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,

https://doi.org/10.5771/9783748943396-31 - am 25.01.2026, 23:44:28. https://www.inlibra.com/de/agb - Open Access -

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."

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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).

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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.

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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."

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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.

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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

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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.

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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".

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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.

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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>.

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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.

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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).

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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).

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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.

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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.

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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.

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> 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.

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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.

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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).

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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.

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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.

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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,

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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

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> "[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.

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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].

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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.

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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.

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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.

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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.

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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".

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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.

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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].

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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.

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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

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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).

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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.

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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,

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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-

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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.

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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]

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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

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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)).

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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.

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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.

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

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