145 MBL (n 1753) went on to say that "The contracts signed by the Portuguese Macao Government whose terms of validity extend beyond 19 December 1999 shall continue to be valid except those which a body authorized by the Central People's Government publicly declares to be inconsistent with the provisions about transitional arrangements contained in the Sino- Portuguese Joint Declaration and which need to be re-examined by the Government of the Macao Special Administrative Region" thereby introducing some form of escape clause. On the reasons Ghai (n 1706), 190–191; Fifoot (n 1736), 56–57.

1774 Sino-Portuguese Joint Declaration (n 709) para. 5, Annex I, part XIV, Art. 120 MBL (n 1753). More details were contained in Annex II part II of the Declaration which in large parts mirrored the respective provisions in the Sino-British Joint Declaration (n 709).

1775 Ghai (n 1706), 188.

1776 Cf. Article 103 MBL (n 1753) "The Macao Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property. Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay. The ownership of enterprises and the investments from outside the Region shall be protected by Law."

With respect to international treaties, the widely endorsed provision of Art. 15 VCSST, the "moving treaty frontiers" rule, was not followed:[1777] International covenants implemented in Hong Kong and Macau continued to have effect while international treaties of mainland China were not automatically extended. Admittedly, it is not beyond doubt whether the relatively meticulous regulation of the transfer in the declarations has been chosen in order to deviate from the otherwise automatic consequence of the taking over of the Chinese legal order or whether one or both states felt legally obligated to uphold parts of the legal framework. In that respect, it is instructive to remember that, in one of its reports to the Human Rights Committee, the UK explicitly mentioned the guarantee for continued application of the ICCPR in the Sino-British Declaration.[1778] The mention lends support to the opinion that the UK felt obliged to assure the (at least intermediate) application of the covenant to the residents of Hong Kong.

Beyond that, the general maxim in Hong Kong and Macau was to leave the domestic legal order untouched and hence to provide for legal continuity as far as possible. The private legal order has, by and large, been upheld. Respect for titles to property and land leases were explicitly accounted for in the declarations. Formerly acquired rights and contracts of private individuals were upheld. An exception exists in the case of Hong Kong with respect to property of land, which was solely attributed to the state.

When the cases of Hong Kong and Macau are referred to as state practice with respect to a principle of acquired rights, it is important to take into account their particularities and the caveats with regard to their categorization as proper succession scenarios. Nevertheless, the precedential effect of these relatively recent incidents of a transfer of territory should not be underestimated: The joint declarations were the final outcome of a politically sensitive and diplomatically protracted but nevertheless consensual bargaining process. Compared to other cases of state succession in which the route to be taken had to be worked out within weeks or months, such as Germany, or was only agreed on after succession had already taken place, such as Eritrea or South Sudan, the Sino-British Declaration was negotiated

1777 Tams, 'State Succession to Investment Treaties: Mapping the Issues' (n 316), 339. Differently, but not convincingly, Zimmermann *Staatennachfolge in völkerrechtliche Verträge* (n 294) 449.

1778 UK, 'Fourth Periodic Report: Supplementary Report on the Depedent Territories: Hong Kong' (7 August 1995) Un Doc. CCPR/C/95/Add.5 paras. 372-374.

over about two years,[1779] the Sino-Portuguese one (in large parts replicating it) over roughly one year,[1780] more than a decade before the actual transfer. Furthermore, both are the product of an agreement between a capitalist, western market economy and one of the politically strongest and largest socialist countries in the world. Therefore, the solutions could serve as a blueprint for other countries no matter what political or economical preferences they abide by. China agreed for a period of several decades to grant far-reaching rights to individuals, not on the basis of nationality, reciprocity, or its own policy but on the basis of "inheritance" or "continuity". The persistence of many rights, except of highly political positions such as the right to stand for the highest political offices or to vote, was not made dependent on a specific nationality (neither the Chinese, nor the British nor the Portuguese one).

Of course, the agreement found in the joint declarations was a temporary one. It was clear from the first day of their entry into force that the guarantees for Hong Kong and Macau as autonomous regions, and with it the upholding of so many individual rights under a continuous legal system, were only given for 50 years. Once those 50 years have elapsed, the fate of the "one country two systems" doctrine is unclear. Therefore, the possible change of rights can be seen as delayed, not debarred. Yet, the theory of acquired rights never purported to guarantee the eternal upholding of individual rights but only that the instant change of sovereignty over a territory would not automatically lead to a loss of rights. The new state is as free as the old one to change the law. Yet, through the internalization of the provisions of the joint declarations, a later amendment may well be subject to limits under Chinese constitutional law.[1781]

IX) The Independence of South Sudan (2011)

1) General Background

Even as a colony, the northern and southern part of Sudan were socially and culturally separated by the occupying powers and hence developed

1779 On the phases of the process Tu (n 1701), 1490.
1780 Cf. Fifoot (n 1736), 31; Ghai (n 1706), 186.
1781 Cf. Tu (n 1701), 1524–1525.

disparately.[1782] After the Sudan, inhabited by a panoply of ethnic communities,[1783] became independent of British colonial rule in 1956, bloody civil wars for more autonomy erupted in the south and ravaged the country for decades.[1784] In 2005, the "Comprehensive Peace Agreement" (CPA)[1785] between the Sudanese government and the warring civil fraction of the Sudan People's Liberation Movement was agreed on and its implementation secured by a UN mission.[1786] The CPA, consisting of several agreements, not only contained a cease-fire agreement but also provided for an interim period of six years after which a referendum about the future of the south was to be organized. In fact, in January 2011, an independence referendum was held under international supervision in South Sudan, in which more

1782 Markus Böckenförde, 'Sudan (2010)' in: *MPEPIL* (n 2) para. 3; Remember Miamingi, 'Constitution Making and the Challenges of State Building in South Sudan' in Amir H Idris (ed), *South Sudan: Post-Independence Dilemmas* (Routledge Taylor & Francis Group 2018) 92 94–95; Clayton Hazvinei Vhumbunu and Joseph Rukema Rudigi, 'Sustainability and Implications of the Sudan-South Sudan Secession' (2019), 6(3) Journal of African Foreign Affairs 23 25; Sterio (n 392) 114; Ali S Fadlalla and Mohamed A Babiker, 'In Search of Constitution and Constitutionalism in Sudan: The Quest For Legitimacy and the Protection of Rights' in Lutz Oette and Mohamed A Babiker (eds), *Constitution-Making and Human Rights in the Sudans* (Routledge 2019) 41 45.

1783 Böckenförde, 'Sudan (2010)' (n 1781) para. 1; also, with respect to citizenship issues, Munzoul AM Assal, 'Citizenship, Statelessness and Human Rights Protection in Sudan's Constitutions and Post South Sudan Secession Challenges' in: *Oette/Babiker Constitution-Making and Human Rights in the Sudans* (n 1781) 118 122–123.

1784 For more information Géraldine Giraudeau, 'La Naissance du Soudan du Sud: La Paix Impossible?' (2012), 58 AFDI 61 62–63; Petrus de Kock, 'Southern Sudan's Secession From the North' in: *Pavković/Radan Secession Research Companion* (n 392); Sterio (n 392) 114–115.

1785 Comprehensive Peace Agreement (9 January 2005) https://peacemaker.un.org/node/1369 (Republic of the Sudan/The Sudan People's Liberation Movement (The Sudan People's Liberation Army)). See on the status as a binding international treaty Scott P Sheeran, 'International Law, Peace Agreements and Self-Determination: The Case of the Sudan' (2011), 60(2) ICLQ 423.

1786 ibid 425–427; Böckenförde, 'Sudan (2010)' (n 1781) para. 11; Miamingi, 'Constitution Making and the Challenges of State Building in South Sudan' (n 1781) 97. On the international involvement in the interim process Matthew LeRiche and Matthew Arnold, *South Sudan: From Revolution to Independence* (OUP 2013) 135–138. On the general political background of the peace process Øystein H Rolandsen and M. W Daly, *A History of South Sudan: From Slavery to Independence* (CUP 2016) 133–150.

than 98% of the voters opted for independence.[1787] Accordingly, the state of South Sudan became independent on 9 July 2011. It was admitted to the UN on 14 July 2011.[1788] The emergence of South Sudan is considered a case of separation (or secession).[1789]

The first constitution of the new state after formal independence was the "Transitional Constitution of the Republic of South Sudan"[1790], which entered into force on 9 July 2011, providing for a four-year transitional period until the enactment of a permanent constitution. Yet, additionally, the signing of the CPA six years earlier was a significant step not only for the relations between the two countries but also for the statehood of South Sudan, because it explicitly acknowledged the south's right to self-determination and eventually the consequence of separation. While, at that time, the goal of the interim period was still to convince the Southerners of the advantages of unity and South Sudan formally had not become an independent state, one of the consequences of the acknowledgment was the enactment of the "Interim Constitution of South Sudan"[1791] establishing state institutions such as a government, a legislature, and a judiciary as early as 2005.[1792] The 2005 Interim Constitution was similar to the 2011 Transi-

1787 LeRiche and Arnold (n 1785) 131/132. Official results reprinted in Nadia Sarwar, 'Breakup of Sudan: Challenges for North and South' (2011), 31(1-2) Strategic Studies 224 227–228.

1788 UNGA, 'Resolution 65/308: Admission of the Republic of South Sudan to Membership in the United Nations' (14 July 2011) UN Doc. A/RES/65/308.

1789 Grimmeiß (n 392) 19; Arnauld *Völkerrecht* (n 255) para. 104; Giraudeau (n 1783), 63/64 "sécessions plus 'négociées' que 'déclarées'" [footnote omitted]; Kock, 'Southern Sudan's Secession From the North' (n 1783); Sterio (n 392) 113; cf. Jure Vidmar, 'South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States' (2012), 47(3) Tex Int'l LJ 541; see Hazvinei Vhumbunu and Rukema Rudigi (n 1781), 27–29.

1790 For more information on the instrument, especially its genesis and the provisions for a permanent constitution Daniel Gruss and Katharina Diehl, 'A New Constitution for South Sudan' (2010-2011), 16 Yrbk Islam Mid East L 69-90. Apparently, there are several, slightly different documents accessible online. This work will make reference to the version Transitional Constitution (2011) https://www.refworld.org/docid/5d3034b97.html (South Sudan).

1791 Interim National Constitution (6 July 2005) https://www.refworld.org/docid/4ba74c4a2.html (South Sudan).

1792 On the special character also Gabriel M Apach and Garang Geng, 'Update: An Overview of the Legal System of South Sudan' (September 2018) <https://www.nyulawglobal.org/globalex/South_Sudan1.html>. But cf. on the opposite evaluation by the public, considering 2011 as the decisive date of independence LeRiche and Arnold (n 1785) 142.

tional Constitution, as the latter was developed from the template of the first and is often considered a mere amendment to it.[1793] Even Art. 199 para. 1 lit a), one of the "transitional provisions" of the 2011 Constitution, spoke of "the amended Interim Constitution of Southern Sudan, 2005 [...] which shall thereafter be known as the Transitional Constitution of the Republic of South Sudan, 2011". It is therefore prudent to inspect both instruments and the relevant statutory domestic law of South Sudan, adopted after the CPA.

Additionally, after separation, several unresolved problems between predecessor and successor state necessitated negotiations that led to nine bilateral agreements being signed on 27 September 2012.[1794] The most important amongst them with respect to the question of private rights are the "Framework Agreement on the Status of Nationals of the Other State and Related Matters"[1795] (Nationals' Status Agreement) and the "Framework Agreement to Facilitate Payment of Post-Service Benefits"[1796] (Pensions Agreement). But some provisions of the other agreements are also of relevance to the topic and deserve further analysis.

1793 Apach and Geng (n 1791); cf. Miamingi, 'Constitution Making and the Challenges of State Building in South Sudan' (n 1781) 94, 95, 97-99; LeRiche and Arnold (n 1785) 153; apparently of different opinion Paul Mertenskoetter and Dong S Luak, 'An Overview of the Legal System of South Sudan' (November/December 2012) <https://www.nyulawglobal.org/globalex/South_Sudan.html> "the Interim Constitution was substituted with the Transitional Constitution of the Republic of South Sudan of 2011".

1794 The full text of all agreements can be retrieved online at https://sites.tufts.edu/reinventingpeace/2012/09/27/sudan-and-south-sudan-full-text-of-agreements/ or https://peacemaker.un.org/. An overview of the content of all nine agreements is provided on the website of the embassy of the Republic of Sudan in Oslo at http://www.sudanoslo.no/the-nine-agreements-between-s-ii.html.

1795 Framework Agreement on the Status of Nationals of the Other State and Related Matters (27 September 2012) https://sites.tufts.edu/reinventingpeace/files/2012/09/Nationals-Agreement-2709120001.pdf (South Sudan/Sudan).

1796 Framework Agreement to Facilitate Payment of Post-Service Benefits (27 September 2012) https://sites.tufts.edu/reinventingpeace/files/2012/09/Agreement-on-Post-Service-Benefits-SudanSouth-S0001.pdf (South Sudan/Sudan).

2) The Continuity of the Legal Order in General

Neither constitution contained an explicit provision on how to deal with *international treaties* of the former Sudan.[1797] South Sudan's actual practice after independence was more in line with non-succession: South Sudan *acceded* to some of Sudan's international treaties.[1798] There is no information indicating that South Sudan succeeded to any bilateral investment treaty of Sudan.[1799]

There were, however, provisions on the continuity of the former *domestic* legal order. In so far, the 2005 Constitution was even more telling than the later 2011 one, underlining the former's significance. Its Art. 208 para. 3 stipulated that "[a]ll current laws shall remain in force and all judicial and civil servants shall continue to perform their functions, unless new actions are taken in accordance with the provisions of this Constitution", therefore accepting continuity of the domestic legal order. A further notable feature of the 2005 Interim Constitution was that, in Art. 208 paras. 6 and 7, it provided for its own continuity *after* the foreseen referendum. Irrespective of the outcome of the referendum, the 2005 Constitution was basically supposed to stay in force and only the institutional set-up was open to change. While it seems obvious that a constitution cannot bind the *pouvoir constituant* and the people of an independent South Sudan were free to adopt a new constitutional basis of their community, those provisions paid witness to a clear commitment to continuity of the domestic legal order after separation. Art. 198 of the 2011 Transitional Constitution (entitled "Continuity of Laws and Institutions") in fact replicated Art. 208 para. 3 of the 2005 Constitution when stipulating that "[a]ll current Laws of Southern Sudan shall remain in force and all current institutions shall continue to perform their functions and duties, unless new actions are taken in

1797 There is merely a provision incorporating international human rights obligations of South Sudan directly into the domestic constitution, Art. 31 para. 3 of the Interim Constitution 2005 (South Sudan) (n 1790) and Art. 9 para. 3 of the Transitional Constitution South Sudan (n 1789). On the question whether South Sudan applies a monist or a dualist approach to international law but with ambigious result Ruben SP Valfredo, 'Domesticating Treaties in the Legal System of South Sudan - A Monist or Dualist Approach?' (2020), 28(3) AJICL 378.

1798 For the CAT (n 516) and the CRC (n 574) this happened only in 2015, i.e. years after independence. For more information, especially on human rights treaties, see *supra*, Chapter III C) II) 2) d).

1799 The Investment Policy Hub of UNCTAD only lists two BITs for South Sudan, which both were concluded *after* independence, https://investmentpolicy.unctad.org/international-investment-agreements/countries/196/south-sudan.

accordance with the provisions of this Constitution." In that way, even after a separation, continuity of the domestic legal order was (again) chosen as the default rule.

Moreover, customary, non-written law had played a major role in the south of Sudan before independence. The 2005 (Art. 5 lit. c) and the 2011 (Art. 5 lit. b) constitutions listed as "sources of legislation", besides others, "customs and traditions of the people", thus also upholding traditional customary rights not encapsulated in a written provision. Customary courts, adjudicating alongside statutory courts, were consciously acknowledged in the Southern Sudanese legal system, also after independence.[1800] However, what was not taken over from the Sudanese system was the reliance on Islamic Sharia law. The 2005 Interim Constitution of South Sudan did not mention that source. The 2005 Interim Constitution of the Sudan,[1801] which at the time was still applicable in South Sudan, consciously differentiated between north and south and only for the former area declared Sharia law applicable.

3) Private Rights

a) Property Rights in General

Legislation on property matters was in the competence of South Sudan even before formal independence in 2011, cf. Art. 57 para. 2 in combination with Schedule B Nr. 9 of the 2005 Constitution ("civil and criminal laws and judicial institutions, lands"). The upholding of the "laws of Southern Sudan" therefore should, formally, have left the civil property regime untouched. Furthermore, both constitutions contained an almost identical provision protecting the private right to own or acquire property "regulated by law" and not to be expropriated except by law, in the public interest, and against compensation; confiscations were only allowed by court order, Art. 28 of the 2011 Constitution and Art. 32 of the 2005 Constitution. No-

1800 Apach and Geng (n 1791); International Commission of Jurists, 'South Sudan: Country Profile' (June 2014) 2 <http://www.icj.org/cijlcountryprofiles/south-sudan/>. See also Art. 167 para. 1 of the 2011 Constitution "Legislation of the states shall provide for the role of Traditional Authority as an institution at local government level on matters affecting local communities"

1801 Interim National Constitution (2005) https://www.refworld.org/pdfid/4ba749762.pdf (Sudan).

tably, while the 2005 Constitution had only protected property of "citizens", the 2011 Constitution protected property of all "persons".[1802] Apart from that point, both guarantees had the same scope, and, therefore, the protected property after independence should have been the same as before. Yet, in general, caution is advisable when relying on provisions of the "Bill of Rights" in the South Sudanese Constitution (2011). Art. 44 ("Saving") maintained explicitly that "[u]nless this Constitution otherwise provides or a duly enacted law guarantees, the rights and liberties described and the provisions contained in this Chapter are not by themselves enforceable in a court of law" but were mere guiding principles for state officials. It is therefore open to serious doubt whether people in South Sudan enjoyed a genuine right of property under the constitution.

b) Land Rights

Land ownership proved to be a pivotal issue in the process of South Sudan's state-building. Its importance was due to the historical link between power politics and land administration, especially colonial policies, and the encroachment on land rights of South Sudanese rural communities by the Khartoum government, which became one of the main issues of the civil wars.[1803] Additionally, many people in South Sudan were heavily dependent on land ownership to fulfill their most basic needs such as food and accommodation.[1804] Land reform therefore became one of the main political goals after 2005.[1805] 180 para. 1 of the 2005 Constitution provided for a concurrent competence of the government in Southern Sudan for the "regulation of land tenure, usage and exercise of rights thereon". In 2009, South Sudan

1802 Art. 43 para. 1 of the Intermin National Constitution of Sudan (2005) only protected property rights of citizens.

1803 Peter H Justin and Han van Dijk, 'Land Reform and Conflict in South Sudan: Evidence from Yei River County' (2017), 52(2) Africa Spectrum 3 8–9; World Bank, 'Land Governance in South Sudan: Policies for Peace and Development' (May 2014) Report No. 86958-SS 13, paras. 1-3, 18, para. 22. Cf. David K Deng, 'South Sudan Country Report: Findings of the Land Governance Assessment Framework (Draft)' (January 2014) 11 <http://hdl.handle.net/10986/28520>.

1804 ibid 7.

1805 In more detail Justin and van Dijk (n 1802), 9–11; *World Bank Land Governance in South Sudan* (n 1802) 18-19, paras. 23-26.

enacted the "Land Act",[1806] still in force after independence.[1807] Its named purpose, Art. 3, was to "regulate land tenure and protect rights in land in Southern Sudan". The 2011 Constitution in Art. 169 para. 1 laid out the basic rule that all "land in South Sudan is owned by the people of South Sudan". But according to Art. 170 para. 6, private title to land could, in principle, only be acquired through registration as leasehold tenure or investment land acquired under lease from the government or community, meaning, in practice, that the land was in state possession.[1808] Since that stipulation deviated from that of the former legislation, especially Art. 7 para. 2 "Land Act", which knew freehold rights of private persons, the change lead to frictions in practice.[1809]

As a further, less theoretical consequence of the Sudanese supremacy not recognizing South Sudan "unregistered" land rights,[1810] the three South Sudanese laws paid tribute to already existing customary or "traditional" land rights. In Art. 180 para. 2 of the 2005 Constitution, the government was also held to respect customary land rights. That idea was taken up by Art. 170 para. 7 of the 2011 Constitution and Art. 8 para. 4 of the Land Act. Art. 170 para. 8 of the 2011 Constitution required "[a]ll levels of government" to "institute a process to progressively develop and amend the relevant laws to incorporate customary rights and practices, and local heritage".[1811] The content of Art. 170 para. 9 of the 2011 Constitution was based on Art. 180 para. 5 of the 2005 Constitution:

> "Customary seasonal access rights to land shall be respected, provided that these access rights shall be regulated by the respective states taking

1806 Land Act (2009) https://www.refworld.org/docid/5a841e7a4.html (South Sudan).

1807 Noel J K Ajo, 'Land Ownership and Conflict of Laws in South Sudan' <https://landportal.org/node/13043>.

1808 ibid. "people in power also carefully crafted the Transitional Constitution. It gave the People the right to own the land by one hand and took that right away by the other. It explains that land belongs to the people yet one can only own a lease from the government. The reality is that the government owns the land and all of us today hold leasehold titles over our plots." Therefore, also critical, Justin and van Dijk (n 1802), 21.

1809 Ajo (n 1806). Cp. also *Deng South Sudan Country Report* (n 1802) 12 "Although the Land Act recognizes freehold as a valid form of ownership, there is currently no land held in freehold anywhere in South Sudan". Furthermore, Art. 14 of the Land Act denied "freehold rights" to foreigners, except for investment purposes, Art. 61.

1810 *World Bank Land Governance in South Sudan* (n 1802) 18, paras. 22-23.

1811 But the provision - strikingly - omitted "international trends and practices" which had been included in the former Art. 180 para. 3 in 2005.

into account the need to protect the environment, agricultural production, community peace and harmony, and without unduly interfering with or degrading the primary ownership interest in the land, in accordance with customary law".

Of special importance was that acknowledgment of unregistered rights for traditional communities or tribes in South Sudan. In fact, the accessibility of land rights in South Sudan is, for many, still linked to their belonging to a certain ethnic or tribal community.[1812] Land "continues to be understood in many African countries in terms of social relations rather than as 'property'".[1813] Accordingly, besides public and private land, the 2011 Constitution also knew so-called "community land",[1814] Art. 170 para. 2, which is understood as "all lands traditionally and historically held or used by local communities or their members", para. 5.[1815] Furthermore, "[c]ommunities and persons enjoying rights in land shall be consulted in decisions that may affect their rights in lands and resources", para. 10, and they "shall be entitled to prompt and equitable compensation on just terms arising from acquisition or development of land in their areas in the public interest", para. 11.[1816] While that legislation at first glance seems generous, a comparison with the previous 2005 Constitution reveals that the rights of communities in this respect were in fact curtailed. In the earlier constitution's Art. 180 para. 6, communities and persons enjoying rights in land should not only be consulted but "their views duly taken into account in decisions to develop subterranean natural resources in the area in which they have rights" and, crucially, "they shall share in the benefits of that development" - a phrase that was deleted in 2011.[1817]

1812 Justin and van Dijk (n 1802), 6.

1813 ibid 7 [reference omitted].

1814 On the problems of distinguishing between those different forms ibid 7–8.

1815 With this, the Transitional Constitution South Sudan (n 1789) supposedly party accomplished the task contained in Art. 180 para. 4 of the Interim Constitution 2005 (South Sudan) (n 1790) that "All lands traditionally and historically held or used by local communities, or their members shall be defined, held, managed and protected by law in Southern Sudan." Cf. also Art. 6 paras. 4-7 (n 1805).

1816 Cf. in this respect also Art. 47 of the Petroleum Act (2012) https://s3.amazonaws.com/rgi-documents/e9bdc9a21b51187808eb4a1156e791748c874ba1.pdf (South Sudan).

1817 Furthermore, Art. 183 para. 4 of the Interim Constitution 2005 (South Sudan) (n 1790) maintained that "Any petroleum development in Southern Sudan shall be conducted in a manner that will ensure that: [...] (c) it recognizes and protects rights in land, including customary and traditional land rights; (d) the communi-

In general, an assessment of the continued protection of property rights in practice is hampered mainly for three reasons. First, the law regulating land tenure in South Sudan was not only a mixture of different laws and regulations, both written and customary, from different times, but those laws had also not been made conform and often even contained contradictory provisions.[1818] Second, in South Sudan, a disparity existed between formal law and its actual application.[1819] Much of the law, even the constitution, was not enforced in the whole territory of South Sudan and its contents remained undelivered.[1820] Third, one of the main problems of property protection was the completely underdeveloped system of land registration, leaving large parts of the territory undocumented.[1821] Even if theoretically being committed to "traditional" rights, much of the customary possession of land or premises by individuals and communities, especially in rural areas, remained formally unrecognized,[1822] the notion of "community" not sufficiently defined[1823] and therefore the "taking" of the land or property remained uncompensated.[1824] Apart from those three stumbling blocks, poor administrative practice, ranging from ignorance of the law to corrupt behavior,[1825] a lack of financial resources and skilled personnel, bad administrative organization,[1826] and missing coordinated action led to arbitrary and unpredictable decisions negatively affecting legal security.[1827] Those issues, in turn, exacerbated the housing situation with thousands of homeless or displaced persons. The task of accommodating the housing

ties in whose areas development of subterranean natural resources occurs have the right to participate, through their respective states, in the negotiation of contracts for the development of those resources".

1818 *World Bank Land Governance in South Sudan* (n 1802) xi, para. 6; *Deng South Sudan Country Report* (n 1802) 1.

1819 *World Bank Land Governance in South Sudan* (n 1802) xi, para. 6.

1820 ibid 21, para. 35.

1821 ibid 35, para. 97.

1822 ibid vii, viii, 19-21, paras. 31-33.

1823 ibid 21-22, 34, paras. 39-40, 92-93; *Deng South Sudan Country Report* (n 1802) 4–5.

1824 *World Bank Land Governance in South Sudan* (n 1802) 23-24, paras. 47-48; *Deng South Sudan Country Report* (n 1802) 2.

1825 *World Bank Land Governance in South Sudan* (n 1802) 38-40, paras. 110-125.

1826 ibid 27, paras. 62-63.

1827 On the transparency and fairness of expropriation procedures ibid 36-37, paras. 104-109.

needs of millions[1828] of internally or externally displaced persons after years of war placed a heavy burden on the new country.

In sum, it can arguably be assumed that formal independence in 2011 did not change much in the way of formal property rights, i.e. already registered rights to land, as it did not involve a real change of system. Notably, the 2009 Land Act in Art. 78-83 already contained provisions providing for restitution of property to persons dispelled by the civil war. However, the new country's devastating economic, social, and political situation thwarted actual implementation.

c) Ownership of Natural Resources

When South Sudan became independent, about 75% of the former Sudan's oil resources, its single most important source of revenue, were located in the territory of another state, South Sudan.[1829] Simultaneously, South Sudan was dependent on the North's infrastructure for the transportation and processing of its crude oil. Furthermore, the 2005 CPA, and with it the "Agreement on Wealth Sharing"[1830] providing for a 50/50 share of oil revenue for both states, expired,[1831] and new solutions had to be found. Neither the Agreement on Wealth Sharing[1832] nor the 2005 South Sudanese Constitution[1833] had conclusively settled the topic of ownership or sovereignty over those natural resources. In that respect, important changes were included in the 2011 Constitution. The new provision in Art. 170 para. 4 stipulated that

> "[r]egardless of the classification of the land in question, rights over all subterranean and other natural resources throughout South Sudan,

1828 *Deng South Sudan Country Report* (n 1802) 7, 1 speaks of about four million displaced people.

1829 IMF Middle East and Central Asia Dept. (Chen, Qiaoe), 'Sudan: Selected Issues: Sudan's Oil Sector: History, Policies, and Outlook' (2020), 20(73) IMF Staff Country Reports 28 28 (also in general on the oil industry in both states).

1830 Agreement on Wealth Sharing During the Pre-Interim and Interim Period (Chapter III to the CPA) (7 January 2004) https://peacemaker.un.org/somalia-frameworkwealthsharing2004 (Sudan/The Sudan People's Liberation Movement (The Sudan People's Liberation Army)).

1831 Art. 5 para. 6 ibid. Cf. also Sarwar (n 1786), 232.

1832 Especially Art. 2 para. 1.

1833 Interim Constitution 2005 (South Sudan) (n 1790).

> including petroleum and gas resources and solid minerals, shall belong to the National Government and shall be regulated by law".

It seems that, through that provision in 2011, ownership of all named natural resources was arguably officially transferred to the state and potential pertaining community or private rights were abolished. Even if the stipulations under the heading "Guiding Principles for Petroleum and Gas Development and Management", especially Art. 172 para. 1, spoke of "[o]wnership of petroleum and gas […] vested in the people of South Sudan and […] managed by the National Government on behalf of and for the benefit of the people", it can again be presumed that those resources came under state ownership. In its Art. 7 para. 1, the national South Sudanese "Petroleum Act" from 2012[1834] replicated that fiduciary idea, but in Art. 8 para. 1 ("ownership of Petroleum") used clear language when stipulating

> "[t]he entire property right in and control over petroleum existing in its natural state in the subsoil of the territory of South Sudan is hereby vested in the Government, and shall be developed and managed by the Government, in each case on behalf of and for the benefit of the people of South Sudan."

Art. 175 of the Transitional Constitution urged the establishment of a "national petroleum and gas corporation which shall participate in the […] activities of the petroleum and gas sectors on behalf of the National Government." The stipulation was put into practice by Art. 13 of the Petroleum Act, with which the "Nile Petroleum Corporation" (NILEPET), a South Sudanese state-owned oil company, was established. The sharing and processing of oil became a major bone of contention between predecessor and successor state after 2011, culminating in a complete shut-down of oil production by South Sudan.[1835] The impasse could only be solved in 2012 through the "Agreement Concerning Oil and Related Economic Matters" (Oil Agreement)[1836]. The solution rested on the general proposition that "[e]ach State shall have the permanent sovereignty over its natural resources located in or underneath its territory, including petroleum resources", Art. 2 para. 1 and the application of the territorial principle, Art. 2

1834 Petroleum Act (n 1815).
1835 Rolandsen and Daly (n 1785) 152–153.
1836 Agreement Concerning Oil and Related Economic Matters (27 September 2012) https://sites.tufts.edu/reinventingpeace/files/2012/09/Oil-Agreement-between-SudanSouth-Sudan0001.pdf (South Sudan/Sudan).

para. 3.[1837] The rights of the "Sudan National Petroleum Corporation" (SUDAPET) to the oil sources in South Sudan remained an unresolved issue, and the quarrel led to the first ever arbitration proceedings against the new state.[1838] Unfortunately, the details of the proceedings, especially the award, have remained under closure.[1839]

With respect to private individual rights to South Sudanese oil resources emanating from concession agreements, the "Agreement on Wealth Sharing" in 2004 originally stipulated that "contracts signed before the date of signature of the comprehensive Peace Agreement" should "not be subject to renegotiation", Art. 4 paras. 2 and 4. Instead, when damages and/or violations of rights of third persons had been entailed by such contracts, the government was responsible for remedial measures, e.g., to pay damages, Art. 4 paras. 3 and 5. However, after July 2011, South Sudan changed its attitude. In the 2012 "Petroleum Act",[1840] it enacted a clean slate approach with respect to "old" contracts, thereby repudiating any obligation to be bound by contracts entered into by the Sudanese Republic. It reserved a whole chapter (Chapter XXI) to the topic, one that basically consisted of only one article, Art. 100 on "Transitional Provisions". Essentially, Art. 100 para. 1 unambiguously confirmed that "[t]he Republic shall not assume any obligations or responsibility under or in connection with prior contracts related to petroleum activities, and is not a successor to such contracts." Thus, all such contracts could be put under review or audit, potential concession blocks could be re-organized, the South Sudanese government was not to be responsible for debts or loan agreements formerly entered into, and contracts potentially upheld would have to be approved by the South Sudanese National Assembly, Art. 100 paras. 2-7. In practice, the new state of South Sudan concluded "transitional agreements" with companies

1837 Yet, Art. 14.1 of the Oil Agreement has to acknowledge that "the parties at the time of the signature of this Agreement disagree and reserve their positions with regard to the consequences of the secession […] on Sudapet's participating interests in exploration and production sharing agreements with contract areas located in the RSS, they shall discuss the matter within a period of two (2) months from the signature of this Agreement".

1838 *Sudapet Company Limited v. Republic of South Sudan,* ICSID Case No. ARB/12/26, Award of 30 September 2016.

1839 For the scarce information available see https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/12/26.

1840 Petroleum Act (n 1815).

in possession of oil concessions by Sudan on its territory,[1841] and repeatedly reserved its right to re-negotiate or even cancel concessions granted by the Karthoum government without paying compensation.[1842]

d) The Status of Nationals

Art. 7 para. 2 of the Sudanese 2005 Constitution and Art. 48 para. 1 of the 2005 South Sudan Constitution were based on the *ius sanguinis* principle, granting *Sudanese* citizenship to "[e]very person born to a Sudanese mother or father".[1843] Both constitutions underlined that "[c]itizenship is the basis of equal rights and duties", Art. 48 para. 2 South Sudanese and 7 para. 1 of the Sudanese Constitution. When South Sudan became independent, its population had risen to almost 10 million people,[1844] who came under the *de facto* sovereignty of a new state. In Art. 45 para. 1, the 2011 South Sudan Constitution introduced the South Sudanese nationality, which was granted to "[e]very person born to a South Sudanese mother or father" and reserved the detailed regulation to statutory law.

Since numerous rights were associated with citizen status,[1845] it was obvious that the re-regulation of nationality in both states could lead to

1841 ONGC Videsh Ltd. 'Annual Report 2012-2013' (2012) 142, para. 43.2 <https://www.ongcvidesh.com/wp-content/uploads/2019/05/OVL_Annual_Report_2012-13.pdf>; Christina Forster, 'Malaysia's Petronas Signs Transition Agreement for South Sudan blocks' *S&P Global Platts* (16 January 2012) <https://www.spglobal.com/platts/en/market-insights/latest-news/oil/011612-malaysias-petronas-signs-transition-agreement-for-south-sudan-blocks>.

1842 Cf. Amitav Ranjan, 'Sudan Wants to Redraw ONGC Videsh Oil Contracts' *The Indian Express* (11 October 2011) <https://indianexpress.com/article/news-archive/web/sudan-wants-to-redraw-ongc-videsh-oil-contracts/>; Energy Voice, 'South Sudan to Split Oil Concession as Lawmakers Question Award' (12 September 2014) <https://www.energyvoice.com/oilandgas/64995/south-sudan-split-oil-concession-lawmakers-question-award/>. At least some of the international companies assumed that without such agreement they would not have been able to continue their work on South Sudanese territory, e.g. *ONGC Videsh Annual Report 2012-2013* (n 1840) 142, para. 43.2.

1843 Additionally, Art. 9 para. 3 of the Interim Constitution 2005 (South Sudan) (n 1790) defined all those eligible to vote in the independence referendum and hence contained an early conception of South Sudanese citizenship.

1844 For nos. see https://data.worldbank.org/country/SS.

1845 E.g. while the Transitional Constitution South Sudan (n 1789) guaranteed property rights to every "person", the Interim Constitution Sudan (2005) (n 1800) only protected property rights of "citizens".

frictions or legal gaps and therefore to a loss of rights. The Nationals' Status Agreement[1846] concluded in 2012 between Sudan and South Sudan attempted to alleviate such frictions. Even in its preamble, it set out the general goal of guaranteeing that "Sudanese and South Sudanese people continue to interact with each other and enjoy the freedom to reside, move, acquire, and dispose of property, and undertake economic activities within the territories of the two states". The central provision, Art. 4 para. 1, provided for four basic freedoms each *national* of the two states should enjoy in the respective other state: freedom of residence, of movement, to undertake economic activity, and to acquire and dispose of property.[1847] While those provisions may seem a matter of course, such requirement can become too high a threshold, even an unsurmountable impediment, to the enjoyment of basic rights in a country such as Sudan or South Sudan, where statelessness constitutes a major problem, not least due to the succession scenario.[1848] In the wake of independence, the Sudan, arguably in contravention of its own constitution,[1849] amended its previous laws and declared in Art. 10 para. 2 of its new Nationality Law[1850] that "Sudanese nationality shall *automatically* be revoked if the person has acquired, de jure *or de facto*, the nationality of South Sudan" [emphasis added][1851]. As this stripping of Sudanese nationality happened automatically, and hence irrespective of an actual conferral of South Sudanese citizenship, many

1846 Nationals' Status Agreement (n 1794).

1847 Beyond that, Art. 4 para. 2 of the Nationals' Status Agreement guarantees these freedoms once "exercised" also in case of amendment or termination of the agreement. This constitutes a remarkable expression of states binding themselves beyond the scope of the treaty.

1848 According to the UNHCR still in 2021 about 90% of the population are not in possession of "essential documentation", UNHCR, 'I BELONG: Collective Action Key to Solving Statelessness in South Sudan' (2021) <https://www.unhcr.org/afr/news/press/2021/11/619f992b4/i-belong-collective-action-key-to-solving-statelessness-in-south-sudan.html>; see also UNHCR, 'A Study of Statelessness in South Sudan' (Juba, South Sudan 2017) 2 <https://www.refworld.org/docid/5b1112d54.html>.

1849 As the *ius sanguinis* principle was declared "inalienable" in Art. 7 para. 2 Interim Constitution Sudan (2005) (n 1800).

1850 Nationality Act (2004 (as amended 2011)) http://citizenshiprightsafrica.org/wp-content/uploads/2016/01/Sudan_Nationality_Law_2011_EN.pdf (Sudan).

1851 According to the amended Art. 10 para. 3 Sudan Nationality Act this was even the case when the father of the person had its Sudan nationality revoked because of para. 2. Mike Sanderson, 'The Post-Secession Nationality Regimes in Sudan and South Sudan' (2013), 27(3) JIANL 204 221–222 also argues that this provisions unjustifiably discriminated against Southern people as Sudan's constitution in general provided for the possibility of dual citizenship.

people living in Sudan became, at least for an interim period, stateless and therefore in many respects disenfranchised.[1852] The relative swiftness of the process bereaved most people of the possibility to orderly migrate to their new place of nationality.[1853]

The situation was exacerbated by three factors. First, the rather generous regulation in the new South Sudanese nationality law[1854] and the automaticity of the loss of Sudanese nationality left many people without any choice but to migrate to the South even if they had much stronger ties ("genuine links") with the Sudan than with South Sudan.[1855] Second, the liberal, broad approach of the South Sudanese legislation, legal loopholes, and poorly defined requirements such as "indigenous ethnic community" gave ample discretion to Sudanese authorities on when they could assume South Sudanese nationality without the guarantee of due process.[1856] Third, discriminatory and slow administrative procedures and a general lack of birth certification or registration rendered it almost impossible for many people, especially from nomadic or trans-boundary tribes as well as displaced and economically poor people, to apply for South Sudanese citizenship.[1857] Hence, the regulation in the Nationals' Status Agreement offered relief to people already having formally acquired South Sudanese citizenship or Sudanese nationals not in danger of losing it because not having a link to the Southern territory. The many who - for several reasons - were not as lucky lost many of their formerly enjoyed rights as Sudanese citizens through the combined effect of new nationality legislation in both states.

A completely different approach was chosen with respect to pension claims of state officials, for whom the re-arrangement of nationality laws also had ramifications. After independence, several members of the civil service on both sides had to migrate. The "Framework Agreement to Facil-

1852 ibid 205-206, 208, 228; cf. UNHCR, 'A Study of Statelessness in South Sudan' (n 1847) 35–36.

1853 Sanderson (n 1850), 205–207.

1854 Nationality Act (2011) http://citizenshiprightsafrica.org/wp-content/uploads/2016/01/South_Sudan_Act_2011.pdf (South Sudan) and Nationality Regulations (2011) http://citizenshiprightsafrica.org/wp-content/uploads/2016/01/South_Sudan_Regulations_2011.pdf (South Sudan). On the different bases of South Sudanese citizenship in more detail Sanderson (n 1850), 208–214.

1855 ibid 208, 228.

1856 ibid 205, 208, 213; UNHCR, 'A Study of Statelessness in South Sudan' (n 1847) 16–17.

1857 ibid 19–34; for nomadic tribes Sanderson (n 1850), 220.

itate Payment of Post-Service Benefits"[1858] acknowledged in Art. 2 para. 1 and para. 2 the duty of the two states to "pay Post-Service Benefits […] including pensions and gratuities and other payments due to [their own] eligible and vested current and former Public Servants […] including Public Servants who have become citizens of [the other state and who reside there] or [in] any other country […]" in accordance with their national law. The preamble explicitly used the term "vested rights" and recognized that the agreement was required to protect civil servants' "livelihoods and wellbeing". Hence, with respect to that segment of society, both states acted in a way much more compliant with the idea of acquired rights. Payment of post-service benefits was linked only to former employment, nationality was no eligibility requirement, and a change of nationality was not considered as a ground for exclusion.

e) Other Issues

The "Agreement on Border Issues" (Border Agreement)[1859] and the "Agreement on a Framework for Cooperation on Central Banking Issues" (Banking Agreement)[1860] contained some provisions of minor relevance for acquired rights. Similar to the constitutional provisions, the Border Agreement aimed to safeguard the traditional privileges of ethnic tribes after border delimitation. Art. 14 para. 1 required the parties to the treaty

> "to regulate, protect and promote the livelihoods of border communities without prejudice to the rights of the host communities and in particular those of the nomadic and pastoral communities especially their seasonal customary right to cross, with their livestock, the international boundary between the Parties for access to pasture and water."

In Art. 3 para. 2, the Banking Agreement guaranteed continued operation to commercial banks headquartered in the respective other state. Furthermore "[t]he claims of commercial banks and other financial institutions

1858 Pensions Agreement (n 1795).

1859 Agreement on Border Issues (27 September 2012) https://sites.tufts.edu/reinventingpeace/files/2012/09/Agreement-on-Border-Issues-2709120001.pdf (South Sudan/Sudan).

1860 Agreement on a Framework for Cooperation on Central Banking Issues (27 September 2012) https://sites.tufts.edu/reinventingpeace/files/2012/09/Agreement-on-Banking-2709120001.pdf (South Sudan/Sudan).

against citizens or legal entities of the other State shall be pursued through established, legal and judicial processes of each State", Art. 3 para. 4. In the "The Agreement on Certain Economic Matters" (Economic Agreement),[1861] both states agreed on partitioning external assets and debts. All mutual claims were to be forgone, Art. 5 para. 1 subpara.1, and subpara. 3. With respect to oil-related claims, an analogous provision was contained in Art. 12 para. 1 and 12 para. 2 of the Oil Agreement.[1862] Yet, importantly, both agreements secured that private claims were not touched upon by the decision: The Economic Agreement foresaw in Art. 5 para. 1 subpara. 3 (and the Oil Agreement contained an analogous provision in Art. 12 para. 3) that

> "the provisions […] shall not serve as a bar to any private claimants. The Parties agree to safeguard the rights of private claimants and to ensure that such claimants that [sic] they have the right of access to the courts, administrative tribunals and agencies of each State for the purpose of realizing the protection of their rights."

Furthermore, both treaties even purported to supporting prospective private claims (Art. 5 para. 1 subpara. 4 Economic Agreement and 12 para. 4 Oil Agreement). According to the still prevalent opinion in international legal scholarship, both states would have been free to waive claims of their nationals under international law or at least not to internationally espouse such private claims.[1863] That exemption - notwithstanding serious doubts as to the practical value of such claims in national courts - therefore has to be seen as a considered decision for the states not to avail themselves of the opportunity. On the other hand, such claims naturally were of more concern for the state of Sudan, which had concluded prior contracts or granted concessions, and were subject to definition by national legislation.

4) Interim Conclusions

All in all, the domestic order of the state of South Sudan also showed a remarkable commitment to continuity. While South Sudan favored a clean-

1861 Agreement on Certain Economic Matters (27 September 2012) https://sites.tufts.edu/reinventingpeace/files/2012/09/Agreement-on-Certain-Economic-Matters-27091200001.pdf (South Sudan/Sudan).
1862 Oil Agreement (n 1835).
1863 See *supra*, Chapter III B) I) 1).

slate approach with respect to treaties concluded by its predecessor,[1864] it, in a general and broad manner, took on the former domestic legal order. Of course, that continuity was rendered more natural by the semi-autonomous status of South Sudan after 2005. But its significance is substantial since South Sudan emerged from a violent process of separation. Importantly, Sharia law was never supposed to be part of the South Sudanese legal order. Conversely, non-religious, traditional non-written laws were formally acknowledged. Therefore, written and unwritten domestic rights of people living in South Sudan *prima facie* seemed to be broadly acknowledged and protected, even after independence. Besides those general continuity stipulations, the interplay of specific provisions in the Interim and Transitional Constitution, bilateral treaties with the Sudan, and domestic statutory law paid attention to securing particular individual rights despite separation.

However, protection of property found its limits when it came to implementation, where, in particular, poor administrative practice and a lack of sufficient property registration played a role. Additionally, protection of individuals' rights was considered secondary when it came to topics perceived as being of vital interest to the national interest of the new state of South Sudan. That back seat concerns, especially, natural resources and land, where South Sudan claimed far-reaching ownership rights irrespective of potential pre-existing possessions. The attitude was also reflected in the decision to cancel existing concession rights.

Apparently, both countries anticipated a potential loss of rights from a change of nationality after independence and concluded the "Nationality Agreement" to buffer the problems induced by the renunciation of Sudanese citizenship. Yet, due to the serious statelessness problems on the ground in both countries, that attempt can only be described as a drop in the ocean. While the difficulties encountered due to a restrictive and overly hasty renunciation of nationality by the Sudan primarily concerned people located in the northern territories, the decision led to a serious disenfranchisement of thousands of people.

The mixture of different, sometimes unwritten, sometimes even contradictory, sources of law made their correct application difficult, and there

1864 Also Apach and Geng (n 1791) although without any conclusive evidence for this contention and later talking about South Sudan's alleged "succession" to human rights treaties. Genest (n 953), albeit on basis of a dubious comparison to the case of Yugoslavia.

was a huge gap between law and its practical enforcement by the courts.[1865] In general, minority rights were reported not to be genuinely implemented and their enforcement was weak.[1866]

> "Sudanese constitutions have been used by subsequent regimes as ideological instruments and as a tool of social control […] Sudan has had a number of constitutions but has experienced neither democratic processes of constitution-making nor respect for constitutions in force. This lack of respect for successive constitutions in Sudan reflects a broader disregard for fundamental constitutional principles and the rule of law."[1867]

Still, much has remained in dispute since the independence of South Sudan, especially the distribution of and cooperation on large oil resources in South Sudan and border delimitation. Despite its wealth in natural resources, South Sudan remains one of the least developed countries with a starving population, a lack of infrastructure, changing governments, corruption, and ongoing inter-ethnic rivalries, which have grown into new civil wars leading to permanent insecurity and the inability to fulfil the population's basic needs.[1868] Egregious crimes have again been committed in recent civil wars since 2011, and the human rights' situation remains

1865 *International Commission of Jurists South Sudan* (n 1799) 2.

1866 See Noha I Abdelgabar, Mohamed A Babiker and Lutz Oette, 'Constitutional Dimensions of Minority Rights and the Rights of Peoples in the Sudans' in: *Oette/Babiker Constitution-Making and Human Rights in the Sudans* (n 1781) 139.

1867 Fadlalla and Babiker, 'In Search of Constitution and Constitutionalism in Sudan' (n 1781) 42. Cf. also, critical on the process of constitution making in South Sudan, Gruss and Diehl (n 1789), 90.

1868 In more detail Giraudeau (n 1783); James P McGovern and John Prendergast, 'South Sudan: The Road to a Living Hell, Paved with Peace Deals' *Just Security* (13 June 2022) <https://www.justsecurity.org/81867/south-sudan-the-road-to-a-living-hell-paved-with-peace-deals/?utm_source=rss&utm_medium=rss&utm_campaign=south-sudan-the-road-to-a-living-hell-paved-with-peace-deals>.

alarming.[1869] Some have announced that the youngest member of the world community of states already "failed".[1870]

X) The British Termination of its EU Membership (2020)

1) General Background

The United Kingdom joined the European Communities, the predecessor of the EU, in 1973, but some of the British population retained serious reservations regarding integration into the supra-national organization.[1871] Over the years, dissatisfaction with its EU membership grew as a consequence of the required domestic application of EU policies and rules, especially those on immigration, human rights, and the social security system. In June 2016, the majority of participants in a public referendum voted in favor of leaving the organization. In March 2017, the British government notified the Council of the EU of its intention to withdraw from the Treaty on European Union (TEU)[1872], thereby triggering the process under Art. 50 para. 2 TEU.[1873] After lengthy negotiations with the EU, domestic quarrels in British parliament, and several extensions of the withdrawal period, the UK finally left the EU on 31 January 2020.[1874] The (last-minute) Withdrawal

1869 Human Rights Council, 'Statement of the Chairperson Yasmin Sooka and Members of the Commission on Human Rights in South Sudan' <https://www.ohchr.org/en/statements/2019/09/statement-chairperson-and-members-commission-human-rights-south-sudan-42nd-human>; Commission on Human Rights in South Sudan, 'Ten Years After Gaining Independence, Civilians in South Sudan Still Longing for Sustainable Peace, National Cohesion, and Accountability – UN Experts Note' (9 July 2021) <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=27292&LangID=E>; McGovern and Prendergast (n 1867).

1870 Miamingi, 'Constitution Making and the Challenges of State Building in South Sudan' (n 1781) 106; Giraudeau (n 1783), 79; McGovern and Prendergast (n 1867).

1871 Joris Larik, 'Brexit, the EU-UK Withdrawal Agreement, and Global Treaty (Re-)Negotiations' (2020), 114(3) AJIL 443 445–446; Thomas Oppermann, Claus D Classen and Martin Nettesheim, *Europarecht: Ein Studienbuch* (9th ed. C.H. Beck 2021) § 3 para. 20.

1872 Treaty on European Union (26 October 2012) OJ C 326 13 (2012).

1873 UK, 'Letter from the Prime Minister of the United Kingdom to the President of the European Council' (29 March 2017) European Council Doc. No. XT 20001/17, Annex I <data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf>.

1874 For an overview of the Brexit process see https://www.consilium.europa.eu/en/policies/eu-uk-after-referendum/.

Agreement[1875] (WA) accordingly entered into force on that date.[1876] It is estimated that about 3.7 million EU citizens lived in the UK at the time of the withdrawal,[1877] and that there were about one million Britons living in another EU member state.[1878]

The "taking-back" of sovereignty put into question the existence of (and was in fact intended to terminate) a range of rights conferred by the EU legal order, which ceased to apply to the UK and its citizens.[1879] In the only similar situation, the territory of Greenland (as a part of the sovereign state of Denmark, which is still an EU member state) leaving the EU in 1985,[1880] the European Commission had issued an opinion in which it drew attention to the fact that

1875 Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (24 January 2020) OJ L 29/7 (2020). Even if the UK concluded the agreement with the EU *and* the EAEC, in the following, it will only be referred to the treaty partners of the EU and the UK as the provisions relevant for the present analysis were solely negotiated between those two partners.

1876 It provided for a transition period until 31 December 2020, see Art. 126-132, during which, in principle, EU law continued to apply in and to the UK. Many of the mentioned deadlines refer to the end of this transition period.

1877 UK Office for National Statistics, 'Latest Population Estimates for the UK by Country of Birth and Nationality, Covering the Period From 2004 to the Year Ending June 2021' (25 November 2021). Statistical Bulletin 5–6 <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/ukpopulationbycountryofbirthandnationality/yearendingjune2021>; cf. also Chris Morris and Anthony Reuben, 'Brexit: How Many More EU Nationals in UK Than Previously Thought?' *BBC News* (29 June 2021) <https://www.bbc.com/news/56846637>.

1878 Georgina Sturge, 'House of Commons Briefing Paper: Migration Statistics' (27 April 2021) No. CBP06077 26, 30-31 <https://commonslibrary.parliament.uk/research-briefings/sn06077/>.

1879 Cf. *Andy Wightman and Others v Secretary of State for Exiting the European Union,* C-621/18, 10 December 2018, Reference For a Preliminary Ruling para. 64 (CJEU) „any withdrawal of a Member State from the European Union is liable to have a considerable impact on the rights of all Union citizens, including, inter alia, their right to free movement, as regards both nationals of the Member State concerned and nationals of other Member States".

1880 Greenland left the EU in 1985 and was listed as an "overseas territory". However, Greenland by then was and still is not a sovereign state, but part of the Kingdom of Denmark but has acquired far-reaching autonomy status. Denmark in 2009 even recognized the Greenlanders as an own people and to a certain extent accorded Greenland the right to conduct its foreign relations on its own, cf. Act on Greenland Self-Government (12 June 2009) Act. No. 473, 12; English translation available at https://wwwex.ilo.org/dyn/natlex2/r/natlex/fe/home (Denmark).

> "[i]f Greenland ceased to be a member and withdrew from the territory of the Community, the mutual rights and obligations at present assumed by the Community and by Denmark in its capacity as Greenland's representative internationally and at Community level would *automatically terminate*."[1881]

Therefore, under the heading of "retention of vested rights" the Commission urged that

> "[p]rovision should be made for appropriate measures to protect companies and persons *who have exercised* the right of establishment as well as Community workers employed in Greenland. The extremely small number of persons affected and the case-law of the Court of Justice that has already been established in favour of the retention of pension rights acquired by workers during periods of employment in a territory which has subsequently ceased to belong to the Community give no reason to suppose that there will be any major difficulties in this area, *even if the future status of Greenland were to rule out the principle of free movement*. It would, however, be *preferable* to retain the substance of the Community rules, at least in respect of Community workers employed in Greenland at the time of withdrawal."[1882]

Two lessons can be drawn from that short excerpt. First, the Commission was of the opinion that mutual rights and obligations of Greenland and the EU would terminate *automatically*. Indeed, that automatic termination was the reason the Commission proposed provisions "for appropriate measures to protect companies and persons". Second, rights should not necessarily be secured for all persons but for those "who have exercised the right of establishment" or "[c]ommunity workers employed in Greenland at the time of withdrawal". Because few people were affected, however, there seems to have been no meaningful discussion of the issue at the time.

1881 Commission of the European Communities, 'Opinion on the Status of Greenland 1/83: Commission Communication Presented to the Council on 2 February 1983' [1983] Bulletin of the European Communities Supplement 1/83, Annex I 21 [emphasis added].

1882 ibid. [emphasis added].

That changed for Brexit. The treatment of individuals' rights as a "bargaining chip"[1883] in the negotiations leading to a withdrawal agreement became a major bone of contention. Indeed, a further point why dealing with this case may proof fruitful for this analysis is that, despite the rather exceptional circumstances, or probably exactly because of them, the doctrine of acquired rights was routinely invoked and became a catch word in the discussions. Originally used as an argument by proponents of the "Leave" campaign, it soon was made clear by the "Remainers" that the doctrine of "acquired rights" could not be resorted to as a panacea for all potential unwelcomed drawbacks of Brexit.[1884] Especially in the phase after the notification of withdrawal, facing the (not unwarranted) fear of a "no-deal" Brexit, i.e. the collapse of negotiations on a withdrawal agreement, a vivid scholarly debate had emerged about the persistence of EU-granted rights as "acquired rights" in case of Brexit.[1885] Both houses of the British parliament dealt with the question under the explicit heading of "acquired rights".[1886]

1883 Paolo Sandro, 'Like a Bargaining Chip: Enduring the Unsettled Status of EU Nationals Living in the UK' *verfassungsblog* (13 July 2016) <http://verfassungsblog.de/post-brexit-status-of-eu-nationals-living-in-the-uk-sandro/>.

1884 See on the one side The Daily Telegraph (London), 'Immigration: Let's Take Back Control: Outside the Shackles of the EU, Says Business for Britain, this Country Could Attract the Skilled Workers it Needs From Across the Globe Without the Uncontrolled Pressures of Free Movement' (26 June 2015), and on the other Lisa O'Carroll, 'Would Europeans Be Free to Stay in the UK After Brexit?: The Leave Campaign Insists EU Nationals Already in Britain Would Be Able to Stay – But Immigration Lawyers Say It's Not So Simple' *The Guardian* (22 June 2016) <https://www.theguardian.com/uk-news/2016/jun/22/will-europeans-be-free-to-stay-in-the-uk-after-brexit>.

1885 E.g. Waibel, 'Brexit and Acquired Rights' (n 8), 444; *Fernández/López Garrido Brexit and Acquired Rights* (n 427); Sionaidh Douglas-Scott, 'What Happens to 'Acquired Rights' in the Event of a Brexit?' *UKCLA Blog* (16 May 2016) <https://ukconstitutionallaw.org/2016/05/16/sionaidh-douglas-scott-what-happens-to-acquired-rights-in-the-event-of-a-brexit/> and the references cited in the following.

1886 House of Lords (European Union Committee), '10th Report of Session 2016–17: Brexit: Acquired Rights' (14 December 2016) HL Paper 82 <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/82/8202.htm>; UK House of Commons, 'Research Paper 13/42: Leaving the EU' (1 July 2013) 14–16 <https://commonslibrary.parliament.uk/research-briefings/rp13-42/>; cf. also Vaughne Miller, 'Brexit and European Citizenship' (6 July 2018). House of Commons Briefing Paper 8365 14–15 <https://commonslibrary.parliament.uk/research-briefings/cbp-8365/>.

That debate is significant, as even if it seems to be accepted that a successor state could also take over only specific sovereign rights and obligations over a territory,[1887] Brexit would not fall under the literal definition of state succession as it was not two *states* between which responsibility was transferred.[1888] But even if not constituting a state, the EU is more than an international organization,[1889] i.e. an "organization established by a treaty or other instrument governed by international law and possessing its own international legal personality"[1890]. In fact, it represents the most eminent example of a "supra-national"[1891] organization. In its seminal judgment *Van Gend en Loos*, the CJEU stated that

> "the EEC Treaty [...] is more than an agreement which merely creates mutual obligations between the contracting states. [...] This view is confirmed by the [...] establishment of institutions *endowed with sovereign rights*, *the exercise of which affects Member States and also their citizens*. [...] the Community constitutes a new legal order of international law for the benefit of which *the states have limited their sovereign rights*, albeit within limited fields, *and the subjects of which comprise* not only Member States but also *their nationals*. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also *intended to confer upon them rights which become part of their legal heritage*."[1892]

1887 Delbrück and Wolfrum (n 266) 159, para. 2.b).

1888 Larik (n 1870), 443; Richard J F Gordon and Rowena Moffatt, 'Brexit: The Immediate Legal Consequences' (2016) 66 <https://consoc.org.uk/publications/brexit-immediate-legal-consequences/>. Comparing the process to other cases of succession Larik (n 1870), 443 who positions Brexit in between succession and withdrawal from an international organisations ibid 443–444.

1889 Oppermann, Classen and Nettesheim (n 1870) 25, § 4 para. 21.

1890 Art. 2(a) ILC, 'Draft Articles on the Responsibility of International Organizations with Commentaries' (2011), 2011(II(2)) YbILC 46 40, para. 87. Since the foundation of the European Union by the Treaty of Lisbon in 2009, the organization's status is explicitly provided for in Art. 47 TEU (n 1871).

1891 Term used (even if not only for the EU) by Kirsten Schmalenbach, 'International Organizations or Institutions, General Aspects (2014)' in: *MPEPIL* (n 2) paras. 16-19; see also *Maastricht,* 2 BvR 2134/92, 12 October 1993, BVerfGE 89 155 (German Federal Constitutional Court [BVerfG]) and *Lissabon,* 2 BvE 2/08, 30 June 2009, BVerfGE 123 267 (German Federal Constitutional Court [BVerfG]) "association of states" ("Staatenverbund").

1892 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Tariefcommissie,* C.26-62, 5 February 1963, Reference For a Preliminary Ruling, Slg 1963 1 12 (CJEU) [emphasis added].

Only one year later, the court underlined and extended that finding in its decision in the case of *Costa/ENEL*:

> "The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty *carries with it a permanent limitation of their sovereign rights*, *against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail*."[1893]

The withdrawal of a state from an organization that has been conferred sovereign rights and the power to issue laws and decisions directly binding within the member states, however, was a situation the drafters of the Vienna Conventions apparently did not conceive of.[1894] The exit of the UK from the supra-national EU (Brexit) currently constitutes a unique process. But Brexit involved a change in sovereignty comparable to succession scenarios entailing a comparable issue - whether a state, the UK, can be bound to accept the decisions of *another* sovereign authority, the EU, once that former state has regained the competence for a matter. The issue is different from the case of a treaty withdrawal, where states are supposed to be bound by their *own* former decisions. It is that difference that should be better accounted for than is currently the case when Brexit is discussed from the sole perspective of treaty withdrawal, as it often is.[1895] On the other hand, the UK consciously acceded to the EU, thereby deliberately conferring sovereign rights. That deliberate choice suggests a certain bindingness of

1893 *Flaminio Costa v E.N.E.L.* C-6-64, 15 July 1964, Reference For a Preliminary Ruling, Slg 1964 1251 594 (CJEU) [emphasis added].

1894 The VCSST declares its rules to be applicable to "any treaty which is the constituent instrument of an international organization" or "any treaty adopted within an international organization", but is "without prejudice to the rules concerning acquisition of membership, cf. Art. 4 VCSST. It defines an international organization simply as an "intergovernmental organization", cf. Art. 2 para. 1 lit. n VCSST.

1895 See also Larik (n 1870), 444 positioning Brexit between leaving an international organization and succession; Patricia Mindus, *European Citizenship after Brexit: Freedom of Movement and Rights of Residence* (Springer 2017) 62–63 drawing an analogy to succession; also Victor Ferreres Comella, 'Does Brexit Normalize Secession?' (2018), 53(2) Tex Int'l LJ 139 141 speaking of secession, without, however, further substantiating this proposition. Gordon and Moffatt (n 1887) 66 reject the application of succession rules as "the ultimate locus of sovereignty remains with the Member States", but concede that "the principles underlying the doctrines of non-retrospectivity and concerns of fairness in protecting existing interests are clearly of relevance to the Brexit situation."

obligations deriving from this supra-national order even after Brexit. The case of Brexit therefore can best be described as a case *sui generis*.

Additionally, the rights imperiled in the process of Brexit were not domestic rights *per se*, i.e. rights enacted by a state as part of its domestic legal order; they were rights conferred upon individuals by the EU "supra-national" legal order. They therefore showed a certain resemblance to individual rights granted by international treaties.[1896] On the other hand, at least from the CJEU's perspective,[1897] EU rights - different to other international rights - are directly enforceable and applicable in every member state and hence are part of the national legal orders without the need for any further incorporation. The UK paid tribute to that particularity through the 1972 "European Communities Act" (ECA),[1898] and it was explicitly acknowledged by the UK Supreme Court in its seminal *Miller* judgment.[1899] In that judgment, the Supreme Court upheld the lower court's conclusion that withdrawal from the TEU required parliamentary approval and did not fall under the "royal prerogative"[1900] exactly because such withdrawal would have led to the abrogation of individual rights under UK *domestic* law.[1901] Even if the UK constitutional system provided for a dualist approach to international law, the ECA had the effect not only of implementing EU law but also of making it directly applicable as domestic law as long as the

1896 On the question of the UK's obligations under EU-only or so called "mixed" international agreements after Brexit see Manuel Kellerbauer, 'Art. 50 TEU' in Thomas Liefländer, Manuel Kellerbauer and Eugenia Dumitriu-Segnana (eds), *The UK-EU Withdrawal Agreement: A Commentary* (OUP 2021) paras. 1.45-1.46; Jed Odermatt, 'BREXIT and International Law: Disentangling Legal Orders' (2017), 31 Emory Int'l LRev 1051; Ramses A Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and its Member States' (2018), 55(Special Issue) CML Rev 101; Thomas Voland, 'Auswirkungen des Brexits auf die völker-vertraglichen Beziehungen des Vereinigten Königreichs und der EU' (2019), 79(1) ZaöRV 1.

1897 *CJEU Costa/E.N.E.L* (n 1892) 593 "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States"; *CJEU van Gend en Loos* (n 1891) 12 "rights which become part of their legal heritage".

1898 European Communities Act UK Public General Acts 1972 c. 68 (UK).

1899 *R (on the Application of Miller and Another) (Respondents) v Secretary of State for Exiting the European Union (Appellant),* UKSC 2016/0196, 24 January 2017, [2017] UKSC 5, https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf (UK Supreme Court).

1900 Cf. on the prerogative and its relationship to the theory of dualism ibid paras. 55-56.

1901 ibid paras. 82, 83, 86, 101.

UK remained part of the EU and the act was not repealed by parliament.[1902] Rights conferred by the EU legal order, at least in the UK, therefore took a middle place between purely domestic and purely international individual rights, making this case even more special.

2) Persistence of Individual Rights Derived from EU Law

a) Theoretical Approaches

Soon after the referendum, it became clear, or at least the majority opinion in the legal discourse considered,[1903] that after Brexit, EU law as such would cease to apply and therefore could not protect UK citizens from losing their rights, especially from losing their EU citizenship.[1904] Art. 50 TEU did not confer any specific legal obligations pertaining to individual rights on the

1902 ibid paras. 55, 60-67.

1903 Against, arguing for continuity of EU citizenship Clemens M Rieder, 'The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship: Between Disintegration and Integration' (2013), 37(1) Fordham Int'l LJ 147 172; arguably also Volker Roeben and others, 'Revisiting Union Citizenship From a Fundamental Rights Perspective in the Time of Brexit' (2018), 5 EHRLR 450 458, 466-468.

1904 Phoebus L Athanassiou and Stéphanie Laulhé Shaelou, 'EU Citizenship and Its Relevance for EU Exit and Secession' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 731 740–747, 749-750; Gillian More, 'From Union Citizen to Third-Country National: Brexit, the UK Withdrawal Agreement, No-Deal Preparations and Britons Living in the European Union' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship under Stress* (Brill, Nijhoff 2020) 457 457, 461-462; Gordon and Moffatt (n 1887) 67; Nicolas Bernard, 'Union Citizens' Rights Against Their Own Member State after Brexit' (2020), 27(3) MJECL 302 314; Sionaidh Douglas-Scott, 'Written Evidence Before the European Union Committee of the UK House of Lords' (4 September 2016) AQR0001 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-acquired-rights/written/37921.html>; *Miller Brexit and European Citizenship* (n 1885) 15–16 (with references to the opposite opinion at 16-20); Robert Frau, *Das Brexit-Abkommen und Europarecht* (Nomos 2020) 88; Steve Peers, 'The End - or a New Beginning?: The EU/UK Withdrawal Agreement' (2020), 39 YEL 122 143, 152-154; *Fernández/López Garrido Brexit and Acquired Rights* (n 427) 49; Ignacio Forcada Barona, 'Brexit and European Citizenship: Welcome Back to International Law' (2020), 24 SYbIL 210 212; also on the various initiatives to alleviate the loss Mindus (n 1894) 72–73.

withdrawing state.[1905] Furthermore, the CJEU, sitting as a full court in *Andy Wightman and Others v Secretary of State for Exiting the European Union*, maintained that

> "since citizenship of the Union is intended to be the fundamental status of nationals of the Member States [...] any withdrawal of a Member State from the European Union is liable to have a considerable impact on the rights of all Union citizens, including, inter alia, their right to free movement, as regards both nationals of the Member State concerned and nationals of other Member States."[1906]

As a consequence, attention turned from (supra-national) EU law to international law and its capacity to secure individual rights in that situation. As could have been expected with respect to a topic having always been "replete of controversy" and being discussed in the middle of political upheaval, the issue was approached in different ways, partly overlapping, partly contradicting each other. Even if the EU and UK were successful in concluding a withdrawal agreement also covering that field, several good reasons remain for giving a short overview of the ideas advanced beforehand and analyzing them for their cogency and practicability. First, the WA did not comprehensively cover all issues related to individual rights potentially falling under the doctrine of acquired rights. Second, it seems important to analyze the international legal situation outside the agreement to grasp the potential evolution of general international law binding on the EU or the UK apart from the WA. While the rules agreed in a treaty may reflect the legal obligations of states or international organizations, that congruency should not lightly be assumed. Moreover, such an analysis may provide tools to categorize, interpret, and evaluate the WA. Additionally, it is likely that the drafters of the WA were influenced by the legal discourse and theories advanced before.

On the one side of the spectrum, in the Brexit case, academics drew a sober picture of the extent to which the doctrine of acquired rights protected individuals.[1907] Referring back to authorities such as *Lalive* and

1905 Piet Eeckhout and Eleni Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading' (2017), 54(3) CML Rev 695 706, 718; Kellerbauer, 'Art. 50 TEU' (n 1895) para. 1.08; cf. also *CJEU Wightman* (n 1878) para. 50.

1906 ibid para. 64.

1907 E.g. Sionaidh Douglas-Scott and Vaughan Lowe, who were invited to give oral and written evidence before the UK House of Lords European Union Committee, see following quotes.

O'Connell and consequently to their definitions from the 1950s to 1970s, the proponents of that argument maintained that the doctrine would only protect a small portion of domestic property rights and therefore would not be applicable to most rights protected by the EU legal order.[1908] Art. 70 para. 1 lit. b) VCLT, in line with the argumentation in this book, was discarded as only protecting rights of the states party to the treaty.[1909] Salvation could, at the most, be found in the UK's still existing obligations under the ECHR.

At the opposite end of the spectrum, authors argued that all rights conferred under the EU order would survive Brexit. One line of that argument, often with (superficial) reference to similar discussions on withdrawal from human rights treaties, contended that Union citizenship, as a package of rights conferred by EU law, could not be taken away at discretion after Brexit as Union citizenship constituted a "fundamental status" or even a

1908 Lowe, 'Written Evidence Before the European Union Committee of the UK House of Lords' (n 47) paras. 5-11. A more comprehensive list is contained in Vaughan Lowe, 'Supplementary Written Evidence Before the European Union Committee of the UK House of Lords' (28 September 2016) AQR0003 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-acquired-rights/written/39768.html>. Extensively referring to Lalive, Douglas-Scott, 'Written Evidence Before the European Union Committee of the UK House of Lords' (n 1903). Primarily talking about the traditional rights mentioned by O'Connell, Douglas-Scott, 'What Happens to 'Acquired Rights' in the Event of a Brexit?' (n 1884). Similar, covering more precedents, but less stringent and less persuasive *Fernández/López Garrido Brexit and Acquired Rights* (n 427) 11, 19, 21, 40, 44, 57, 59, 60 who deny almost all relevance of the doctrine of acquired rights under international law. See also Forcada Barona (n 1903), 231 "Obviously, the international law doctrine of acquired rights, only by the absurdity of wanting to be applied to a political decision of a democratic character that affects millions of people, did not have much used as a limit to the loss of citizenship rights associated with Brexit, and was soon discarded by almost all commentators" [footnote omitted].

1909 Lowe, 'Written Evidence Before the European Union Committee of the UK House of Lords' (n 47) paras. 24-27; Douglas-Scott, 'Written Evidence Before the European Union Committee of the UK House of Lords' (n 1903); Douglas-Scott, 'What Happens to 'Acquired Rights' in the Event of a Brexit?' (n 1884); *Miller Brexit and European Citizenship* (n 1885) 14; Gordon and Moffatt (n 1887) 66; Waibel, 'Brexit and Acquired Rights' (n 8), 443; *Fernández/López Garrido Brexit and Acquired Rights* (n 427) 31, 58 "Anything else is groundless speculation about a sentence taken out of context"; Mindus (n 1894) 62. In detail on the discussion with respect to Art. 70 VCLT see *supra*, Chapter III C) II) 2) f).

"fundamental right".[1910] The argument was built on the assumption that securing Union citizenship meant securing the rights associated with it. However, since that argument cannot convincingly provide a basis for a right to Union citizenship outside the EU treaties,[1911] it collapses as soon as one has to admit that there is no absolute international right to a specific nationality and UK citizens would not become stateless through the loss of EU citizenship. Even if such a right did exist, it is not sufficiently proven that EU citizenship would in fact be "unreasonable", i.e. did not have a legitimate aim, was disproportionate, or otherwise "inappropriate, unjust, illegitimate or unpredictable",[1912] especially in light of the deliberate inclusion by all EU member states of Art. 50 in its present form into the TEU via the treaty of Lisbon[1913]. It is thus important to distinguish between Union citizenship and its pertaining rights:[1914]

> "The debate about associate or continuing EU citizenship is a distraction. It's not the label that matters. Rather, the core issue is protecting people whose rights are withdrawn while they are exercising them or who are discriminated against on grounds of their nationality as a result of the withdrawal process."[1915]

Arguments advocating the upholding of rights are often supported by relying on Art. 70 para. 1 lit. b) of the VCLT.[1916] Individual rights acquired

1910 E.g. William T Worster, 'Brexit and the International Law Prohibitions on the Loss of EU Citizenship' (2018), 15(2) IOLR 341; Roeben and others (n 1902); Minnerop and Roeben (n 429), 486.

1911 Arguments based on the EU Rights Charter (n 577), e.g. brought forward by Roeben and others (n 1902), 460–463, can be discarded because the Charter will not be applicable in the UK after Brexit and the ECHR does not know an unqualified right to a nationality. The argument in Minnerop and Roeben (n 429), 486 is also based on "higher-ranking principles of EU-law" that are not applicable to the UK after Brexit.

1912 See for this standard and pertaining case law Worster (n 1909), 346, 361-362; cf. also Roeben and others (n 1902), 459–460.

1913 Art. 1 para. 58 of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community (17 December 2007) OJ C 306 1 (2007).

1914 Gordon and Moffatt (n 1887) 50–51.

1915 More, 'From Union Citizen to Third-Country National' (n 1903) 479.

1916 Peers (n 1903), 134; Roeben and others (n 1902), 470–471. Sympathizing with this approach Stijn Smismans, 'EU Citizens' Rights Post Brexit: Why Direct Effect Beyond the EU is Not Enough' (2018), 14(3) EuConst 443 447/448 and footnote 9; similar Peers (n 1903), 134 "while the VCLT provisions concerning retention of rights in the event of termination of a treaty, or the ban on reprisals in the event

under *international* treaties are assumed to be protected by the provision. That opinion bypasses the ILC's commentary that Art. 70 para. 1 lit. b) VCLT is only concerned with states' rights and not "vested rights of individuals"[1917] by arguing that what is at stake are not "vested rights" in the traditional sense. Rights derived from international law could nevertheless exist besides states' rights.[1918] However, that approach is, again, too general when postulating that - the much more nuanced - Art. 70 para. 1 lit. b) VCLT prohibits "any retroactive effect"[1919] without even distinguishing between executed or executory rights.[1920] In essence, what proponents of that reading of Art. 70 para. 1 lit. b) VCLT attempt to do is to convert a treaty rule into a customary rule without showing sufficient state practice.

In his article named "Brexit and Acquired Rights",[1921] *Waibel* advocates a strain of argument that asserts to take a possible evolution of the doctrine of acquired rights into account. He explicitly refers to the theories of *O'Connell*, *Lalive*, and *Kaeckenbeeck*, which understand acquired rights as a factual situation that has to be recognized.[1922] He acknowledges that "the scope of acquired rights protection under customary international law evolves over time."[1923] Therefore, he argues that "public" rights nowadays may be encompassed by the doctrine, too,[1924] and that succession is a scenario so close to Brexit that its rules may be applied analogously.[1925] Apart from the fact that the public-private distinction had already been abandoned by some "classic" authors,[1926] unfortunately, *Waibel* (in his admittedly short

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that a treaty of a 'humanitarian character' is terminated for a material breach, arguably do not literally cover those covered by the citizens' rights rules, it could be argued that in conjunction with the EU law principle of legitimate expectations, such rights cannot be removed." [footnotes omitted].

1917 See in more detail *supra*, Chapter III C) II) 2) f) aa).

1918 Minnerop and Roeben (n 429), 479–480.

1919 ibid 475.

1920 See the general statements at ibid 477, 485, 487, 489 or the unclear reference to "situations that commenced" at ibid 481.

1921 Waibel, 'Brexit and Acquired Rights' (n 8).

1922 ibid 442.

1923 ibid 444.

1924 ibid.

1925 ibid 442 "If private rights are protected in the more disruptive scenario of state succession where sovereignty changes hand and new states emerge or old states disappear, acquired rights should be protected even more so in the less disruptive scenario of a state withdrawing from the European Union"; similar Mindus (n 1894) 62–63.

1926 See *supra*, Chapter I C).

piece) does not explain whether, why, or how that evolution might have come about. Additionally, he, somehow contradictory, clings closely to the traditional definitions of acquired rights, e.g., *Lalive*'s exclusion of "rights of a public or political character" from protection.[1927] *Waibel* is not completely clear on how acquired rights are determined and how any requirements might interact. At times, he relies on the distinction between "liquidated" and "unliquidated" claims.[1928] Simultaneously, he qualifies "[t]he economic freedoms under the EU treaties and the permanent right to live and reside in the host member country following five years of residency" as acquired rights because of their "considerable monetary value"[1929] without inquiring why that requirement is (still?) relevant at all. His choice of rights purported to survive the change thus seems random.

What all these mentioned approaches have in common is that they confine the doctrine of acquired rights to its traditional, "old" enunciation and do not sufficiently ponder a possible evolution or the reasons for its former definition.[1930] However, in the following, as in the whole of this analysis, in order not to foreclose the possibility of a further evolution of the definition, the term "acquired rights" will be used in a broad sense, meaning all individual rights acquired in the domestic legal order of a state and eligible for protection in a case of a change in sovereignty. Consequently, it is proposed that the whole discussion on the protection of essential rights granted by the EU legal order in the Brexit process is concerned with acquired rights.[1931] The proposal entails that, to grasp the complete picture of such a rule, all arguments purporting to a survival of individual EU rights after Brexit should be taken into account, no matter whether they come from other areas of international law or involve the term "acquired rights". What should therefore also be considered are arguments relying on existing *duties of the EU and the EU27* under EU and international law

1927 Waibel, 'Brexit and Acquired Rights' (n 8), 443–444.
1928 ibid 444.
1929 ibid.
1930 Minnerop and Roeben (n 429) even explicitly discard the doctrine of acquired rights only to in turn advocate a protection of all individual EU-citizens' rights after Brexit. A similar unduly narrow stance is taken by *Fernández/López Garrido Brexit and Acquired Rights* (n 427) 55 "We agree with that recommendation, which implies accepting the status quo at the time of the UK's formal withdrawal with regard to the citizens who enjoy today, and will enjoy up to the date of the UK's withdrawal, European citizenship rights in the UK and in the EU (the British). In other words, as if they were 'acquired rights', even if they are not."
1931 Such understanding is shared by Bernard (n 1903); Mindus (n 1894).

related to securing basic individual rights during the negotiations of the WA.[1932] Those duties include constitutional principles and values of the EU itself such as legal security, the rule of law, and basic human rights. What makes the approach particularly interesting is that it advocates an international obligation to secure rights of individuals *against their own home state*. That approach brings such rights close to human rights even if the rationale of the duty supposedly lies in objective principles of the EU legal order.

As mentioned, many of these arguments can, be brushed aside *for the UK* if one agrees that the EU law itself, and therefore its particularities and rules, will not apply in the country after Brexit and as long as no external, customary rule transposing the rights or obligations is proven. In turn, the ECHR has been routinely mentioned by many authors as a "fall-back" position when it comes to the rights of EU citizens against the post-Brexit UK.[1933] Especially the ECtHR's jurisprudence on Art. 8 ECHR, the right to family life, is used as an argument for a persistence of residence and/or working rights once acquired.[1934] Tellingly, the ECtHR's decision in *Kurić*, already analyzed with respect to the situation of Slovenian independence,[1935] was often presented in the Brexit discourse as evidence that civil status cannot be taken away without reasonable grounds.[1936] Yet, it has to be underlined that even the ECHR is not directly applicable in the UK but only through the (domestic) Human Rights Act. The UK can repeal the Human Rights Act at its will at any time and UK judges are domestically not obliged to follow the jurisprudence of the ECtHR nor allowed to declare invalid a parliamentary law if they find it to be in violation of the ECHR.[1937]

1932 E.g. Bernard (n 1903), 323; on the EU's duties while negotiating the agreement Kellerbauer, 'Art. 50 TEU' (n 1895) para. 1.34.

1933 Mindus (n 1894) 104; Gordon and Moffatt (n 1887) 62–64; Vaughan Lowe, 'Oral Evidence', *Examination of Witnesses, Public Record of Oral Evidence Before the Justice Sub-Committee* (2016) „the international law doctrine of acquired rights is pretty well eclipsed by the protection given by the European Convention on Human Rights, for example. There is no obvious reason why anyone would try to rely on the acquired rights doctrine, rather than rely on the European Convention". More cautious Douglas-Scott, 'Written Evidence Before the European Union Committee of the UK House of Lords' (n 1903).

1934 Eeckhout and Frantziou (n 1904), 719–723.

1935 *ECtHR Kurić and Others* (n 1364).

1936 Bernard (n 1903), 313, 314/315; Mindus (n 1894) 68–69.

1937 See information provided by the UK Supreme Court at https://www.supremecourt.uk/about/the-supreme-court-and-europe.html.

Hence, also the ECHR, faced by a - potential - domestic unwillingness to afford protection to the mentioned rights, would not be a steadfast guarantee for EU or British citizens.[1938] Against that background, it seems of special significance that *Gordon and Moffat* indicate that the principles of legal security and legitimate expectations are also well entrenched in British administrative law and could potentially offer an avenue for individual redress after Brexit.[1939] Crucially, as a common denominator, almost all theories advocating for the upholding of EU rights refer to the protection of legitimate expectations or legal security as recurrent points, either as an independent or as an additional argument from the international or national plane.[1940]

After this brief overview, the following shows whether and in how far the UK and the EU in their negotiations and in the final WA text have followed up on the ideas. The solution in the WA constitutes not only the fruits of political bargaining but also a reflection on these different thoughts.

1938 Also Eeckhout and Frantziou (n 1904), 725/726. Tellingly, the UK government intended to 'update' or even substitute the Human Rights Act see BBC News, 'Human Rights Act: UK Government Unveils Reform Proposals' (14 December 2021) <https://www.bbc.com/news/uk-59646684>; see Milanović (n 819); Steph Spyro, 'Sunak to Resurrect Bill of Rights to Foil EU law and Deport Migrants Quickly' *Daily Express* (6 November 2022) <https://www.express.co.uk/news/politics/1693033/rishi-sunak-immigration-british-bill-of-rights>.

1939 Gordon and Moffatt (n 1887) 62–64.

1940 Peers (n 1903), 134; Eeckhout and Frantziou (n 1904), 726; Roeben and others (n 1902), 459 "Such removal does away with the basis for all the citizens' rights that the Treaty and the case-law provide, to reside, to vote, and not to be expelled or extradited. The individual finds himself or herself cut off from much of the EU legal order, and *a legal vacuum replaces the certainty this citizenship seeks to establish*. As such, removing Union citizenship is more than a change in status; it interferes with the *promise of protection* inherent in the concept of citizenship" [emphasis added]; similarly Worster (n 1909), 361 "looking at UK nationals resident or with long standing ties to EU member states, these individuals may have investments, homes, and lives that are rendered unstable and unpredictable". Gordon and Moffatt (n 1887) 58–61 explain that also British administrative law knows the principle of vested rights and legitimate expectations.

b) Individual Rights under the EU-UK Withdrawal Agreement

aa) The General Conception of the Agreement

In Art. 126, the WA provided for a "transition period" until 31 December 2020 during which, subject to a sophisticated list of exceptions in Art. 127 WA, most of the Union law should still be applicable in the UK. To a large extent, the transition period prolonged the membership of the UK after formal withdrawal. As the interim period has now ended, its pertaining legal situation is not covered by the following analysis.[1941] However, the end of the transition period is the still relevant ("cut-off") date for determining certain facts in the post-withdrawal situation.

The WA explicitly names rules or rights meant to still exist after Brexit. That explicit inclusion strongly suggests that, unless otherwise indicated, with the exit of the UK from the EU treaty, EU law will cease to apply in the UK and the CEJU will no longer have jurisdiction over the UK or its nationals. Both parties, in principle, assumed the termination of all mutual rights and obligations *not* mentioned in the WA, including the rights of EU citizens in the UK or UK citizens in the EU under the EU treaties.[1942] Hence, EU citizenship was not to be granted to British citizens after 31 December 2020 (unless they held the nationality of another EU member state as well).[1943]

1941 For a detailed account see Peers (n 1903), 146–152. On individual rights during this period European Parliamentary Research Service (Cîrlig, Carmen-Cristina), 'EU and UK Citizens' Rights After Brexit: An Overview' (06/2020) 4 <https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2020)651975>.

1942 Whether the mentioning of the relevant rights in the WA is declaratory or constitutive for their continuity is a question open to debate.

1943 In support of this supposition, "Union Citizen" is defined in Art. 2 lit. (c) of the WA as "any person holding the nationality of a Member State" referring to a list of members states in that the UK is not included, Art. 2 lit. (b) WA. Additionally, there is a separate definition for "United Kingdom national" in Art. 2 lit. (d) of the WA.

bb) The Rights Protected

Before and during the WA negotiations, the former UK Prime Minister[1944] and several EU institutions[1945] insisted on the protection of British and EU citizens' rights as a cornerstone of the Brexit process.[1946] The protection of "citizen's rights" indeed took a prominent place in the final WA. Its preamble's suggestion

> "that it is necessary to provide *reciprocal* protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have *exercised* free movement rights before a date set in this Agreement, and to ensure that their rights under this Agreement are *enforceable* and based on the principle of non-discrimination; recognising also that rights deriving from periods of social security insurance should be protected" [emphasis added]

is a first-class summary of the following provisions on citizens' rights. In fact, its position in Part II of the agreement, the very first part after the general provisions and definitions, underlines the special status dedicated to the topic. Art. 10 WA delimits the "personal scope" of that part and therefore defines the persons and rights that ought to be protected. According to Art. 10 para. 1, the following provisions should apply to

1944 UK, 'Prime Minister's Open letter to EU Citizens in the UK' (19 October 2017) <https://www.gov.uk/government/news/pms-open-letter-to-eu-citizens-in-the-uk.>.

1945 European Commission, 'Letters by Chief Negotiator Barnier to UK Secretary of State Barclay from 25 March and 18 June 2019' (2019) <https://www.gov.uk/government/publications/costa-amendment-letter-to-the-eu-institutions>; European Parliament, 'Resolution on the Framework of the Future EU-UK Relationship' (14 March 2018) 2018/2573(RSP) lit.) L, para. 52; European Parliament, 'Resolution on Implementing and Monitoring the Provisions on Citizens' Rights in the Withdrawal Agreement' (15 January 2020) 2020/2505(RSP).

1946 Basic rights were not the focus of the negotiations. Since the WA does not mention the EU Rights Charter (n 577) it ceased to apply to the UK; therefore critical Frau (n 1903) 58, 64. Yet, this omission is logical as the Charter according to its Art. 51 addressed "institutions and bodies of the Union […] and […] Member States only when they are implementing Union law." Since EU law does not apply anymore to the UK, the Charter is not applicable. An example of the Charter's application in the interim period is provided by *CG v The Department for Communities in Northern Ireland,* C-709/20, 15 July 2021, Reference For a Preliminary Ruling paras. 88-89 (CJEU [GC]).

> "(a) Union citizens *who exercised their right to reside* in the United Kingdom in accordance with Union law before the end of the transition period *and continue* to reside there thereafter;
> (b) United Kingdom nationals *who exercised their right to reside* in a Member State in accordance with Union law before the end of the transition period *and continue* to reside there thereafter;
> (c) Union citizens who *exercised their right as frontier workers* in the United Kingdom in accordance with Union law before the end of the transition period *and continue* to do so thereafter;
> (d) United Kingdom nationals *who exercised their right as frontier workers* in one or more Member States in accordance with Union law before the end of the transition period and *continue to* do so thereafter" [emphasis added].

According to Art. 9 lit. b) of the WA, "'frontier workers' means Union citizens or United Kingdom nationals who pursue an economic activity in accordance with Article 45 or 49 Treaty on the Functioning of the European Union (TFEU) in one or more States in which they do not reside". Persons eligible to protection of their "citizen's" rights after Brexit are thus EU or UK citizens either residing or working in an EU member state or the UK, respectively, at the time of withdrawal. Under specific conditions, their family members and partners with a "durable relationship" were also included, Art. 10 para. 1 lit. (e) and para. 4.[1947] All those individuals were also protected from discrimination in the future on grounds of nationality, Art. 12 WA. However, crucially, to have these rights secured, the right must have been *made use of*, i.e. the right to reside or work must have been "exercised" *and continue* to be exercised. The persistence of rights was therefore predicated upon the distinction between rights already exercised and mere "potential" rights people may have been entitled to but that had never been used. That distinction arose from a conscious decision not to protect all rights but to "provide *reciprocal* protection for Union and UK citizens, to enable the effective exercise of rights derived from Union law and *based on*

1947 In general on both categories Michal Meduna, 'Part Two. Citizens' Rights: Title I. General Provisions' in: *Liefländer/Kellerbauer et al. UK-EU Withdrawal Agreement* (n 1895) paras. 3.14-3.22. On the reduced scope of family members Michael Dougan, 'So long, Farewell, Auf Wiedersehen, Goodbye: The UK'S Withdrawal Package' (2020), 57(3) CML Rev 631 671. Cut-off-date for the existence of such relationships is always the end of the transition period, cf. *Citizens' Rights After Brexit* (n 1940) 6.

past life choices, where those citizens have *exercised* free movement rights by the specified date."[1948] Once a right ceases to be exercised, it will come to an end as well.

After setting that course, the WA proceeds to enlist the particular rights to be secured and preconditions for their protection. Art. 13 WA is concerned with "residence rights", which are secured "under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU"[1949] and several provisions of the "Citizens' Rights Directive" 2004/38/EC[1950]. The introduction of further limitations is explicitly forbidden, and the respective state has no discretion in applying these principles unless in favor of the person concerned, Art. 13 para. 4 WA. Persons residing in a state in accordance with these provisions were to "have the right to leave the host State and the right to enter it", again pursuant to Directive 2004/38/EC, Art. 14 para. 1 WA. As before, under EU law (especially Directive 2004/38/EC), after five years of legal residence in a country, a person acquired the right to permanent residence and "[p]eriods of legal residence or work in accordance with Union law before and after the end of the transition period shall be included in the calculation of the qualifying period necessary for acquisition of the right of permanent residence", Art. 15 para. 1 WA. Finally "[o]nce acquired, the right of permanent residence shall be lost only through absence from the host State for a period exceeding 5 consecutive years", para. 3. Individuals who did not complete the five years before the end of the transition period were to "have the right to acquire the right to reside permanently under the conditions set out in Article 15 of this Agreement once they have completed the necessary periods of residence", Art. 16. Similarly, Art. 24 para. 1 preserves the rights of workers in accordance with the limitations already contained in EU law such as Art. 45 paras. 3 and 4 TFEU. Also self-employed persons

1948 European Commission, 'Joint Report From the Negotiators of the European Union and the United Kingdom Government on Progress During Phase 1 of Negotiations Under Article 50 TEU on the United Kingdom's Orderly Withdrawal From the European Union' (8 December 2017) TF50 (2017) 19 para. 6 <https://commission.europa.eu/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1_en>. On the evolution of the phrase More, 'From Union Citizen to Third-Country National' (n 1903) 462–463.

1949 Special provisions for family members are contained in Art. 13 paras. 2 and 3 WA (n 1874).

1950 Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States (29 April 2004) OJ L 158, 77 (EC).

retain their rights under Art. 49 and 55 TFEU, Art. 25 WA. Moreover, the WA secured already recognized professional qualifications, Art. 27, and EU law was to be applied to ongoing recognition procedures, Art. 28. What is more, all those rights, once acquired, were protected for the holder's lifetime "unless they cease[d] to meet the conditions set out in those Titles", Art. 39.

Rights with a link to property protection had a special status. In Title III of Part Two on Citizens' Rights, on the Coordination of Social Security Systems, Art. 30 - 31 WA stipulate that entitlements under social security schemes for persons involved in cross-border activities at the time of the withdrawal were to be kept, in some cases even for third-party nationals or stateless persons.[1951] In contradistinction, Art. 32 did not provide for the continued application of the respective provisions but secured that aggregated times paid into social security systems were still recognized after Brexit and could be exported to national systems.[1952] Again, those rights could even be claimed by third-party-nationals, Art. 33 WA.[1953] Hence, the rights were, in essence, protected in the same way as before the withdrawal.[1954] Intellectual property rights *already recognized* ("registered or granted") under EU law survived the withdrawal, and the UK "without any re-examination" had to grant a "comparable registered and enforceable" right under its own law, Art. 54 WA. Thus, those rights were "de-personalized", i.e. de-coupled from the nationality of their holder. They were not included into the life-long protection scheme of Art. 39 WA,[1955] which is only natural as intellectual property, "a defined set of the intangible products of creative activity […] usually referred to by the form of 'right' granted to the holder",[1956] is regularly protected only for a certain amount of time.

1951 Daniel Denman, 'Title III: Coordination of Social Systems' in: *Liefländer/Kellerbauer et al. UK-EU Withdrawal Agreement* (n 1895) paras. 3.119-3.130.

1952 ibid paras. 3.131-3.140.

1953 ibid para. 3.142.

1954 For more information on the very detailed but rather generous rules with respect to social security entitlements Herwig Verschueren, 'The Complex Social Security Provisions of the Brexit Withdrawal Agreement, to be Implemented for Decades' (2021), 23(1) EJSS 7; in general *Citizens' Rights After Brexit* (n 1940) 7/8; Catherine Barnard and Emilija Leinarte, 'Citizens' Rights' in Federico Fabbrini (ed), *The Law & Politics of Brexit: Volume II: The Withdrawal Agreement* (OUP 2020) 107 116.

1955 For social security rights Marie Simonsen, 'Title IV: Other Provisions' in: *Liefländer/Kellerbauer et al. UK-EU Withdrawal Agreement* (n 1895) para. 3.147.

1956 Frederick M Abbott, 'Intellectual Property, International Protection (2022)' in: *MPEPIL* (n 2) paras. 2-3.

Finally, the WA provided that the CJEU should "continue to have jurisdiction in any proceedings brought by or against the United Kingdom before the end of the transition period", Art. 86 para. 1 WA. The same held true for administrative procedures concerning "compliance with Union law by the United Kingdom, or by natural or legal persons residing or established in the United Kingdom" initiated before the end of the transition period, Art. 92 para. 1 lit (a) WA. Because individuals only have limited capability to bring actions before the CJEU on their own,[1957] that provision is only marginally relevant for them.

In addition, the two Protocols on Northern Ireland and Gibraltar explicitly emphasized the protection of acquired rights, although less concretely. Art. 2 para. 1 of the North Ireland Protocol required the UK to "ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union".[1958] Art. 1 para. 1 of the Protocol on Gibraltar stipulated in even vaguer language that "[t]he Kingdom of Spain [...] and the United Kingdom in respect of Gibraltar shall closely cooperate with a view to preparing and underpinning the effective implementation of Part Two of the Withdrawal Agreement on citizens' rights, which fully applies, inter alia, to frontier workers residing in Gibraltar or in Spain".

cc) What is Lost?

However, under the regime of the WA, rights or positions have been "lost" after Brexit - essentially most rights that are not explicitly safeguarded in the text of the WA.[1959] First, as already mentioned, UK nationals (as long as they did not hold a second nationality of another EU member state) were

1957 *Cf.* Art. 263 Abs. 4 and Art. 268 TFEU; *see* Oppermann, Classen and Nettesheim (n 1870) § 13 paras. 10, 56-67; Anthony Arnull, 'Judicial Review in the European Union' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (OUP 2015).

1958 For more information Dagmar Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' in Federico Fabbrini (ed), *The Law & Politics of Brexit: Volume III* (OUP 2021) 49 61–62.

1959 *Citizens' Rights After Brexit* (n 1940); Smismans (n 1915), 443. Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' (n 1957) 55 describes the protection of individual rights as "fractional".

not to enjoy the status of EU citizens anymore. Hence, associated rights such as the right to vote or stand for EU elections or municipal elections in another member state,[1960] or diplomatic protection, Art. 20 para. 2 TFEU, were to be foregone, except under special (bilateral) agreement.[1961]

In a case before the CJEU, *EP v. Préfet du Gers and Institut National de la Statistique and des Études Économiques*[1962], involving the loss of election rights by a UK national living in France for more than 15 years at the time but not having acquired French citizenship, the referring French court asked the CJEU several poignant questions. First of all whether the loss of union citizenship and the loss of voting rights by UK nationals having made use of their freedom to move and reside in another EU member state was a necessary consequence of the withdrawal according to Art. 50 TEU or whether the WA secured such rights. And if such rights were not secured, whether the WA was considered to be invalid because of lack of legal protection that would violate basic principles of the EU legal order. Such argumentation is based on the claim mentioned above, that it was upon the EU to secure rights of UK citizens against the state of their nationality. Advocate General *Collins* had outrightly denied UK nationals any persisting right to vote in another member state under EU law after Brexit:[1963] He opened by underlining that it was an explicit choice of the EU member states to make Union citizenship dependent on being a national

1960 The UK guaranteed voting rights to all persons who held and continued to hold lawful immigration status by the end of the interim period. For all other persons the UK granted these rights on the basis of reciprocal agreement which had been concluded e.g. with Spain, Portugal, Luxembourg and Poland, see UK Government, 'Policy Paper: Local Voting Rights for EU Citizens Living in the UK" (17 June 2021) <https://www.gov.uk/government/publications/local-voting-rights-for-eu-citizens-living-in-the-uk/local-voting-rights-for-eu-citizens-living-in-the-uk>. There are several EU Members States who accord permanently resident non-nationals the active and sometimes even passive right to vote in local elections, see for an overview *Citizens' Rights After Brexit* (n 1940) 16–17.

1961 Dougan (n 1946), 673. The right to petition the European Parliament or to raise complaints before the European Ombudsman are not dependent on EU citizenship, but all persons resident or having their registered office in a member state are entitled, Art. 227, 228 TFEU, cf. More, 'From Union Citizen to Third-Country National' (n 1903) 471/472.

1962 *EP v. Préfet du Gers and Institut National de la Statistique et des Études Économiques (INSEE),* C-673/20, 9 June 2022, Reference For a Preliminary Ruling (CJEU).

1963 *Préfet du Gers and Institut National de la Statistique and des Études Économiques - Opinion,* C-673/20, 24 February 2022 (Advocate General Collins); see also CJEU, *Press Release No 39/22: Advocate General's Opinion in Case C-673/20* (2022).

of a member state and not to give the EU competence in this respect.[1964] It was the sovereign choice of the UK to leave the EU and consequently to bereave its nationals of Union citizenship and associated voting rights.[1965] In his view, there was no duty upon the EU to negotiate in favor of British citizens:

> "Since the United Kingdom's sovereign choice to leave the European Union amounts to a rejection of the principles underlying the European Union, and the Withdrawal Agreement is an agreement between the European Union and the United Kingdom to facilitate the latter's orderly withdrawal from the former, the European Union was in no position to insist that the United Kingdom fully adhere to any of the European Union's founding principles. *Nor could the European Union secure rights that, in any event, it was not bound to assert on behalf of persons who are nationals of a State that has left the European Union and who are therefore no longer Union citizens.*"[1966]

Since the goal of securing voting rights abroad for UK nationals was not pursued by the UK government,[1967] *Collins* is very clear who the claimant should complain to:

> "She can address any issue that she may have concerning her status or rights as a British national to the United Kingdom authorities. […] These observations apply equally to [her] attempts to rely upon legitimate expectations against the European Union and/or the French authorities. Any breach of legitimate expectations that [she] may wish to ventilate concerning her status as a Union citizen is to be addressed to the United Kingdom, which has withdrawn from the European Union, and not to either the French authorities or to the European Union."[1968]

Finally, since UK citizens, as third-country nationals, were not comparable to EU citizens, *Collins* did not consider that there was discrimination on the grounds of nationality.[1969] What is remarkable is that *Collins* maintained that the loss of "political" rights of UK nationals associated with EU citizen-

1964 *Opinion AG Collins* (n 1962) paras. 22, 75.
1965 ibid paras. 28, 42, 70.
1966 ibid para. 75 [emphasis added].
1967 ibid para. 73.
1968 ibid paras. 43-44.
1969 ibid para. 51.

ship was a direct consequence of withdrawal and that there were no strings attached on the UK under EU law to cut back such rights. Furthermore, he explicitly rejected any kind of "fiduciary" duty of the EU to protect the position of UK nationals under EU law. Hence, he espoused a traditional view of European law as a type of international law in which an individual's fate is dependent solely on his or her home state, at least with respect to such "political" rights as voting rights. The CJEU in its recent judgment from 9 June 2022[1970] aligned with his view and held that

> "nationals of that State who exercised their right to reside in a Member State before the end of the transition period, no longer enjoy the status of citizen of the Union, nor, more specifically, by virtue of Article 20(2)(b) TFEU and Article 22 TFEU, the right to vote and to stand as a candidate in municipal elections in their Member State of residence"[1971].

That finding was considered "the automatic result" of the UK's sovereign decision to withdraw from the EU treaties.[1972] It underlined that the purpose of the WA was "to ensure *mutual* protection for citizens of the Union and for United Kingdom nationals who exercised their respective rights of free movement before the end of the transition period."[1973] It was not the obligation of the EU to secure such rights[1974] as "the EU institutions enjoy broad discretion in policy decisions in the conduct of external relations […]. In the exercise of their prerogatives in that area, those institutions may enter into international agreements based, inter alia, on the principle of *reciprocity* and *mutual* advantages."[1975] Besides insisting that that the mentioned rights would not persist after Brexit as they were intrinsically coupled to EU citizenship, the court also clarified that the EU was under no fiduciary duty to act in favor of UK nationals.

Additionally, mere "inactive" rights granted by the EU legal order but not exercised by a person were not to be kept. All EU or British citizens

1970 *CJEU Préfet du Gers (n 1961).*
1971 ibid para. 83.
1972 ibid para. 62. The CJEU distinguished this case explicitly from "specific situations falling within the scope of EU law, where a Member State had withdrawn its nationality from individual persons" and in which there was an "obligation to carry out an individual examination of the proportionality of the consequences of the loss of Union citizenship concerned".
1973 ibid para. 72 [emphasis added].
1974 ibid para. 98.
1975 ibid para. 99 [emphasis added].

who had not taken residence or worked as frontier workers by the end of the transition period could not avail themselves of the generous provisions under the WA (nor could their relatives and partners) but were to be subject to British domestic immigration regulations (EU citizens) or be treated as nationals of a third state (UK citizens). That stipulation entailed that British nationals lawfully residing in another EU member state would lose their right to move across Europe in countries other than their country of residence or country of work.[1976] Additionally, the "right to return" after five years of absence from the country of residence was not secured during the negotiations, cf. Art. 15 para. 3 WA.[1977] Furthermore, the WA did not cover persons offering trans-national services while residing and working in the same country, i.e. situations in which only the service crossed the border.[1978] As summarized by *More*,

> "[t]he principal rights not protected by the Agreement for Britons in the UK are their EU rights to earn a living through employment or self-employment in another Member State, provide cross-border services ('market citizenship rights') and move freely across EU borders."[1979]

Furthermore, after 31 December 2020, criminal conduct by persons residing or working in the UK were to no longer be judged according to European rules but according to national legislation, Art. 20 para. 2 of the WA. Applicants for resident status were potentially to have to undergo thorough security checks, which could lead to acquired rights of residence or movement being restricted or to deportation measures - a serious drawback of withdrawal.[1980] Additionally, CJEU case law providing for several family reunification rights was no longer to be applicable to UK nationals.[1981]

1976 *Citizens' Rights After Brexit* (n 1940) 5, 7; Barnard and Leinarte, 'Citizens' Rights' (n 1953) 115; Dougan (n 1946), 673–674 "golden cage".

1977 Cf. Smismans (n 1915), 447 and Peers (n 1903), 159 who argue that before Brexit such right to return could have been held under free movement rights; cp. also Dougan (n 1946), 669–670.

1978 More, 'From Union Citizen to Third-Country National' (n 1903) 470; Meduna, 'Part Two. Citizens' Rights' (n 1946) para. 3.43; Marie Simonsen, 'Chapters 2 and 3: Rights of Workers and Self-Employed Persons, and Professional Qualifications' in: *Liefländer/Kellerbauer et al. UK-EU Withdrawal Agreement* (n 1895) para. 3.91.

1979 More, 'From Union Citizen to Third-Country National' (n 1903) 467 (also on earlier drafts of the agreement).

1980 Barnard and Leinarte, 'Citizens' Rights' (n 1953) 115, 116; cf. Dougan (n 1946), 671.

1981 *Citizens' Rights After Brexit* (n 1940) 6; Smismans (n 1915), 443; Dougan (n 1946), 672–673; More, 'From Union Citizen to Third-Country National' (n 1903) 469.

dd) The Actual Implementation

As mentioned, one of the main problems with rights emanating from international law is their fragile status under national law. Each state can decide on how it wants to incorporate its international duties into its national corpus of law. An additional serious disadvantage of domestic non-implementation lies in the fact that it regularly leads to individuals lacking any administrative or judicial redress in case of a violation of their rights. The UK adheres to a dualist approach, finding international law only applicable domestically once incorporated by national legislation.[1982] In 2018, it in fact repealed its domestic legislation implementing EU law, the ECA, as of exit day.[1983] Even if simultaneously incorporating almost all EU law in force and directly applicable at the time of the withdrawal into its national legal order, and thus plainly upholding existing rights derived from EU law, that course of action naturally left the UK free to change the law at any time by a simple act of parliament.[1984]

Beyond that, the interpretation of certain rules implementing the WA can vary considerably. As the WA provided for life-long protection of rights, their effective domestic enforcement in the UK became an issue and was explicitly dealt with in the WA. The "general provision" Art. 4 stipulates that

> "(1) The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.
> Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
> (2) The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative

But see for the UK's domestic decision to maintain these rights Bernard (n 1903), 324 and More, 'From Union Citizen to Third-Country National' (n 1903) 469.

1982 Peers (n 1903), 135; *UK Supreme Court Miller* (n 1898) para. 55. On the background and evolution of this thesis Roger Masterman, 'Reasserting/Reappraising Dualism' *UK Const L Blog* (7 December 2021) <https://ukconstitutionallaw.org/2021/12/07/roger-masterman-reasserting-reappraising-dualism/>.

1983 European Union (Withdrawal) Act 2018, UK Public General Acts 2018 c. 16. However, the effect of the ECA was "saved" by the European Union (Withdrawal Agreement) Act 2020, UK Public General Acts 2020 c. 1, for the time of the transition period, i.e. until the end of 2020.

1984 Also Eeckhout and Frantziou (n 1904), 725/726.

authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.
(3) The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.
(4) The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.
(5) In the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period."

This acknowledgment of the limits of force of international obligations is remarkable. The provision recognizes not only the need for domestic implementation to make the WA enforceable by individuals but also the utility of pertinent interpretative rules. Nevertheless, Art. 4 WA only begs the question as, naturally, the provision is also not directly applicable in the UK, but, like the other WA contents, was formally implemented by statutory law[1985]. Moreover, Art. 4 para. 2 WA is somewhat vague, leaving much discretion for implementation, which can lead to a reduced effectiveness of rights.[1986]

After Brexit, the European Commission was empowered to monitor the implementation of the WA in the Union member states but no longer in the UK. Therefore, the WA provides for several exceptional "new" enforcement or monitoring measures with respect to the rights under Part II. For example, while the CEJU's jurisdiction (for new applications) in principle ended with the withdrawal from the TEU, this was different when it came to "citizens' rights" under Part II of the WA. Art. 158 para. 1 of the WA allows UK courts to request a preliminary ruling from the CJEU when "a question is raised concerning the interpretation of Part Two of this Agreement" and the case "commenced at first instance within 8 years from the end of

1985 Section 5 of the European Union (Withdrawal Agreement) Act (2020) UK Public General Acts 2020 c. 1 (UK).

1986 Critical on the implementation the WA provisions therefore Smismans (n 1915), 457–465; fearing non-implementation Peers (n 1903), 144.

the transition period".[1987] Yet, arguably, UK courts are not obliged to refer their cases to the CJEU.[1988] Furthermore, Art. 164 WA established a "Joint Committee" (JC), consisting of EU and UK representatives in charge of monitoring the implementation and application of the WA. Within the JC, a "Committee on Citizens' Rights" has been established, Art. 165 para. 1 lit. a) WA. While the JC can, Art. 166 paras. 1, 2, issue binding decisions to the EU and the UK, decisions that are of the same force as those of the WA itself, the action, can, para. 3, only take place following the mutual consent of EU and UK. That requirement of mutual consent represents a limiting factor when it comes to condemning possible failures in implementing the WA.

Finally, Art. 159 para. 1 WA established an "independent authority". The body was charged with monitoring the implementation and application of Part Two of the WA *within* the UK. It could - like the European Commission - conduct inquiries and receive complaints from Union citizens and their families and bring legal actions before UK courts. The independent monitoring authority (IMA) was to report "on the implementation and application of Part Two in the Union and in the United Kingdom, respectively" to the special committee of the JC, Art. 159 para. 2. Yet, concerns about the IMA's effectivity and independence were raised, as it was dependent on the funding and personnel provided by the UK and could be abolished by the JC after eight years, Art. 159 para. 3.[1989] In sum, the WA did not provide for any capability of individuals to bring claims and therefore to control the correct application of Part II of the WA before a supra- or international court or institution after the interim period.[1990] Effective enforcement of citizens' rights under the WA is hence limited.[1991]

1987 Restrictions are in place for cases concerning Art. 18 and 19 WA.

1988 Barnard and Leinarte, 'Citizens' Rights' (n 1953) 123; Verschueren (n 1953), 19; Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' (n 1957) 60.

1989 Barnard and Leinarte, 'Citizens' Rights' (n 1953) 108, 127–129; Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' (n 1957) 60; European Parliament, 'Resolution on Implementing and Monitoring the Provisions on Citizens' Rights in the Withdrawal Agreement' (n 1944) para. 12.

1990 Note that the information leaflet of the European Commission, 'Enforcement of Individual Rights of United Kingdom Nationals Under Part Two of the Withdrawal Agreement' <https://commission.europa.eu/system/files/2021-08/enforcement_of_individual_rights_under_the_withdrawal_agreement_en.pdf> does not mention any judicial avenue apart from UK courts.

1991 Also Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' (n 1957) 60.

In fact, several complaints have been made about the UK's treatment of EU citizens after Brexit.[1992] Most of the critique related to implementing the WA has been directed against the UK's so-called "EU settlement scheme" (EUSS). Art. 18 WA left EU states and the UK a free choice on whether to implement a declaratory or constitutive registration system for persons eligible under the WA.[1993] The UK implemented the former, requiring EU citizens to apply for "settled" or "pre-settled" status, originally a domestic immigration status, if they wanted to stay and enjoy their previous rights in the country.[1994] Even before its start, serious concerns were uttered that the EUSS would be implemented in a discriminatory manner and in a way that would eventually lead to many people losing their residence rights in the UK, thereby not adhering to the spirit of the WA.[1995] In December 2022, the IMA, in fact, sucessfully challenged the legality of the particular implementation of the EUSS under the WA.[1996] The major bone

1992 Daniel Boffey, 'EU to Ask UK to Respect Citizens' Rights After Mistreatment Scandals' *The Guardian* (19 May 2021) <https://www.theguardian.com/world/2021/may/19/eu-to-ask-uk-to-respect-citizens-rights-after-mistreatment-scandals>. In fact, already during the transition period in 2020, the European Commission had opened infringement proceedings against the UK for failure to comply with provisions of the
WA and sent a letter of formal notice to the UK, European Commission, 'Commission Opens Infringement Proceedings Against the United Kingdom For Failure to Comply With EU Rules on Free Movement' (2020) <https://ec.europa.eu/commission/presscorner/detail/en/inf_20_859>; Laurenz Gehrke, 'EU Takes Legal Action Against UK on Free Movement: Brussels Gives Britain Four Months to Comply With Rules' *Politico* (14 May 2020) <https://www.politico.eu/article/eu-takes-action-against-uk-on-free-movement/>; C. J McKinney, 'European Commission Accuses UK Government of Violating EU Citizens' Rights' (14 May 2020) <https://www.freemovement.org.uk/european-commission-accuses-uk-government-of-violating-eu-citizens-rights/>.

1993 Meduna, 'Part Two. Citizens' Rights' (n 1946) para. 3.62 describes Art. 18 as „the single biggest departure from Union law on free movement of citizens" in the WA. For an overview of the relevant regulations in the EU member states see *Citizens' Rights After Brexit* (n 1940) 10–14.

1994 ibid 8–10.

1995 Smismans (n 1915), 449–451, Frau (n 1903) 75. Concerned about the problems with respect to vulnerable people Barnard and Leinarte, 'Citizens' Rights' (n 1953) 110–112; *Citizens' Rights After Brexit* (n 1940) 9–10 and European Parliament, 'Resolution on Implementing and Monitoring the Provisions on Citizens' Rights in the Withdrawal Agreement' (n 1944) paras. 8-11. On implementation cf. also More, 'From Union Citizen to Third-Country National' (n 1903) 467–468.

1996 IMA, 'Judicial Review Claim Issued by IMA' (14 December 2021) <https://ima-citizensrights.org.uk/news_events/judicial-review-claim-issued-by-ima/>; *The In-*

of contention was that the Secretary of State required those qualifying EU and EEA EFTA citizens who successfully applied for pre-settled status to make a second application. If they failed to do so they were considered unlawful residents and were "exposed to serious consequences affecting their right to live, work and access social security support" in the UK.[1997] While a comprehensive discussion of the question would go beyond the scope of this chapter, the introduction of such further formal requirements for the acquisition of rights secured under the WA is a prime example of the mentioned "implementation gap". Already in light of the ECtHR case law in *Kurić*,[1998] such practice seemed assailable.

3) Interim Conclusions - Theory Tested Against the Facts

The Brexit process is a peculiar, complicated, multi-layered scenario influenced by obligations under EU law, human rights law, and general international law as well as - and by no means least - by political considerations. Even if not constituting a proper succession scenario, the process of withdrawal of the UK from the EU is a unique and, for the purposes of our analysis, tremendously significant case - not only because the Brexit is the most recent example of a change of sovereign rights with respect to a certain territory but also because the change has led to a remarkable loss of deeply entrenched and forceful individual rights hammered out over decades by national and EU courts. Those rights were not only protected on the international plane but purported to be directly applicable within the member states. The notion of acquired rights featured prominently in the debate. Probably, it was not despite but exactly because of these extraordinary, "new", circumstances that the doctrine of acquired rights was re-discovered.

The WA means that an international instrument exists in which both parties articulated their opinions with respect to the consequences of a withdrawal. It represents a considered, long-negotiated agreement between the EU as a supra-national organization, one of the most important and

dependent Monitoring Authority for the Citizen's Rights Agreements v. Secretary of State for the Home Department (The European Commission and The3Million Limited intervening), Case No: CO/4193/2021, Judgment of 21 December 2022, [2022] EWHC 3274 (Admin) (UK High Court of Justice).

1997 ibid. paras. 9-12, 74-75.

1998 *ECtHR Kurić and Others* (n 1364).

powerful international economic and political players, and the UK as one of its most important and economically as well as politically strongest members. Both parties possess highly developed administrative and judicial systems. Of course, caution is warranted: The WA is the result of a political bargaining process, not a statement of the law - it can therefore not be taken as a plain evidence of *opinio iuris sive necessitatis*. However, the conclusion of the WA can be seen as an act of state practice that can contribute to the evolution of an already existing or the emergence of a new rule of law. Additionally, the provisions with respect to citizens' rights were not particularly disputed between the parties. In fact, Part II of the Agreement was drafted at an early stage in the process and apparently has not been subject to major revisions since March 2018.[1999] The enormous importance attached to individual rights in the agreement is striking, all the more so as the rights secured under the WA can, by no means, be seen as customary rights. They are special rights applicable in principle only to EU citizens and therefore only within the treaty regime of the TEU.

The scheme of securement of rights shows a remarkable resemblance to the traditional acquired rights doctrine. If the starting point was from a "fundamental rights" or "human rights perspective", positioning the individual center stage, then rights acquired under the EU legal order would have been given an "untouchable" status. That status would have meant securing the pure "right" to free movement, to residence or work within a state to every person eligible for it before. That position is not what the WA espouses - its default option is the loss of individual rights after Brexit. Even a highly integrated and sophisticated "supra-national" legal order such as that of the EU does not transcend its own boundaries. Rights once conferred can be taken away. On the other hand, starting from a pure inter-state perspective, it would have been possible to do away with all of the individual rights formerly conferred by the EU order as long as that removal was done formally correct. As mentioned, Art. 50 TEU explicitly provides for the possibility of leaving the Union and consciously does not

1999 Cf. Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (19 March 2018) https://www.gov.uk/government/publications/draft-withdrawal-agreement-19-march-2018.

attach any material prerequisites to a withdrawal.[2000] Yet, such complete negation of all individual rights was also not the solution chosen in the WA.

The WA opted for a middle way. It protected rights that had been "exercised", i.e. made use of. That path comes close to the differentiation chosen in Art. 70 para. 1 lit. b) VCLT between "executed" and "executory" rights. The distinction protects not mere theoretical entitlements but factual "existing" situations - reminiscent of what *O'Connell* proposed more than 60 years ago. The purpose, or at least the result, of the distinction is a far-reaching upholding not of the *legal* situation but of the *factual status quo* created through the use of the right. Additionally, from a personal perspective, what is protected are situations in which a legitimate expectation in the rights' persistence emerges. The WA drafters explicitly meant to protect "life-choices" of persons, i.e. situations in which an individual has a legitimate interest in the persistence of the situation, such as when he or she chose to permanently reside in an EU country.

Several authors have detected the protection of legitimate expectations as one of the bases of the WA.[2001] Therefore, the right to free movement was not protected after Brexit as it was not predicated upon the expectation of being able to exercise it on a continuous basis. That legitimization might also be the reason why the possibility to offer trans-boundary services was not secured. In such cases, it is the legal environment and not the factual one that changes. However, the belief in the persistence of a good market situation or mere chances of success are not protected. Finally, to have given EU citizenship to British nationals as third-country nationals would have meant to fundamentally change the citizenship's basis and content. Essentially, it would have meant giving more to British citizens than they had before Brexit, when they could lose EU citizenship by loss of nationality. That right is not what the theory of acquired rights asks for.

2000 Eeckhout and Frantziou (n 1904), 706, 718; Kellerbauer, 'Art. 50 TEU' (n 1895) para. 1.08; cf. *CJEU Wightman* (n 1878) para. 50.

2001 Cf. Forcada Barona (n 1903), 234; Eeckhout and Frantziou (n 1904), 726–727; Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' (n 1957) 49; Smismans (n 1915), 447/448; Mindus (n 1894) 106; against *Fernández/López Garrido Brexit and Acquired Rights* (n 427) 45 stating (without further explanation) that acquired rights would be "stronger". Cp. Burri T, 'Why leaving the EU would be complicated for the UK' *Euractiv* (17 June 2016) https://www.euractiv.com/section/uk-europe/opinion/why-leaving-the-eu-would-be-complicated-for-the-uk/ referring to the "structural guarantee" of Union law that can only be changed by the consent of all EU members.

On the other hand, what becomes clear is that the WA's content extends considerably beyond the scope of the traditional doctrine of acquired rights. First of all, it protects more than "property rights" or "pecuniary rights". It protects a panoply of rights the value of which is not completely measurable in money but which have a deeply moral value, such as rights to residence. As property legislation is still within the competence of the member states, EU law does not have as much to say on the issue. However, intellectual property rights and cross-border pension rights, i.e. rights with a special link to property, are secured under the WA, even without any specific nationality requirement. Furthermore, the WA is particularly generous in that it accords life-long protection to most of the rights upheld (Art. 39). Arguably, that protection would not have been required by the original doctrine of acquired rights, which does not protect the rights in a stronger fashion than before the change in sovereignty.[2002] It is thus questionable whether a "transmission period" comparable to that foreseen by Art. 126 WA would not have sufficed under general international law.[2003]

A further extraordinary feature of the WA constitutes the recognition of its limited influence on the UK national sphere. It therefore openly purports to accord effective and actionable rights to individuals,[2004] and

2002 Therefore overstretching the doctrine of acquired rights e.g. Forcada Barona (n 1903), 240 with a quote to Jean-Claude Piris, 'Should the UK Withdraw From the EU: Legal Aspects and Effects of Possible Options' [2015] Foundation Robert Schuman - Policy Paper, 10 "I would not think that one could build a new legal theory, according to which 'acquired rights' would remain valid for millions of individuals [...] who, despite having lost their EU citizenship, would nevertheless keep its advantages for ever".

2003 Before the conclusion of the WA the European Commission initiated a process of so called "Brexit-Preparedness" with all the remaining 27 EU member states in order to prepare for a no-deal scenario. When these member states were asked for their domestic regulation of residence rights for former EU nationals, the picture varied across all countries, but only very few of them intended to grant indefinite residence rights to UK nationals without a new application under national law, European Commission, 'Citizens' rights: EU27 Member States Measures on Residence Rights of Legally Residing UK Nationals and Social Security Entitlements Related to the UK in Case of No Deal' <https://wayback.archive-it.org/11980/20201223032410/https://ec.europa.eu/info/brexit/brexit-preparedness/citizens-rights_en>. That reaction is notable and can be representative evidence of state practice.

2004 In comparison, Art 5 para. 1 of the following Trade and Cooperation Agreement (30 April 2021) OJ L 149/10 (2021) explicitly maintains that "nothing in this Agreement [...] shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international

contains explicit requirements for the UK to implement the agreement and in particular its provisions on citizens' rights. Amongst them is the establishment of an independent authority to monitor implementation accessible by individuals - a quite extraordinary feature for an international treaty not protecting human rights.

Apart from those considerable innovations, the WA shows features of a traditional agreement under international law. First, it is largely based on the principle of reciprocity.[2005] The introduction of that basis was also due to the mode of negotiations leading to the WA. While the EU negotiated in favor of the EU citizens in the UK, the UK tried to secure the position of its citizens in the EU.[2006] However, UK citizens are not equally protected and, in fact, lost more rights than the remaining EU citizens.[2007] Thus, second, nationality still played a non-negligible role in the process, the exception being the treatment of persons in social security schemes.[2008] Hence, the WA, and the negotiating parties in general, despite their highfalutin statements, did not completely depart from a state-centric point of view. Furthermore, it has yet to be determined how effective the enforcement of the WA through the IMA or British courts will be. Apart from those avenues, individuals' opportunities for direct redress are limited.

C) Conclusions

What becomes clear from the foregoing overview is that a country can tackle the issue of individual rights acquired under a predecessor's domestic legal order in a myriad of ways, and while there are similarities, no state has yet acted in exactly the same way as others. The story of state succession since 1990 has brought up a panoply of regulations and views on the topic,

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law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties." According to para. 2 "A Party shall not provide for a right of action under its law against the other Party on the ground that the other Party has acted in breach of this Agreement or any supplementing agreement."

2005 Cf. More, 'From Union Citizen to Third-Country National' (n 1903) 463; Forcada Barona (n 1903), 233, 240. Already suggesting a solution on basis of reciprocity before the WA Piris (n 2001), 10.

2006 More, 'From Union Citizen to Third-Country National' (n 1903) 480; Bernard (n 1903), 319, 323.

2007 More, 'From Union Citizen to Third-Country National' (n 1903) 480–481; Bernard (n 1903).

2008 ibid 311–312.

necessitated by the different situations and political backgrounds. While some of the changes were introduced by an amicable and friendly exchange of views, often accompanied by an international agreement setting out the basic consensus points, others were the result of hostilities and violent and disruptive. Regardless of such differences, however, it seems fair to say that, in all cases, the shift in sovereignty constituted an eminent momentum for the self-perception of the respective states. No state succession came out of the "nowhere". In an international system in which state continuity was and is one of the cornerstones and guarantors of stability and peace, such shifts rarely take place unless crucial change seems to be the best or only option. Hence, the legal act of succession has always been preceded by profound political changes within a state. It therefore necessarily entailed the questioning of the foregoing legal order and almost intrinsically asked for new solutions to old problems. It is the profoundness of those changes going to the roots of the identity of the respective state that, in relevant legal proceedings, has caused constitutional and international courts to accord broad discretion to a new state in ordering its new inner system, even if, in some cases, the re-ordering involved abrogating positions held under a former legal order.

On the other hand, benches or whole courts were regularly split on these issues.[2009] The international community was often divided on how to assess the situation, too. In many cases, legal classification of a factual situation has taken time, often with extensive debate, and sometimes finally made only years after the events or is still controversial. Different perceptions of the facts exist and often the affected state authorities neither acted nor pronounced their stance on the issue unambiguously. Additionally, the categories of succession are not well-defined, the whole field not conventionally regulated. Regularly, it can be doubted whether the definition of a certain situation was made according to objective criteria or because an attempt was being made to achieve certain political ends. Added to the wide variety of solutions chosen, this lack of definition makes it difficult to present an obvious *leitmotif* in the collected practice. Apparent similarities have to be

2009 See *ECtHR [GC] Jahn and others* (n 1069) para. 117 overturning the previous judgment *ECtHR Jahn and Others* (n 1211). *ECtHR Savickis and Others* (n 1277) overturning with a ten to seven vote its own former case-law in *ECtHR Andrejeva* (n 1279); *ECtHR [GC] Blečić v. Croatia* (n 1398) (six to eleven votes split bench); *ECtHR Ališić* (n 1466) and *ECtHR Ališić - Dissenting Opinion Nußberger* (n 1477). See also on disputes between different courts of the same state the "Slovak Pension Cases" before the Czech courts, *supra*, section B) V) 3).

approached cautiously; striking differences should not be overemphasized. Nevertheless, common points or general paths can be discerned. Similarities might become more significant or credible when the disparity in the states surveyed in this book, in terms of geographical locations, social and political systems, ethnic compositions, economic strengths etc., is taken into account.

I) Practice with Regard to the Domestic Legal Order in General

As early as 1965, *Zemanek* had

> "submitted that no evidence as to a rule of international law continuing the law in force independently of the will of the new sovereign has come to light. Quite the contrary is the case. The quasi-uniform practice of providing for continuance in legislation tends to support the contention that the law must be reenacted to continue."[2010]

From the cases analyzed in this book, such a conclusion can also be seconded today. Almost all states covered included explicit provisions in either their new constitution or their respective laws, some concluded international treaties explicitly regulating their attitudes towards a predecessor's law. The regulation was even performed in cases of continuity, i.e. where the permanence of the legal system would have been a matter of course. Eritrea is the only state for which no explicit provision dealing with the fate of the former legal order on its territory could be detected. Furthermore, all states explicitly legislating in favor of the persistence of a predecessor's domestic legal order had some reservations about the continuity, generally the law had to conform to any new constitution, sometimes even to a whole new domestic legal order. While those caveats are clear evidence that states did not consider themselves to be bound by former law *against* their will, they do not conclusively answer the question whether approval by the new sovereign was declaratory or constitutive for the persistence of domestic

2010 Zemanek (n 38), 281; cf. also Crawford *Brownlie's Principles of Public International Law* (n 3) 429; Epping, '§7. Der Staat als die „Normalperson" des Völkerrechts' (n 2) 197/198, para. 240.

law, i.e. what would have happened when no explicit attitude had been adopted or until a decision had been made.[2011]

However, at least for the purposes of our analysis, the dispute is of no relevance. Even if the domestic private order was *not* continued automatically, the discontinuation would not mean that a state did not have to respect the rights acquired, or, perhaps better phrased as, the factual situation established through the exercise of rights, under the former legal order. Contrarily, even an assumption of the permanence of the domestic legal order would not mean that states were not at freedom to curtail or abrogate rights acquired under that legal order.[2012] Additionally, as alluded to, all investigated states in fact continued the domestic legal order, even Eritrea. But if a state at least continues to accept and enforce private rights, tacit approval can also be assumed.

In the period under analysis, at least one of each of the types of succession explained in Chapter II can be discerned. A complete picture of one uniform practice of succession to *international* treaties does not materialize, either in cases of merger or absorption (lowering the number of states worldwide), e.g., Yemen and Germany, or in cases of separation (increasing the number of states worldwide), e.g., Montenegro, Eritrea, Sudan, and Kosovo, or for dismemberments (also increasing the number of states worldwide), e.g., the SU, the SFRY, and the CSFR.

But apparently, when it came to the question of the *domestic* legal order, the practices in cases of separation or dismemberment were considerably more uniform. Basically, all states under analysis developing from the dismemberment of another state, especially in the cases of the SU, the SFRY, and the CSFR, opted for continuity of the domestic legal order. As explained, since many of the successor states had been conveyed jurisdiction with respect to some areas of domestic law even before independence, or dismemberment had taken place amicably, that option seems rather obvious. However, even states that became independent during those "waves"

2011 For continuity (but based on philosophical, instead of legal, considerations) O'Connell, 'Recent Problems of State Succession in Relation to New States' (n 3), 124, 127, 131; for cessions Strupp (n 2) 85, 86; against "automatic" continuity Zemanek (n 38), 278, 281; apparently of the opinion that the very fact of adoption of laws speaks against the continuity of the national legal order Rosenne (n 44), 268 and 279.

2012 This is why O'Connell, although assuming the permanence of the domestic legal order, still argues for a doctrine of acquired rights, i.e. the duty to compensate for expropriations.

of succession and generally adhered to a theory of discontinuity, such as the Baltic states or Georgia, in large parts voluntarily continued the domestic legal order, albeit while (re)adapting their own constitutions and several politically sensitive laws. With respect to separation, South Sudan deliberately transferred domestic law of the Sudan from which it separated into its national legal order. The examples of the Kosovo and Eritrea are both special. In Kosovo, through the interim administration of UNMIK on its territory, the legal order dating from before Serbian control was restituted. In Eritrea, discontinuity was more of a political choice, but the official attitude was neither clear nor stringent, and in many respects, the country still seemed to have at least assumed continuity of the old law until it abrogated it. Continuity of the domestic legal order was not always a conscious choice; it was often a mere *consuetudo* or an actual necessity, as a complete overhaul of the national legal system in a short time would have been logistically unfeasible.

While new states generally just continued with the known domestic legal order, "unified" states had to tackle the question of which of the several domestic legal orders to keep or how to reconcile them. In its merger, Yemen's general policy was to opt for far-reaching continuity in the respective parts of its unified country. It paralleled that decision for its international obligations. While that continuation theoretically protected all rights acquired under the respective legal order, it became clear that, in the long run, the solution was not viable for a unified state in which citizens moved freely. Contrarily, in Germany, a case of accession or absorption, one domestic system was considered prevalent over the other and, in fact, superseded it in most aspects. Again, the same approach was adopted with respect to international treaties. Here, the question of whether and how to protect formerly acquired rights was virulent from the beginning.

As previously explained,[2013] in this list of cases, cessions, i.e. voluntary transfers of territory, hold a special status as there is no change to the personality of both states involved. The examples here, Hong Kong, Macau, and Walvis Bay, have shown that, for the permanence of domestic law, similar problems to those arising through unification exist - the question remains how to reconcile two, sometimes very disparate, legal systems. The receiving states, China and Namibia, solved the problem differently. In the cases of Hong Kong and Macau, far-reaching continuity of the "old" law for a 50-year transition period was chosen, leading to a (temporary) split of the

2013 *Supra*, Chapter II C) III).

legal system within one country. That continuity is even more remarkable as, for both Hong Kong and Macau, it was not clear whether China had ever actually lost sovereignty over the territories. Whatever the current situation, it is more than probable that, at the end of the transmission period, both territories will legally become assimilated into the rest of China. In comparison, Walvis Bay from the moment of transfer was completely absorbed into the territory of Namibia, and the law in force was supplanted by Namibian law. Hence, in the long run, in all cases of cession under discussion, the domestic legal system of the receiving state will be applied.

In sum, continuity of the domestic legal order was widespread practice. Importantly, even states completely repudiating (mostly for political reasons) a continuation of the *international* relations of their predecessor (e.g., the Baltic states) or those applying a pick-and-choose approach with respect to multilateral conventions (e.g., Eritrea or South Sudan) did not follow their lines with the same verve and stringency when it came to former *domestic* law, normally still choosing a general transition of the domestic law with specific (although important) exceptions. The analysis here has shown that, most of the analyzed states chose a far-reaching continuity of the former domestic legal order. Not nearly so many acceded or succeeded to all human rights treaties of their respective predecessor state. This finding supports an independent significance of a rule of acquired rights over and above the significance of international treaties.

II) Practice with Respect to Acquired Rights of Individuals in Particular

If the whole domestic legal order of a predecessor is adopted, acquired rights could be assumed to pose no problem.[2014] Yet, while such a continuity is a good starting point and shows a general positive attitude of a successor state towards a predecessor's legal order and is also a good sign that individual rights will be maintained, it is not the whole truth. The problem lies not in the ever-existing possibility for a state to abrogate or modify the law according to its own domestic, mostly constitutional, prerequisites - a possibility the traditional doctrine of acquired rights has not questioned - but in the limits of that possibility.

2014 Zemanek (n 38), 279; Rosenne (n 44), 273.

As already alluded to, not unsurprisingly, all of the canvassed state laws contained a provision protecting property.[2015] However, the crux with such rights as property, where no generally accepted definition exists and which are still largely defined by domestic law, is that it is mostly in the hands of the successor state which legal positions are defined as property and under which conditions. As was vividly shown in the case of German unification, the constitutional guarantee of property under the GG was of no avail to all "new" citizens, unless the FRG had accepted a certain asset as constituting property under the GG.[2016] Furthermore, other rights or positions theoretically accepted can be undermined in practice when further prerequisites, such as nationality (e.g., in the Sudan) or reciprocity (in some SFRY successor states) are added. This undermining happens most easily in states adopting transmission clauses making the acceptance of the previous legal order subject to the wide requirement of "conformity with the new law".

The picture emerging from the analysis above is that, from the point of view of acquired rights, the politically and internationally often much more violent and dangerous separations or dismemberments of states are generally easier to deal with and run "smoother" since the domestic legal order is less touched. However, it has to be borne in mind that the examples here often contain cases in which the successor states, in fact, held jurisdiction over property legislation long before succession took place. Furthermore, such "smooth" transitions only took place in theory. In practice, new states, while formally guaranteeing rights, especially property rights, routinely tried to exclude "foreigners" from benefits, often through stripping them of their former nationality or simply through discriminatory administrative practice. This discrimination was exemplified by the disenfranchisement of former SFRY nationals in Slovenia, in Estonia's and Latvia's citizenship legislation, and in Sudan's stripping of people entitled to South Sudanese nationality of Sudanese citizenship. Thus while, from a theoretical and formalist perspective, individual rights were upheld in a sweeping manner in the cases of separation or dissolution under scrutiny, in practice, discriminatory treatment of parts of a population entailing the loss of formerly acquired rights could be witnessed.

2015 In almost all of them, this guarantee of property was an individual right, not a mere political goal or guideline for official actions; but see *supra*, section B) I) 1) for the exception of Yemen.

2016 Cf. *BVerfG Rentenüberleitung I* (n 1172) paras. 123-130, 132-133; accepted by *ECtHR Klose and Others* (n 1170); affirmed by *ECtHR Peterke and Lembcke* (n 1178).

Since state unifications were generally amicable, states went to an extended effort to integrate the new population. That amicability does not mean that there was no discriminatory treatment of parts of the population. Yet, in an overall view, in the merger or accession cases under scrutiny here, there were almost no rampant violations of property rights or unjustified ethnic discriminations; the attempt was made to accommodate acquired rights as much as possible. Therefore, besides having a look at the general attitude of states with respect to the former domestic legal order, it is also of significance in how far states were, in practice, attentive to specific individual rights and positions.

All states under scrutiny paid attention to the acquired rights of individuals. None of them completely abolished the former legal order, but there were differences in the amount of recognition: Regulations of successor states concerning acquired rights have varied in terms of length and details.[2017] There are long, meticulously drafted treaty opera as, e.g., for Germany or Hong Kong and Macau, texts that explicitly deal with particular rights and positions. And there are short, taciturn texts, such as for Czechoslovakia, in which the major legal texts did not mention private rights as a specific problem but only provided for the continuity of the legal system in general. Not all states mentioned private rights in their main transmission provisions, with many simply referring to a predecessor's "laws" or "legal acts" that were to be upheld, and the protection of specific rights was left to statutory law. Yet, in the light of politically motivated exclusions of whole parts of the population from the enjoyment of specific rights, it is remarkable that almost no state completely refused to adopt certain private rights, a unity standing in marked opposition to the spotty picture of succession or accession to human rights commitments of the predecessor states. What is more, even states consciously not taking over the previous legal order made a line of exceptions for certain individual rights in order to keep them alive. Germany implemented a relatively sophisticated system of exceptions to the general rule, sometimes realized by putting in place longer or shorter intermediary periods allowing its new citizens to adapt to the new situation. Even if, in general, extending the FRG law to the territory of the former GDR, the FRG upheld several GDR provisions of particular importance to former GDR inhabitants or trans-

2017 Again, the notion of "acquired rights" is used in a broad sense, meaning all individual rights acquired under the domestic legal order of a state and eligible to protection in a case of change in sovereignty.

ferred pension rights into the FRG system. In the same vein, even if its law was already similar to South African law, Namibia included comprehensive clauses providing for the maintenance of almost all individual positions acquired before the transfer into the respective acts. Also the Kosovo, even if referring back to its own autonomous law, basically accepted rights acquired under the Serbian legal order unless the law was of a discriminatory character.

These findings are most obvious in the two areas under special scrutiny - treatment of private property and treatment of pensions rights. In principle, all mentioned states accepted property acquired under the respective old legal system - either by generally adopting the former legal order or by explicitly making exceptions for such acquired rights. The restoration of formerly nationalized property was a wide-spread topic in states with a former socialist political and economic system, e.g., South Yemen, the GDR, and the SFRY. While in Yemen the property regime of South Yemen was, in principle, accepted and compensation was paid to former owners, Germany and the SFRY "direct" successor states generally pursued a policy of restitution, preferably in kind. However, if the state did hand back the property, it had to account for rights private people had acquired to the restituted property in the meantime, most prominently new ownership or certain dwelling rights (such as "occupancy rights" in the SFRY).

Remarkably, even if generally repudiating a former political system and pursing a policy of reversal, in the end almost all states challenged with having to reconcile different interests recognized the legal positions of all parties, even if to a different extent. The problem was generally either solved by prioritizing one of the parties' rights while compensating the other for the loss or by transforming real rights such as dwelling rights into personal rights such as a tenancy. Nevertheless, good faith in the lawfulness of acquisition was a prerequisite for the acceptance of rights acquired under a socialist legal regime. In the wake of the violent conflicts and ethnic cleansing in the SFRY, restitution or acknowledgement of acquired rights became a feature in enforcing housing rights and the "right to return" proclaimed by the international community.[2018] This aspect was underlined in the 2001 Succession Agreement between the successor states of the SFRY.

2018 See e.g. ECOSOC, 'Principles on Housing and Property Restitution for Refugees and Displaced Persons: Final Report of the Special Rapporteur, Paulo Sérgio Pinheiro' (28 June 2005) UN Doc. E/CN.4/Sub.2/2005/17; and the UNSC resolutions *supra*, footnote 1563.

Importantly, several SFRY successors have established commissions or other quasi-judicial bodies to give individuals a forum in which to vindicate these claims.

However, the analysis of the cases brings to light obvious limits of the acceptance of former property rights. Those limits mostly concerned rights to real estate, land, and pertaining natural resources, in particular exploitation concessions. The colonial history of the respective countries should be taken into account when evaluating any relevant measures. The Sino-British Declaration, despite its far-reaching acceptance of individual and human rights, excluded private rights to land in Hong Kong. Eritrea and South Sudan also nationalized all land. While South Sudan seems to have at least accepted acquired rights to land (such as customary rights or usufruct rights), Eritrea arguably has simply abolished all rights to land acquired under the former legal regime. Famously, neither state accepted concession agreements concluded by their predecessors and partly re-negotiated them. They acclaimed their sovereignty over their natural resources by nationalizing them without compensation. Hence, property rights perceived as pivotal to state sovereignty are particularly vulnerable in times of succession.

All states under analysis regulated the topic of the survival of pension rights. Such regulation is remarkable for such an administratively challenging and costly issue. It is notable that war-ridden and poor states, such as Eritrea, initiated a pension fund for their state officials. Furthermore, also pension claims of ordinary civil persons were often protected without regard for the nationality of the pension holder. That regulation has also even found expression in the relatively recent 2001 SFRY Succession Agreement and the 2020 WA between the UK and the EU. Of course, the particularity of pension rights, as compared to those of other property rights, is that they have a current and a prospective value. Claims to payment of pensions in many cases are supposed to be redeemed in a relatively near future. What becomes clear from the foregoing is that, while states protected the current value of such acquired pension rights, they were not ready to guarantee any prospective future value of the pension. The persistence of the social or economic environment determinative for the value of a certain amount of money was never protected. That lack of persistence is what made pension accruements and their holders particularly vulnerable in times of change. To alleviate transition to new economies, some states granted transition periods or *ex gratia* payments.

III) What Can Be Taken from Those Findings?

As alluded to at the beginning of this book, the protection of rights acquired under a national legal order in situations of state succession is a recurring theme in state successions. Few international documents contain an explicit reference to the notion of "acquired rights". Yet, explicit reference is made to the doctrine in one of the most important international agreements on succession issues: the settlement of the claims in one of the largest "waves" of state succession between the five successor states of the SFRY, the 2001 Agreement on Succession Issues. Furthermore, in the recent negotiations leading to a withdrawal agreement between the EU and the UK, the term has regularly been used. In their national laws, states have seldom referred explicitly to the term of "acquired rights". Nevertheless, they have shown a remarkable determination to uphold, in large parts, at least the portion of domestic private law in force between private individuals. The continuation of private law even happened in cases in which the successor stood in marked opposition to the predecessor state and/or if the predecessor's law was very different from its own. Domestic law even persisted when the successor state was not willing to succeed or even accede to international treaties concluded by the predecessor. Even states not taking over the predecessor's legal order in general were attentive to upholding individual rights and positions and made relevant exceptions to the rule. The WA has taken up that tradition and made the protection of "citizens' rights" a priority.

The scope of rights protected after succession has been enlarged and expounded compared to the traditional ideas developed in the middle of the 20th century. For example, as outlined above, intellectual property rights and copyrights are today protected by many constitutions as property and recent international agreements make reference to them. Furthermore, several national laws have explicitly upheld not only written law but also protected tribal rights (South Sudan), rights of indigenous people (Hong Kong), and customary rights in general (Namibia, Hong Kong, South Sudan). The most eminent extension of the original doctrine of acquired rights, however, can be considered to be the inclusion of the protection of permanent residence or "dwelling rights".[2019] That protection became particularly vivid with the inclusion of the "right to return" into the 2001

2019 The Upper Silesian Tribunal, on basis of the Geneva Convention (n 68) (!), had adjudicated rights of residence of private persons under a heading separate from

Succession Agreement. The WA has also affirmed and elaborated on the topic. What has also come across in this study is the "right to have rights", or at least not to be bereaved of that essential status for discriminatory purposes or without good reasons. That issue became relevant in the treatment of former SU or SFRY citizens in some of the successor states, where they were simply "erased" from the registers or had to undergo new, challenging nationalization procedures.

Generally, courts or tribunals, national as well as international, have not explicitly relied on the doctrine of acquired rights. However, the Namibian Supreme Court[2020] and the ECtHR in *Ališić*[2021] applied the content of the doctrine by upholding domestic private rights against successor states. The Eritrea-Ethiopia Claims Commission implicitly acknowledged the doctrine, even if finding it not applicable in the case at hand.[2022] Many judicial bodies have accorded particular significance to the interests of individuals in the persistence of their formerly acquired rights in the process of state-building. While they, due to extraordinary circumstances, have accorded a lot of leeway to the respective states, especially concerning the right of property, in some cases they have also set limits to curtailing rights and, thus, possibly contributed to the evolution of the doctrine of acquired rights. For example, in *Ališić*, the ECtHR in fact awarded the claimants enforceable individual claims against two states by upholding claims under the predecessor's law. In the case of "the erased", the Slovenian Constitutional Court intervened and also the ECtHR found the Slovenian policy in violation of the ECHR. Moreover, international agreements protecting individuals' rights in cases of a change of sovereignty, such as the Succession Agreement or the WA, have insisted on the particular relevance of setting up enforcement mechanisms for the domestic protection of acquired rights.

A recurrent argument, especially of national courts when reviewing national acts in the wake of succession, has been that of "trust" or "legitimate expectations", along with legal security and legal stability. Those were also buzz words in a number of national legal acts. As an example, the Slovenian

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that of "vested rights", Erpelding and Irurzun, 'Arbitral Tribunal for Upper Silesia (2019)' (n 68) paras. 59-64.

2020 *Supreme Court of Namibia Mwandinghi* (n 1687), but as mentioned on the assumption of change of government.

2021 *Ališić et al. v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* (2014) Appl. No. 60642/08 ECHR 2014-IV 213 (ECtHR (GC)).

2022 *EECC Final Award on Pensions* (n 1653).

Constitutional Court had rejected the Slovenian policy concerning the "erased" on the basis of trust in the legal regulation and "legitimate expectations". The BVerfG has also limited the power of the FRG authorities to retrospectively make changes to pension accruements acknowledged in the UT according to whether the individuals concerned could have had "legitimate expectations" in the permanence of the pensions regulation. The Hong Kong High Court has claimed that one of the main purposes of the Sino-British Declaration was to avoid a legal lacuna, which would lead to "chaos". Finally, according to its treaty parties, the WA was supposed to protect "life choices" of EU citizens. That aim aligns with much of domestic legislation requiring good faith in the acquisition of a title in order for that acquisition to be protected (cf. the *BVerfG* decision concerning the *Bodenreformland*, Namibian legislation with respect to Walvis Bay, much of the restitution legislation in the FRG, and the SFRY successor states). What could also be detected in practice, especially in the Succession Agreement but also in some national laws, e.g., very detailed ones in Hong Kong and Macau, was a certain de-coupling of protection from an individual's nationality. Both these developments, the focus on "trust" and "legitimate expectations" and the "de-nationalization" could be signs of a move of the doctrine of acquired rights away from its roots in the law of foreigners and towards a right of the individual akin to human rights. Yet, such a result is counteracted by other facts. First of all, none of the authorities cited above advocated "eternal" rights frozen in time and not open to change after succession. The WA stands out as an exception when it guarantees certain rights (but only those) for the lifetime of a person. Continuous state practice, however, has accepted any curtailment or even abolishment of rights as long as the change has not come about in too sudden a manner. The typical tool in such cases has been the introduction of transmission periods to give people the opportunity to accommodate to the new situation. In general, it seems to have been firmly acknowledged that the expectation that the law will stay the same is not protected.

Moreover, the survey of practice shows that nationality is still a relevant category in today's international law, also in cases of state succession. In the legal rules of different successor states, discrepancies concerning the acquisition of nationality can still lead to statelessness and disenfranchisement. Even the WA, as a recent international agreement generously conveying a range of rights, is based on reciprocity of guarantees and belonging by nationality and not on an individual's status as a human being. This reciprocity underlines that the doctrine of acquired rights is still, for better

or worse, intimately connected with minority protection issues. People discriminated against and disenfranchised in cases of a change of sovereignty were routinely stateless persons, persons of an ethnic minority or economically, and socially marginalized. No matter how big these "minorities" in the cases at hand were in terms of numbers, they were never the ruling parts of society after succession.

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

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 *Ališic*[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 *Kuric*[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

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.

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German Summary: Wohlerworbene Rechte in Fällen der Staatennachfolge

Als die Republik Südsudan im Juli 2011 unabhängig wurde, wurden damit fast zehn Millionen Menschen „über Nacht" zu Einwohnern eines neuen Staates. Auch ausländische Investoren sahen sich einem geänderten rechtlichen Umfeld gegenüber, nicht zuletzt, weil ca. 75% der Rohölressourcen des Sudan nun im Gebiet eines anderen Staates - des Südsudan - lagen. Auch in der Zukunft ist zu erwarten, dass es zu ähnlichen Wechseln der Staatsmacht über ein Gebiet, sog. Staatennachfolgen (oder Staatensukzessionen) kommen wird. Da die Kompetenz zur Rechtssetzung entsprechend auf den Nachfolgestaat übergeht, kann dies für Individuen, die nach wie vor einen Großteil ihrer Rechte aus nationalen Rechtsordnungen ableiten, enorme Änderungen ihres rechtlichen Status nach sich ziehen. Offen bleibt aber letztendlich bis heute, ob dieses Recht zur Modifikation der internen Rechtsordnung unbegrenzt ist oder welche Einhegungen es erfährt.

Im Laufe des 19. Jahrhunderts hatte sich als Antwort auf diese Fragen die Lehre von den sog. „wohlerworbenen Rechten" herausgebildet. Sie umschreibt den Gedanken, dass unter der nationalen Rechtsordnung des Vorgängerstaates erworbene, private Rechte von Einzelpersonen auch im Falle einer Staatennachfolge nicht erlöschen, sondern vom Nachfolgestaat respektiert werden müssen. Die Lehre fand vor allem Anfang des 20. Jahrhunderts großen Anklang in der internationalen Rechtsprechung und in der Literatur. Der Schutz dieser „wohlerworbenen Rechte" wurde sogar oft als allgemeines Prinzip des Völkerrechts herausgestellt.

Tatsächlich ist es aber bis heute umstritten, ob, und wenn ja in welcher Ausformung, die Lehre von den wohlerworbenen Rechten Bestandteil der geltenden internationalen Rechtsordnung ist. Dies hängt auch damit zusammen, dass die Rechtsnatur der wohlerworbenen Rechte oft nur knapp behauptet, nicht aber nachvollziehbar belegt wurde. Generell fristete die Beschäftigung mit den Konsequenzen von Staatennachfolge auf die innerstaatlichen Rechtsordnungen der beteiligten Staaten in den letzten Jahrzehnten eher ein akademisches Schattendasein. Andere Fragen der Staatennachfolge, z.B. die Nachfolge in völkerrechtliche Verträge, wurden hingegen in großer Ausführlichkeit behandelt. Ziel der vorliegenden Arbeit war es daher, durch eine Aufarbeitung der dogmatischen Grundlagen der Lehre

der wohlerworbenen Rechte sowie eine umfassende Analyse der moderneren Staatenpraxis in Nachfolgesituationen eine bestehende Lücke in der wissenschaftlichen Literatur zu schließen. Es sollte untersucht werden, ob und inwieweit diese Lehre heute zum Bestand des positiven Völkerrechts gezählt werden kann, welchen Inhalt sie hat, ob es noch einen bedeutenden Anwendungsbereich für sie gibt und welchen zusätzlichen Nutzen eine potentielle Norm mit sich bringen könnte.

Zur Untersuchung dieser Fragestellungen ist die Arbeit in fünf Kapitel aufgeteilt: Kapitel I und II führen in das traditionelle Konzept der wohlerworbenen Rechte sowie die Grundlagen der Staatennachfolge ein. Kapitel III untersucht das sich wandelnde international-rechtliche Umfeld der Lehre seit der Mitte des 20. Jahrhunderts und arbeitet den ihr verbliebenen Anwendungsbereich heraus. Das inhaltlich zentrale Kapitel IV enthält sodann eine umfassende Sammlung und Analyse von Staatenpraxis aller Nachfolgesituationen seit 1990 bezogen auf den Umgang der betroffenen Staaten mit dem nationalen Recht der Vorgängerstaaten und insbesondere den unter diesem Rechtssystem erworbenen Rechten Einzelner. Das abschließende Kapitel V verbindet alle vorherigen Erkenntnisse zu einer Gesamtanalyse und leitet Antworten auf die Fragen zu rechtlichem Status, Inhalt, Grenzen und Potential eines modernen Prinzips der „wohlerworbenen Rechte" ab.

I) Kapitel I beschreibt den „klassischen" Inhalt des Begriffs „wohlerworbene Rechte" sowie seinen Gebrauch bis zur Mitte des 20. Jahrhunderts durch die Rechtsprechung und einschlägige Literatur und versucht, hieraus eine allgemeine Definition abzuleiten. Dies ist von besonderer Bedeutung, da der Begriff, obwohl er damals bereits Eingang in Vertragswerke gefunden hatte und von Teilen der Rechtsprechung und Literatur als feststehender Teil des internationalen Rechts betrachtet wurde, in seinem genauen Inhalt notorisch unklar war und bis in die Gegenwart blieb. Das Argument sog. „wohlerworbener Rechte" wurde in einer Vielzahl von Zusammenhängen, oft aber ohne eindeutige Beschreibung der Rechtsfolgen oder wissenschaftliche Durchdringung vorgebracht. Dieser Umstand hat es den Gegnern der Idee wohlerworbener Rechte in den Folgejahren relativ einfach erlaubt, sie als bloße politische Floskel abzulehnen.

Ihren Ursprung fand die Lehre der wohlerworbenen Rechte im nationalen Recht, hier in speziellen Ausformungen des Rechtsstaatsprinzips, insbesondere dem Verbot der Rückwirkung von Gesetzen und dem Vertrauensschutz bzw. dem Gebot der Rechtssicherheit. Diese grundsätzlichen Prinzipien wurden in der Folge auch im internationalen Privatrecht ange-

wandt, wenn es um die Anerkennung von im Ausland erworbenen Rechten ging. Zum völkerrechtlichen Terminus wurden die „wohlerworbenen Rechte" auf zwei Wegen: Zum einen durch die Maxime, dass kein Souverän mehr Rechte übertragen könnte als er selbst besaß, und somit auf dem übertragenen Land lastende Rechte erhalten blieben. Der zweite Weg führte über das sogenannte Fremdenrecht. Dabei sicherten sich Staaten untereinander einen „Mindeststandard" grundlegender Rechte, z.B. den Schutz von erworbenen Eigentumsrechten, für die jeweils anderen Staatsangehörigen auf ihrem Territorium zu. Dieser Standard sollte nun auch in Nachfolgefällen gelten. Wohlerworbene Rechte waren also geldwerte Rechte von ausländischen Privatpersonen, die diese unter der nationalen Rechtsordnung des Vorgängerstaates rechtswirksam erworben hatten und die nun vom Nachfolgestaat zu beachten sein sollten. Dabei war die Möglichkeit der Enteignung durch den Nachfolgestaat immer anerkannt, sie musste aber entsprechend durch eine Entschädigung ausgeglichen werden. Begründet wurde die Weitergeltung solcher Rechte im Falle der Staatennachfolge in erster Linie mit der Idee der ungerechtfertigten Bereicherung: Der Nachfolgestaat sollte nicht entschädigungslos geldwerte Vorteile behalten dürfen, sondern aus Billigkeitsgründen Ersatz leisten müssen.

Der Ständige Internationale Gerichtshof erwähnte in mehreren Entscheidungen das „Prinzip" der wohlerworbenen Rechte. Bis in die 1970er Jahre wurde das „Prinzip" auch von akademischer Seite ausführlicher, vor allem aber aus der erwähnten Perspektive des Fremdenrechts, analysiert. Innerhalb der Vereinten Nationen wurde das Thema vor dem Hintergrund der Dekolonialisierung und des politischen Kampfes um eine neue Weltwirtschaftsordnung jedoch zu einem „heißen Eisen" internationaler Politik. Wohlerworbene Rechte wurden von den neuen unabhängigen Staaten, aber auch von einigen Staaten, die sich nach internen Revolutionen an einem sozialistischen Gesellschaftssystem ausrichten wollten, als Mittel der Perpetuierung überkommener Machtverhältnisse angesehen und nicht anerkannt. Angesichts auch des Erstarkens anderer Rechtsgebiete zum Schutz des Einzelmenschen (siehe Kapitel III) versank die völkerrechtliche Lehre von den wohlerworbenen Rechten anschließend fast in der Bedeutungslosigkeit und wurde nur noch selten erwähnt.

II) In Kapitel II werden die rechtlichen Grundlagen der Staatennachfolge dargelegt. Dies erscheint im hier gewählten Umfang nötig, da die Staatennachfolge bis heute eines der umstrittensten Rechtsgebiete des Völkerrechts darstellt, in dem wenig Einigkeit schon bezüglich grundlegender Institute herrscht. Alle Kodifikationsversuche der Völkerrechtskommission zur Staa-

tennachfolge haben wenig Anklang bei den Staaten gefunden. Nur eine Konvention, die Wiener Konvention über die Staatennachfolge in Verträge (WKSV), ist bis heute überhaupt in Kraft getreten. Obwohl Staatennachfolgen seit Jahrhunderten stattfinden, haben sich nur ganz sporadisch und fragmentarisch völkergewohnheitsrechtliche Regeln herausgebildet. Keine davon behandelt dezidiert das Schicksal der Rechte Einzelner.

Die Definition der Staatennachfolge als die „Verdrängung eines Staates durch einen anderen Staat in Bezug auf die Verantwortung für die internationalen Beziehungen eines Gebiets" (Art. 2 Abs. 1 lit. b WKSV), ist aber auf allgemeine Akzeptanz gestoßen und wurde daher der Arbeit zu Grunde gelegt. Wichtig ist, dass Staatennachfolge damit nicht eine rechtliche Konsequenz (den Übergang von Rechten und Pflichten), sondern einen tatsächlichen Vorgang beschreibt. Sie ist von der Kontinuität, d.h. der Beibehaltung der Identität eines Staates abzugrenzen.

Diese weite Definition der Staatsnachfolge umfasst eine große Anzahl sehr verschiedenartiger Situationen, deren Nomenklatur im Einzelnen variiert. Typischerweise werden der *Zerfall* eines Staates in mehrere neue Staaten, die *Abtrennung* eines Teils eines bestehenden Staates, die *Inkorporation* (oder Absorption) eines Staates in einen anderen Staat, die *Fusion* (Zusammenschluss, Verschmelzung) mindestens zweier Staaten zu einem neuen Staat, sowie die einvernehmliche *Gebietsübertragung* (Zession) unterschieden. Die Definition der Staatennachfolge umfasst damit sowohl Fälle, in denen mindestens ein neuer Staat entsteht oder untergeht, als auch Fälle eines bloßen Gebietstransfers. Fälle von Okkupation oder Annexion sind nicht als Staatennachfolgekonstellationen zu behandeln, u.a. da sie nach heute allgemeiner Meinung nicht zu einem Wechsel der Souveränität über das Gebiet führen.

III) Kapitel III gibt einen Überblick über das geänderte rechtliche Umfeld der Lehre von den wohlerworbenen Rechten und klärt, ob es für sie heute noch Anwendungsbereiche gibt. Wie erwähnt, erlebte die Beschäftigung mit der Lehre ihren Höhepunkt Anfang bis Mitte des 20. Jahrhunderts, bevor sie seit den 1980er Jahren fast vollständig aus dem völkerrechtlichen Diskurs verschwand. Heute wird sie in der Literatur sogar teilweise als obsolet bezeichnet. Eine genauere Befassung mit der Materie zeigt jedoch, dass die Idee der wohlerworbenen Rechte nach wie vor einen bedeutenden eigenen Anwendungsbereich hat. Ein großer Teil der Literatur geht hier von einem zu statischen und fragmentierten Verständnis des Völkerrechts aus: Die Lehre der wohlerworbenen Rechte wird durch aktuelle Entwicklungen im Völkerrecht aber nicht nur überlagert und verdrängt, sondern sie hat

durch diese auch neue Impulse bekommen und sich weiterentwickelt. Zudem entstehen im Falle von Staatensukzessionen weiterhin Rechtsschutzlücken für Individualrechte durch fehlenden menschenrechtlichen oder investitionsrechtlichen Schutz.

Die Rolle der Einzelperson im Völkerrecht hat sich bedeutend gewandelt. Im 19. und noch zu Beginn des 20. Jahrhunderts war Völkerrecht hauptsächlich auf dem Prinzip der Reziprozität aufgebautes Koordinationsrecht zwischen Staaten. Der Einzelne besaß auf internationaler Ebene keine Rechte, sondern wurde durch seinen Heimatstaat „mediatisiert". Anfängliche Konzepte des Schutzes von Individuen wie das bereits erwähnte Fremdenrecht oder das Minderheitenrecht, welches nach dem Ersten Weltkrieg zur Befriedung ethnischer Konflikte entwickelt wurde, blieben in ihrer Konzeption zwischenstaatlich. Jedoch griff nach 1945 und der Annahme der Charta der Vereinten Nationen eine neue Idee um sich, die zur großen Erfolgsgeschichte des 20. Jahrhunderts avancieren sollte - die Menschenrechte. Insbesondere ab Ende der 1970er Jahre nahm die Menschenrechtsbewegung Fahrt auf. Universelle und regionale Menschenrechtssysteme haben seitdem Einzelnen eine Vielzahl internationaler Rechte zuerkannt, die sie sogar vor unabhängigen Beschwerdeinstanzen selbst und gegen ihren Heimatstaat geltend machen können. Zusätzlich schuf das Recht zum Schutze von Auslandsinvestitionen die rechtlichen und institutionellen Voraussetzungen für Individuen, gegen staatliche Beeinträchtigungen von Investitionsvorhaben selbst und unabhängig von „diplomatischem Schutz" vorzugehen. Es entspricht daher heute allgemeiner Meinung, dass dem Einzelnen Rechte auf völkerrechtlicher Ebene zustehen können. Parallel hat sich mit dem internationalen Strafrecht ein Rechtsgebiet herausgebildet, das dem Einzelnen auch völkerrechtliche Verpflichtungen auferlegen kann. Auf der anderen Seite sind Individuen nach wie vor nicht den Staaten gleichgeordnete Subjekte des Völkerrechts. Insbesondere auf die Entstehung von Völkerrecht haben sie nur sehr begrenzten Einfluss und zur Durchsetzung ihrer Rechte sind sie nach wie vor entsprechend auf ihren Heimatstaat angewiesen.

Jedoch hat sich die Völkerrechtsordnung auch insgesamt gewandelt, weg von einem reinen Recht der Koordination individualstaatlicher Interessen hin zu einem Kooperationsverhältnis einer Staatengemeinschaft mit gemeinsamen Werten. Kodifiziert in der Wiener Vertragsrechtskonvention von 1969 (WVK) findet sich das gewohnheitsrechtlich anerkannte Konzept des sog. *jus cogens* (Art. 53 and 64), also zwingenden Rechts, das ausschließlich durch späteres entgegenstehendes Recht gleichen Rangs ab-

geändert werden kann. Ein zweites allgemein anerkanntes Konzept, vom Internationalen Gerichtshof (IGH) zum ersten Mal in seinem Urteil *Barcelona Traction* aus dem Jahr 1970 verwendet, ist das der sog. *erga omnes* Verpflichtungen, welche alle Staaten gegenüber der Staatengemeinschaft als solcher verpflichten, und bezüglich derer unterstellt wird, dass alle Staaten ein Interesse an ihrer Befolgung haben. Auch wenn die Einzelheiten dieser Verpflichtungen noch nicht geklärt sind, wird offensichtlich, dass sie Ausdruck einer gemeinsamen Wertebasis und einer Verantwortung der Staatengemeinschaft für die Einhaltung grundlegender humanitärer Normen sind. Das Interesse des Einzelnen kann also zum Interesse der Staatengemeinschaft werden, und seine Verletzung im Einzelfall daher auch von anderen Staaten gegenüber dem Heimatstaat des Individuums geltend gemacht werden.

Zudem zeigen die Systeme des Menschenrechtsschutzes und des Investitionsschutzes in Staatennachfolgesituationen signifikante Rechtsschutzlücken, da ihre Stärken vor allem auf ihrer vertraglichen Ausprägung basieren, deren Fortbestand im Falle einer Sukzession aber nicht garantiert ist. Nur sehr wenige Menschenrechte sind völkergewohnheitsrechtlich anerkannt. Der Großteil der justitiablen Menschenrechte ist in Menschenrechtskonventionen enthalten. Nach hier vertretener Ansicht kann nicht davon ausgegangen werden, dass sich ein verbindlicher universaler menschenrechtlicher Eigentumsbegriff herausgebildet hat. Der Schutz privater Investitionen hingegen umfasst schon grundsätzlich nur geldwerte Güter von Ausländern. Allgemeine Entschädigungsstandards sind notorisch umstritten und entsprechend vage. Des Weiteren ist auch dieses Rechtsgebiet, soweit es über das Fremdenrecht hinausgeht, gewohnheitsrechtlich nicht verfestigt, sondern von Verträgen geprägt. Trotz nun schon jahrzehntelanger entsprechender Argumentation existiert auch keine gewohnheitsrechtliche Regel der automatischen Nachfolge in Menschenrechtsverträge oder Investitionsschutzabkommen.

Zentrale Bedeutung kommt in diesem Zusammenhang der völkergewohnheitsrechtlich anerkannten Vorschrift des Art. 70 Abs. 1 lit b) WVK zu, die bestimmt, dass eine Beendigung eines Vertrages „nicht die vor Beendigung des Vertrags durch dessen Durchführung begründeten Rechte und Pflichten der Vertragsparteien und ihre dadurch geschaffene Rechtslage“ berührt. Einer direkten Anwendung auf Individualrechte steht zwar entgegen, dass Art. 70 Abs. 1 lit. b) WVK eindeutig von den Rechten „der Vertragsparteien“, also Staaten, spricht; allerdings kann in der Vorschrift der Ausdruck eines allgemeinen Verbots der rückwirkenden Einflussnahme

auf *bereits bestehende, ausgeübte* Rechte durch nachträglichen Entzug ihrer Rechtsgrundlage gesehen werden – eine Regel, die auch auf das Aufheben einer nationalen Rechtsordnung nach Staatennachfolgen angewendet werden könnte.

Hier existiert somit weiterhin ein bedeutender, wenn auch limitierter, Anwendungsspielraum für die Lehre der wohlerworbenen Rechte.

IV) Kapitel IV untersucht sodann aktuelle Staatenpraxis in Nachfolgefällen, um nachzuweisen, ob und in welchem Umfang die Lehre von den wohlerworbenen Rechten heute Bestandteil des positiv geltenden Völkerrechts ist. In jedem Beispiel wurde zuerst die Einstellung des jeweiligen Nachfolgestaates zur internen Rechtsordnung des Vorgängerstaates betrachtet. In einem zweiten Schritt wurde die Kontinuität einzelner privater Rechte analysiert. Ein besonderer Fokus lag auf Eigentumsrechten und eigentumsähnlichen Rechten sowie auf erworbenen Rentenansprüchen.

Die Analyse umfasst dabei den Zeitraum seit 1990. In dieses etwas mehr als 30-jährige Intervall fallen die Vereinigung des Jemen, die deutsche Wiedervereinigung, der Untergang der Sowjetunion (SU), der Zerfall der Sozialistischen Föderativen Republik Jugoslawien (SFRJ) inklusive der späteren Abspaltung Montenegros und des Kosovo, die Teilung der Tschechoslowakei, die Abspaltung Eritreas von Äthiopien, die Übertragung der sog. Walfischbucht an Namibia, die (Rück-) Transfers von Hong Kong und Macao an China, sowie die Abspaltung des Südsudan, und damit Beispiele für alle der Sukzessionsformen, die in Kapitel II vorgestellt wurden. Da Ziel der Arbeit die Analyse eines *modernen* Verständnisses der Theorie der wohlerworbenen Rechte ist, wird bewusst darauf verzichtet, Fälle sog. *newly independent states*, also Nachfolgefälle der Dekolonialisierung, sowie ggf. noch weiter zurück liegende Sukzessionsfälle zu untersuchen.

Jedoch wirft ein Novum der neueren Geschichte Fragen nach einer zumindest analogen Anwendung der Regeln über die Staatennachfolge auf: der Austritt des Vereinigten Königreichs aus der Europäischen Union (Brexit). Die Mitgliedstaaten haben der Europäischen Union (EU) genuine Souveränitätsrechte übertragen. Sie kann in den Mitgliedstaaten, ggf. sogar gegen den Willen einzelner Mitgliedstaaten, unmittelbar verbindliches Recht setzen, welches den Einzelnen verpflichtet und berechtigt. Holt ein einzelner Staat durch seinen Austritt diese Souveränitätsrechte „zurück", stellt sich ähnlich wie bei der Staatennachfolge die Frage, ob er die den Einzelnen durch souveräne Rechtsakte der EU verliehenen Rechte anzuerkennen hat. Auch der Brexit wurde daher in die Analyse aufgenommen.

Die Ergebnisse der Untersuchung machten dabei erwartungsgemäß offensichtlich, dass die Art und Weise mit privaten Rechten bei Staatensukzession umzugehen, denkbar variabel ist und es keine allgemeinen Lösungen gibt, die auch nur in zwei Staaten identisch verfolgt wurden. Dies war schon angesichts der breiten geografischen Streuung und der disparaten politischen Hintergründe der Beispiele naheliegend. Es wurden in fast allen untersuchten Staaten (mit Ausnahme Eritreas) explizite, wenn auch mehr oder weniger detaillierte Regelungen getroffen, wie mit der „alten" Rechtsordnung umzugehen sei. Zudem haben alle Staaten, die sich für die Kontinuität der Vorgängerrechtsordnung entschieden, dies nur unter gewissen Vorbehalten, insbesondere der Konformität mit ihrer neuen Verfassung, getan.

Vor diesem Hintergrund fiel aber umso mehr ins Gewicht, dass in allen analysierten Fällen privaten Rechten von Einzelpersonen Beachtung geschenkt wurde, wenn auch in verschiedener Intensität und auf verschiedenem Wege. Keiner der Staaten schaffte die vorherige Rechtsordnung komplett ab. Fälle, in denen neue Staaten entstanden, d.h. Abspaltungen von einem bestehenden Staat bzw. der Zerfall eines Staates (SU, SFRJ, Tschechoslowakei, Eritrea, Montenegro, Südsudan) zeigten sich relativ einheitlich. Grundsätzlich haben alle Staaten, die aus dem Zerfall eines Gesamtstaates entstanden (SU, SFRJ, Tschechoslowakei), die Kontinuität der internen Rechtsordnung gewählt. Vielen der Nachfolgestaaten kam zuvor in gewissem Umfang autonome Rechtssetzungsmacht zu, z.B. im Falle der jugoslawischen Nachfolgestaaten, Montenegros oder des Südsudan, und/oder der Nachfolgeprozess fand größtenteils kooperativ statt, wie im Fall der SU oder der Tschechoslowakei. Selbst die von der SU jahrzehntelang rechtwidrig besetzten baltischen Staaten übernahmen in weiten Teilen das Privatrecht, welches in ihrem Gebiet direkt vor ihrer Unabhängigkeit galt. Sogar bei der gewaltsam herbeigeführten Unabhängigkeit des Südsudan vom Sudan wurde die interne Rechtsordnung im Prinzip weitergeführt. Die Beispiele des Kosovo und Eritreas sind vor ihrem sehr speziellen Hintergrund einzuordnen: Die Unabhängigkeit des Kosovo, dessen Staatsqualität bis heute umstritten ist, erwuchs aus jahrelanger internationaler Verwaltung des Gebiets, welches zuvor von Serbien seiner Autonomie beraubt worden war. Die erfolgte Rückanknüpfung an das Recht der SFRJ und das von der Übergangsverwaltung erlassene Recht (und gerade nicht das – rechtswidrig implementierte – serbische Recht) sollte damit als Bestätigung des Rechts des legalen Vorgängerstaates angesehen werden und spricht insgesamt für Kontinuität. Des Weiteren wurden selbst während

des serbischen Regimes erworbene Rechte grundsätzlich anerkannt, aber einer späteren Einzelfallprüfung unterworfen. Die Rechtslage in Eritrea ist undurchsichtig, auch hier spielt die Rechtswidrigkeit der vorhergehenden Machtübernahme Äthiopiens und der folgende Bürgerkrieg eine entscheidende Rolle. Die vorherige - äthiopische - Rechtslage wurde in einigen Bereichen wohl dennoch bewusst übernommen. Bemerkenswerterweise haben damit selbst Staaten, die eine Übernahme internationaler Verträge ihres Vorgängers rundheraus (z.B. die baltischen Staaten) oder teilweise (Südsudan und Eritrea) ablehnten, eine größere Akzeptanz bezüglich der internen Rechtsordnung des Vorgängers an den Tag gelegt. Es übernahmen mehr Staaten generell die vorherige interne Rechtsordnung als alle Menschenrechtsverträge des Vorgängers. Auch dieser tatsächliche Befund unterstreicht die Bedeutung der wohlerworbenen Rechte neben Rechten aus internationalen Verträgen.

Verglichen damit standen Staaten, die aus einer Fusion oder Vereinigung mehrerer Vorgängerstaaten entstanden, vor der Herausforderung, verschiedene nationale Rechtsordnungen miteinander in Einklang zu bringen oder sich zwischen ihnen zu entscheiden. Im vereinigten Jemen, einem Beispiel einer Fusion, wurden beide Rechtssysteme auf dem jeweiligen Territorium des Vorgängerstaates weitestgehend aufrechterhalten, was in der Praxis jedoch zu Friktionen führte. Dagegen hatte man sich bei der deutschen Wiedervereinigung, einem Fall einer Inkorporation, darauf geeinigt, dass das Recht der Bundesrepublik weitestgehend auf das Gebiet der beigetretenen ehemaligen Deutschen Demokratischen Republik (DDR) ausgedehnt wurde und das dortige Recht überlagerte. Zessionen, also (einvernehmliche) Gebietstransfers, wie in Hong Kong, Macao und der Walfischbucht, führten zwar gerade nicht zum Untergang oder der Neuentstehung von Staaten, jedoch ergaben sich ähnliche Herausforderungen wie im Falle von Zusammenschlüssen, da auch entschieden werden musste, welches Recht dort forthin gelten sollte. Bei der Rückgabe von Hong Kong und Macao einigte sich China mit Großbritannien bzw. Portugal darauf, das interne Recht in diesen Gebieten, gleichsam rechtlicher Enklaven, sehr weitgehend für 50 Jahre unangetastet zu lassen. Auf das Territorium der Walfischbucht hingegen wurde das namibische Recht erstreckt. Staaten, welche das interne Rechtssystem des Vorgängerstaates nicht (größtenteils) übernahmen, also die Bundesrepublik bezüglich der DDR-Rechtsordnung und Namibia bezüglich südafrikanischem Recht in der Walfischbucht, machten von dieser Regel weitreichende Ausnahmen zum Schutz individueller Rechte, oder

führten Übergangsperioden ein, in denen das „alte" Recht Stück für Stück dem neuen Recht angeglichen wurde.

Entsprechend haben alle untersuchten Staaten im Vorgängerstaat erworbenes Eigentum prinzipiell anerkannt. In Staaten mit einer (teilweise) sozialistischen Vergangenheit stellte die Restitution zuvor staatlich enteigneten („nationalisierten") Privatvermögens eine besondere Herausforderung dar. Während diese Enteignungen im Jemen soweit ersichtlich grundsätzlich akzeptiert und den Enteigneten Entschädigung gezahlt wurde, gingen Deutschland und die Nachfolgestaaten des ehemaligen Jugoslawiens den entgegengesetzten Weg und restituierten früheres Vermögen, prinzipiell *in natura*. Gleichzeitig wurde aber Rücksicht auf in der Zwischenzeit ggf. gutgläubig an diesen Sachen erworbene Rechte (z.B. Mietrechte oder Nutzungsrechte) genommen. Insbesondere zur Befriedung der gewaltsamen Konflikte und ethnischer Verfolgungen auf dem Gebiet der ehemaligen SFRJ wurde die Rückgabe von Eigentum und die Anerkennung erworbener Rechte an diesen zu einem wichtigen Eckpunkt des von der internationalen Gemeinschaft proklamierten „Rechts auf Wiederkehr".

Rentenansprüche wurden im Grundsatz – soweit sie zuvor existierten – von den Nachfolgestaaten anerkannt, was für ein solch verwaltungstechnisch aufwändiges und kostspieliges Thema überraschend ist. Zudem wurden Rentenansprüche meist unabhängig von der späteren Nationalität der betroffenen Person gewährt.

Die vorstehende Analyse machte jedoch auch Grenzen des Schutzes wohlerworbener Rechte sichtbar. Vor allem Rechte an Grund und Boden und dort lagernden Bodenschätzen wurden von Nachfolgestaaten nicht oder nur teilweise respektiert. Eritrea und der Südsudan führten nach ihrer Unabhängigkeit weitreichende Bodenreformen durch, die einen Großteil des Eigentums an Grund und Boden ohne äquivalente Entschädigung verstaatlichten. Auch wurden fremde Konzessionsrechte von beiden Staaten nicht vollumfänglich anerkannt. Sogar in Hong Kong, wo ansonsten die weitgehende Kontinuität der von den Briten eingeführten Rechtsordnung anerkannt war, wurde nichtstaatliches Eigentum an Grund und Boden nach der Rückübertragung nicht (mehr) umfassend akzeptiert. Bezüglich der Rentenansprüche wurde meist nur der Umstand, dass, und ggf. wie lange eine Person Rentenanwartschaften im Inland gesammelt hatte, anerkannt. Was keiner der Staaten uneingeschränkt schützte, war der Wert dieser Anwartschaften, insbesondere die zukünftige Höhe der Rente. Zudem ließ sich die wirtschaftliche Entwicklung der Nachfolgestaaten, die einen erheblichen Einfluss auf die letztendliche Höhe der Einkommen und

entsprechende Höhe der Renten hat, meist nicht vorhersagen, und führte somit zu großen Unterschieden.

Es darf auch nicht übersehen werden, dass trotz der teilweise sehr weitgehenden Anerkennung wohlerworbener Positionen im geschriebenen Recht, die Praxis dieser Theorie nicht immer entsprach. Einige der Nachfolgestaaten haben, oft vor dem Hintergrund einer gewaltsamen Auseinandersetzung und politischer Opposition mit bzw. gegenüber dem Vorgängerstaat, versucht, "neue", oft ethnisch definierte, Teile ihrer Bevölkerung zu diskriminieren und ihnen Rechte vorzuenthalten. Dies geschah vorrangig in Situationen der Abspaltung oder vollständigen Zergliederung eines Staates. Vor allem das Merkmal der Staatsangehörigkeit, das auch heute noch nur in seinen Randbereichen völkerrechtlich reguliert ist, wurde genutzt, um (neuen) Minderheiten Rechte zu nehmen und sie auszugrenzen. Oft traten diesen Versuchen aber nationale Verfassungsgerichte, internationale Gerichte, internationale Organisationen oder auch andere Staaten entgegen. Da die in unserer Auswahl beschriebenen Zusammenschlüsse von Staaten durchweg auf freundschaftlicher Basis vonstattengingen, wurde dort im Vergleich mehr Wert auf die Integration der neuen Bevölkerungsteile gelegt. Wenn auch diskriminierende politische Entscheidungen nicht vollständig ausgeschlossen waren, gab es hier jedenfalls keine ungezügelten Rechtsverletzungen oder ethnischen Verfolgungen, sondern wohlerworbene Rechte wurden im Grundsatz weitgehend auch in der praktischen Umsetzung geschützt.

Erklärtes Ziel des Austrittsabkommen zwischen Großbritannien und der EU war es, „Lebensentscheidungen" der EU-Bürger auch nach dem Brexit zu schützen. Trotzdem baut das Abkommen sehr stark auf dem Prinzip der Gegenseitigkeit und damit letztendlich weiterhin auf nationalstaatlicher Grundlage auf. Es geht grundsätzlich vom Erlöschen allen EU-Rechts in Großbritannien aus (ebenso ist der EuGH ab dem Zeitpunkt des Austritts grundsätzlich nicht mehr zur Entscheidung über Sachverhalte betreffend Großbritannien berufen), nennt in Abschnitt 2 aber an prominenter Stelle mehrere „Bürgerrechte", die aufrecht zu erhalten sind. Dazu gehören z.B. das Niederlassungsrecht in einem anderen Mitgliedstaat und das Recht der „Grenzgänger", in einem anderen Mitgliedstaat zu arbeiten und entsprechend die Grenze zu überqueren – allerdings nur, soweit diese Rechte auch zuvor ausgeübt wurden und weiterhin ausgeübt werden. Sie werden in sehr weitgehendem Umfang geschützt, so z.B. grundsätzlich auf Lebenszeit, und können auch auf Familienangehörige oder Partner erstreckt werden. Auch Renten und (europäische) Rechte am geistigen Eigentum werden fast wie

vor dem Austritt geschützt. Auf viele andere Rechte, insbesondere das Recht zur Wahl des Europäischen Parlaments, sonstige Freizügigkeitsrechte, oder Rechte, die bisher nicht ausgeübt wurden, können sich britische Bürger nach dem Austritt jedoch nicht mehr berufen.

V) Das abschließende Kapitel V stellt anhand einer umfassenden Analyse der zuvor gefundenen Ergebnisse Inhalt, Rechtsnatur, Grenzen und Perspektiven der wohlerworbenen Rechte dar. Die Prüfung orientiert sich dabei an Art. 38 Abs. 1 des IGH-Statuts, der als Quellen des Völkerrechts internationale Verträge, das Völkergewohnheitsrecht und allgemeine Rechtsgrundsätze nennt.

Verträge stellen nach weit verbreiteter Meinung auch heute noch die bedeutendste Quelle des Völkerrechts dar. Tatsächlich wurde ein Großteil der Sukzessionsfälle im Rahmen von *ad-hoc* Vereinbarungen zwischen den betreffenden Staaten gelöst. Trotzdem sind völkerrechtliche Verträge nach hier vertretener Ansicht die am wenigsten geeignete Rechtsquelle zum Schutz wohlerworbener Rechte. Da Verträge grundsätzlich auf der Zustimmung aller beteiligten Staaten aufbauen, ist eine Verpflichtung eines neuen Staates ohne seine Einwilligung schwer begründbar. Alle Versuche, bestimmte *law-making* oder *world order treaties* als verbindlich auch für neue Staaten zu erklären, sind bisher ohne konkrete Folge geblieben. Wie oben beschrieben, existiert selbst für multilaterale, universell gültige Menschenrechtsverträge keine allgemeine Regel der automatischen Nachfolge. Im Übrigen müsste eine Regel, die die Nachfolge in einen Vertrag anordnet, denknotwendig aus einer anderen Quelle als dem Vertrag selbst stammen. Sie ist damit grundsätzlich im Völkergewohnheitsrecht oder in den allgemeinen Grundsätzen zu suchen.

Völkergewohnheitsrecht ist nach Art. 38 Abs. 1 lit. b) IGH-Statut „Ausdruck einer allgemeinen, als Recht anerkannten Übung", setzt sich also nach weiterhin gefestigter Ansicht aus zwei Bestandteilen zusammen: einer einheitlichen, von der Mehrheit der Staaten getragenen Praxis und der Überzeugung, zu diesem Verhalten rechtlich verpflichtet zu sein (sog. *opinio juris*). Man ist sich weitgehend einig, dass neue Staaten an das zum Zeitpunkt ihrer Entstehung geltende allgemeine Völkergewohnheitsrecht gebunden sind, da sie gerade als Subjekt des *bestehenden* internationalen Rechtssystems anerkannt werden. Jedoch begegnet die Feststellung von Gewohnheitsrecht im Bereich der Staatennachfolge bedeutenden Schwierigkeiten: Sukzessionen stellen Ausnahmesituationen dar, die sich in der gleichen Form meist nicht wiederholen. Die Präzedenzwirkung anderer Fälle ist somit begrenzt. Auch trägt die enorme Weite des Tatbestandes

der Staatennachfolge dazu bei, dass von der Definition eine Unzahl sehr verschiedener Tatbestände mit diversen geografischen, politischen und sozialen Hintergründen, Motiven und Ausgangssituationen umfasst sind. Das Herausfiltern einer allgemeinen Praxis ist unter diesen Gesichtspunkten fast nicht möglich. Entsprechend können aus den *ad-hoc* Verträgen regelmäßig keine allgemeinen Regeln abgeleitet werden. Insgesamt ist die Praxis in den uns vorliegenden Fällen daher bei nüchterner Betrachtung zu vielgestaltig, der Hintergrund zu divers, die *opinio juris* zu schlecht nachweisbar, als dass aus ihr völkergewohnheitsrechtliche Regeln mit der Konsequenz der Verpflichtung von Staaten im Einzelfall hergeleitet werden könnten.

Allerdings stellt die Lehre von den wohlerworbenen Rechten nach hier vertretener Meinung einen allgemeinen Rechtsgrundsatz/ein allgemeines Rechtsprinzip im Sinne des Art. 38 Abs. 1 lit. c) IGH-Statut dar. Solche Prinzipien können nach an Zustimmung gewinnender Meinung nicht nur durch einen Vergleich von parallelen Regelungen in verschiedenen nationalen Rechtsordnungen hergeleitet werden, sondern auch direkt auf der internationalen Ebene entstehen, solange sie nur von fast allen Staaten „anerkannt" sind. Das Prinzip der wohlerworbenen Rechte gründet sich auf allgemeine Grundsätze der Rechtssicherheit und des Vertrauensschutzes, die nicht nur allen nationalen Rechtsordnungen in ihren Grundzügen gemein sein dürften, sondern auch der internationalen Rechtsordnung zugrunde liegen.

Die zuvor geleistete Analyse der relevanten Praxis von Staaten, internationaler Organisationen und Gerichten hat gezeigt, dass all diese Akteure ihr Handeln grundsätzlich daran ausrichteten, durch Staatensukzession erzwungene Wechsel der Rechtsordnung auch für die Rechtsposition des Einzelnen so wenig einschneidend wie möglich zu halten. Auch besteht eine bemerkenswerte Tendenz zur Aufrechterhaltung der unter der innerstaatlichen Rechtsordnung des Vorgängerstaates erworbenen Rechtspositionen selbst im Fall von z.B. starker politischer Opposition gegenüber dem Vorgängerstaat. Darüber hinaus finden sich Vorschriften im Völkervertragsrecht, die den Gedanken von Rechten, die ihre ursprüngliche rechtliche Grundlage überdauern, stützen, allen voran Art. 70 Abs. 1 lit. b) WVK. Wesentlich ist, dass Inhalt des Prinzips der wohlerworbenen Rechte nicht der Schutz von Rechten im Sinne juristischer Berechtigungen ist, sondern der Schutz einer bestimmten faktischen Lage, die durch den Gebrauch ehemals verliehener Rechte entstanden ist, und in deren Fortbestand der Ausübende Vertrauen entwickeln durfte.

Aus dem Prinzip der wohlerworbenen Rechte lassen sich verschiedene Konsequenzen ableiten: Erstens hat sich eine generelle Vermutung für den Fortbestand der nationalen Privatrechtsordnung in Fällen von Staatennachfolgen etabliert. Es konnte zwar aus der analysierten Staatenpraxis eindeutig keine Verpflichtung eines Nachfolgestaates, die interne Rechtsordnung seines Vorgängers aufrecht zu erhalten, herausgefiltert werden. Dies erschließt sich schon aus den umfangreichen Übergangsbestimmungen, die auch explizite Vorbehalte und Ausnahmen enthalten. Jedoch besteht für den Fall, dass der Nachfolgestaat sich nicht explizit äußert, eine Vermutung für die Aufrechterhaltung unter der vorherigen Rechtsordnung erworbener individueller Rechte. Uneindeutige Aussagen oder Handlungen können im Einklang mit dem Schutz erworbener Rechte ausgelegt werden. Daraus folgt spiegelbildlich, dass, wenn ein Nachfolgestaat sich dazu entschließt, Rechte Einzelner entfallen zu lassen, dies explizit geschehen sollte.

Zweitens hat sich inhaltlich in der internationalen Rechtsprechung der Standard herausgebildet, dass Staaten, wenn sie private Rechte Einzelner verkürzen oder ganz abschaffen, die Bedeutung der Gründe für die Abschaffung mit der Bedeutung der betroffenen Rechtspositionen abwägen und damit beide Interessen in einen Ausgleich bringen müssen. Während internationale Gerichte hierbei oft auf einen Standard aus den ihre Jurisdiktion begründenden Vertrag, z.B. Menschenrechte aus der EMRK und entsprechende Verhältnismäßigkeitsgesichtspunkte, abgestellt haben, griffen vor allem nationale oberste Gerichtshöfe oft auch auf Argumente der Rechtssicherheit und des Vertrauensschutzes zurück. Ob ein solcher Eingriff in bereits bestehende Rechte akzeptiert wurde, variierte je nach den Umständen der spezifischen Situation. Internationale Gerichte haben Staaten insoweit einen weiten Ermessensspielraum zugestanden. Im Einzelfall können sehr weitgehende Rechtsverkürzungen auf allgemeine Interessen des Allgemeinwohls gestützt werden. Während also wohl (noch) keine strenge Proportionalitätsprüfung gefordert ist, darf der Nachfolgestaat unter der Rechtsordnung seines Vorgängers erworbene Privatrechte nicht einfach ignorieren und nicht offen diskriminierend oder grob unverhältnismäßig handeln.

Zudem haben sich mittlerweile Fokus und Maßstab der Beurteilung von einem geldwerten Vorteil des Staates mehr in Richtung der „berechtigten Erwartungen" der betroffenen Einzelpersonen verschoben. Diese Umorientierung führt zu einer Öffnung des Schutzbereichs der wohlerworbenen Rechte auch für immaterielle Interessen. Ebenso ermöglicht dies ungeschriebene, gewohnheitsrechtlich gewachsene Ansprüche anzuerkennen.

Auch sollte nach hier vertretener Ansicht, gestützt durch die Staatenpraxis, der Schutz wohlerworbener Rechte von seiner Basis im Fremdenrecht entkoppelt werden und die Interessen von Individuen weitgehend unabhängig von deren neuer Staatsangehörigkeit nach dem Sukzessionsvorgang geschützt werden.

Schließlich variiert die Intensität der Pflicht eines Nachfolgestaates „wohlerworbene Rechte" zu respektieren, auch entsprechend der spezifischen Umstände der Nachfolge. Hierbei hat sich herauskristallisiert, dass Staaten umso eher und umso weitgehender Individualrechte anerkannt haben, je mehr Einfluss der Nachfolgestaat auf die Umstände und Konditionen der Nachfolge an sich hatte, und je mehr Einfluss der Nachfolgestaat auf die Entstehung der privaten Rechte vor der Nachfolge hatte. Daraus folgt, dass strengere Anforderungen im Falle von Zessionen zu stellen sind. Ähnlich wird die Situation bei freiwilligen Zusammenschlüssen oder Absorptionen von Staaten zu betrachten sein. Problematischer ist eine Verpflichtung auf wohlerworbene Rechte hingegen in Fällen von neu entstehenden Staaten, da hier durch die Pflicht, vom Vorgängerstaat geschaffene Rechte anzuerkennen, eine größere Beeinträchtigung von Souveränitätsrechten eintritt. Diese Fälle nehmen eine Mittelposition ein. Am anderen Ende des Spektrums finden sich sodann unilaterale Abtrennungen von Teilgebieten, die zuvor kein Mitspracherecht bei innerstaatlichen Angelegenheiten hatten. In diesen Fällen wird nur eine verminderte Pflicht zur Anerkennung wohlerworbener Rechte festgestellt werden können bzw. es werden den betroffenen Staaten regelmäßig mehr Möglichkeiten der Rechtfertigung offenstehen.

Trotzdem sich das Prinzip der wohlerworbenen Rechte in den letzten Jahrzehnten deutlich herausgebildet und genauere Konturen gewonnen hat, ist seine Wirkung in vielen Bereichen weiterhin begrenzt: Der heutige Entwicklungsstand des Grundsatzes reicht nicht weit genug, um eindeutige Rechte des Individuums bzw. Pflichten des Staates für den Einzelfall allein aus ihm herzuleiten. Es ist ein positiv bindendes Prinzip, das jedoch vor allem im Zusammenspiel mit konventionsrechtlichen und gewohnheitsrechtlichen Regeln wirkt, und als Auslegungs- und Leitmotiv herangezogen werden kann. Das Prinzip der wohlerworbenen Rechte ist nicht Quelle eines materiellen Mindeststandards, sondern kann lediglich einmal durch Ausübung erworbene *tatsächliche* Positionen erhalten. Das Prinzip kann zudem nicht das soziale und wirtschaftliche Umfeld des Rechts perpetuieren, das für seinen Wert oft von großer Bedeutung ist.

Nichtsdestotrotz hat das Prinzip der wohlerworbenen Rechte, gerade wegen seiner Unbestimmtheit und Flexibilität, als Leitmotiv enormes Potential in zukünftigen Situationen innerhalb und außerhalb von Staatennachfolgen einen Beitrag zur Weiterentwicklung und Vereinheitlichung des Völkerrechts, ggf. sogar auch des internationalen Privatrechts zu leisten. Das Recht der Staatennachfolge ist in weiten Teilen unklar und lückenhaft. Hinzu kommt, dass vor allem im letzten Jahrzehnt auf Seite mancher Staaten ein gewisser Rückzug ins Nationale, verbunden mit einer Abwehrhaltung gegenüber dem Völkerrecht und internationalen Institutionen festgestellt werden konnte. Daher mag eine Regel wie die der wohlerworbenen Rechte, die sich nicht nur auf eine breite Basis in vielen nationalen Rechtsordnungen stützen kann, sondern letztendlich auch auf private, gemeinhin als „unpolitisch" empfundene Rechte rekurriert, wieder mehr Zuspruch erfahren als z.B. die auf Menschenrechte gestützten Argumente.

Von besonderer Bedeutung ist schließlich das Potential des Grundsatzes der wohlerworbenen Rechte, verschiedene Rechtsgebiete zu verknüpfen, zu deren einheitlicheren Anwendung und Auslegung beizutragen und damit die weitere Fragmentierung des Völkerrechts zu verhindern. Zusätzlich kann das Prinzip helfen, Gemeinsamkeiten zwischen nationalem und internationalem Recht hervortreten zu lassen und die Grenze zwischen den beiden Ebenen durchlässiger zu machen. Als Brücke zwischen internationalem und nationalem Recht kann das Prinzip auch dazu beitragen, zumindest in einigen Bereichen die schleppende nationale Umsetzung internationaler Vorgaben im nationalen Recht zu verbessern. Zudem ist das Prinzip durch seinen Verweis auf rein nationale Gegebenheiten in der Lage, spezifischen, nicht global anerkannten Rechtspositionen sowie regionalen Besonderheiten Rechnung zu tragen und gleicht insoweit das Fehlen eines universellen menschenrechtlichen Eigentumsbegriffs aus. Darüber hinaus kann das Prinzip der wohlerworbenen Rechte auch auf Szenarien angewendet werden, die nach der klassischen Definition keine Staatennachfolge darstellen, aber in der die Interessenlage von Staaten und Individuen analog gelagert sind. Hierzu zählen z.B. Fälle von Gebietszuschreibungen durch gerichtliche Entscheidung und Fälle der Ausdehnung von Souveränitätsrechten in Bereiche, in denen Individuen zuvor Rechte ohne formal-gültigen Titel, sondern allein durch langjährige, geduldete Ausübung erworben haben.

Zusammenfassend hat das Prinzip der wohlerworbenen Rechte daher großes Potential, den Schutz von Individualrechten in Fällen von Staatennachfolgen, aber auch in vergleichbaren Situationen, zu einem Eckpunkt staatlicher Entscheidungen zu machen und damit den Status des Einzel-

menschen völkerrechtlich weiter zu festigen. Seine Flexibilität und Generalität sichern dabei seine Anwendbarkeit auch auf untypische und neue Fälle, ggf. Jahre bevor sich speziellere, wirkmächtigere Rechtsgebiete an diese angepasst haben, oder neue Regeln entstanden sind. Denn auch in der Zukunft wird eine der zentralen Aufgaben des nationalen und des internationalen Rechts der Schutz von Individualrechten und die Sicherung von Kontinuität in Zeiten des politischen Wandels sein.