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The Enforceability of Private Property and Contract Rights against a Successor State in International Law

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ABSTRACT

When one state replaces another in sovereignty over territory, several legal issues arise. One pressing issue that has fallen into neglect in scholarship concerns the enforceability of certain private rights, specifically property and contract rights, against the successor state. These include, for example, state contracts, concessions, or land grants by the government.

This article examines the conceptual bases that have been invoked to explain the survival of such rights against a successor state. Even if such rights survive as a matter of customary international law, none of these theories—acquired rights, subrogation, the continuity of the predecessor state's legal system and/or its institutions, the territorialization of rights, equitable interests, or unjust enrichment—is individually capable of accounting in full for the enforceability of property or contract rights against a successor state. The successor state is, however, under an obligation to negotiate in good faith with the beneficiaries of certain preexisting rights. This might be the most clear-cut duty that remains, underscoring the significance of negotiated solutions in state succession matters.

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I. NEW SOVEREIGN, OLD RIGHTS

When one state replaces another in sovereignty over territory, several legal issues arise. Many concern the relations between the successor state in sovereignty on the one hand and third states or international organizations on the other. For example, what is the successor state's position in relation to treaties and membership in international organizations? Which foreign diplomatic personnel, if any, is accredited to it? Other questions concern property and financial interests. Is the successor state entitled to any share of the predecessor state's immovable or movable property, including gold or foreign currency reserves in foreign banks? Is it liable for any share of the sovereign debt? Some of these questions have been explored in depth, both in practice and in writings. Others have been the subject of attempted codification or progressive development in treaties or other instruments.

One particularly pressing issue that has fallen into neglect concerns the enforceability of certain private rights,[1] specifically property and contract rights that had been granted by the predecessor state, against a successor state. These could include, for example, state contracts, concessions, or land grants by the government.[2] Are these private rights, originally enforceable against the predecessor state, in principle also enforceable against the successor state? If so, under what circumstances is that the case? For example, is a mining lease granted by a state to a foreign contractor pursuant to a production-sharing

1. Recent literature is limited. The principal contributions are the following: *See* Patrick Dumberry, *State Succession to State Contracts: A New Framework of Analysis for an Unexplored Question*, 19 J. WORLD INV. & TRADE 595 (2018); María Isabel Torres Cazorla, *Rights of Private Persons on State Succession: An Approach to the Most Recent Cases*, *in* STATE SUCCESSION: CODIFICATION TESTED AGAINST THE FACTS 663 (Pierre M. Eisemann & Martti Koskenniemi eds., 2000).

2. Although the categories falling under this rubric can be broad, they do not encompass all private rights enforceable against the state. This article does not, for example, explore the enforceability of patents, trademarks, or pensions against the successor state. The article also does not explore the status of legal relations between private persons in the successor state's legal system.

contract[3] enforceable against the successor state,[4] or would the successor state be free to refuse to honor that lease?

It is certainly a desirable outcome, from the point of view of economic stability at least, for such rights to be enforceable by operation of law against a successor state, even in the absence of a negotiated agreement, perhaps nowhere more so than in the case of private property rights. It is safe to say that state practice and *opinio juris* are sufficient to support a rule of customary international law requiring a successor state to honor such rights. The U.S. Restatement (Fourth) on the Law of Foreign Relations of the United States (Restatement) takes the position that it "would be unfair to a private party"[5] if property rights were not enforceable against the successor state.[6] This may well be true, but, as a legal theory, this statement is insufficient. For reasons of intellectual coherence and completeness, and to provide guidance for future cases, it is necessary to explore whether it is possible to articulate a more robust legal basis, not least because the enforceability of property and contract rights against a successor state has, at times, come under intense scrutiny, especially where newly independent states are concerned.

The rights under consideration here, which will at times be referred to as "private rights," are rights specifically granted by a state to a private party and enforceable by that private party against the state. For example, this category might include state contracts, concessions, or land grants by the government. The character of such rights—including whether they have a contractual or a proprietary or even a sui generis character—differs from legal system to legal system; but, for present purposes, the general categories of "contractual" and "proprietary" capture the essential features of the rights under consideration. This article does not engage with rights between private persons in a successor state, such as contracts between private parties; it considers rights granted by legislation, such as pension rights, only in passing.

This article first sets out the question's contemporary relevance (Part II) and the uncertain conceptual background that bedevils state succession and private rights (Part III), before attempting a categorization of the rights affected (Part IV). The article next explores

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3. Many production-sharing contracts foresee the possibility that contractors may apply for leases upon making a commercial discovery. *See, e.g.*, *Government of India, Model Production Sharing Contract*, GOV'T OF INDIA, (2005) (art. 11, "Petroleum Mining Lease for Offshore Area"), (last accessed Nov. 5, 2023) https://www.dghindia.gov.in/assets/downloads/56cee2dfb848d4_MPSC_NELP-IV.pdf [https://perma.cc/6E3A-9MUJ] (archived Nov. 11, 2023) (Art. 11, "Petroleum Mining Lease for Offshore Area").

4. *Id.*

5. *See* RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 209 cmt. f (AM. L. INST. 2018).

6. *See also* United States v. O'Donnell, 303 U.S. 501, 510–11 (1938) (holding that certain lands in California that formed part of the territory the United States had acquired through the Treaty of Guadalupe Hidalgo remained subject to property rights by virtue of principles of international law and the United States' treaty obligations).

theories that have been invoked to justify the survival of such rights. As it turns out, however, none of the theories that tribunals and expert bodies have invoked—acquired rights, subrogation, the continuity of the predecessor state's legal system and/or its institutions, the territorialization of rights, equitable interests, or unjust enrichment—is individually able to account in full for the enforceability of property or contract rights against the successor state in all situations. This level of doctrinal imprecision might seem intellectually unsatisfactory and an undesirable state of affairs since it can lead to practical uncertainty.

After critically examining these six main theories, the article concludes that not one of them is by itself capable of fully explaining why private property and contract rights are enforceable against a successor state (Part V). What is clear, though, is that the successor state is under an obligation in general international law to negotiate in good faith with the beneficiaries of certain preexisting property and contractual rights (Part VI). The article concludes that this duty underscores the undeniable significance of negotiated solutions in state succession matters (Part VII).

II. CONTEMPORARY RELEVANCE OF THE QUESTION

The questions under consideration have more than just a historical dimension; on the contrary, they arise with urgency today. For instance, Scotland held a long-promised independence referendum in 2014, and the Scottish National Party made a second independence referendum a core of its 2021 Manifesto. Scotland's former First Minister had promised to hold a further independence referendum in October 2023.[7] While the UK Supreme Court, in a judgment handed down on November 23, 2022, held unanimously that the Scottish Parliament did not have the legal authority to hold a referendum on independence, a future referendum remains a possibility if the UK Parliament authorizes it.[8] One of the issues that would arise concerns North Sea oil.[9] Although the oil industry in Scotland has decreased as it moves towards a net-zero emissions energy market, North Sea oil

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7. *SNP 2021 Manifesto: Scotland's Future, Scotland's Choice*, SNP (Apr. 15, 2021), https://www.snp.org/manifesto/ [https://perma.cc/8FTQ-6AJ6] (archived Nov. 20, 2023).

8. Reference by the Lord Advocate of Devolution Issues under Paragraph 34 of Schedule 6 to the Scotland Act 1998, [2022] UKSC 31 [8], [70], [82], [92]. The UK government previously had taken the position that it would be premature for the UK Supreme Court to rule on the legality of such a referendum. *See London Say it is "Premature" for Supreme Court to Rule on Scottish Referendum*, FIN. TIMES (July 12, 2022), https://www.ft.com/content/42ecaf4a-084a-4d0c-9884-c79e3dd87869 [https://perma.cc/FA4X-8VP9] (archived Sept. 13, 2023). In 2012, the UK government requested a legal opinion from Professor James Crawford and Professor Alan Boyle on the international law aspects of the 2014 Scotland independence referendum, principally concerning state continuity and succession. JAMES CRAWFORD & ALAN BOYLE, ANNEX A OPINION: REFERENDUM ON THE INDEPENDENCE OF SCOTLAND – INTERNATIONAL LAW ASPECTS (2012), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf [https://perma.cc/7BRX-FMJ2] (archived Sept. 29, 2023).

9. *See* FIN. TIMES, *supra* note 8; CRAWFORD & BOYLE, *supra* note 8.

remains an important part of the economy for now,[10] and the UK government has fairly recently granted new oil and gas exploration licenses in these areas.[11] Would such licenses be enforceable against a hypothetically independent Scotland if they granted rights with respect to areas falling on the Scottish side of any eventual maritime boundary? Would Scotland be free to alter the terms of such a license, or to subject the contractor's rights under them to more exacting environmental requirements, for example?

Further, in December 2021, New Caledonia held its third referendum on independence from France pursuant to the decolonization process envisaged in the 1998 Nouméa Accord.[12] These referenda all failed to pass, but they demonstrate the possibility of negotiated independence here or in other dependent territories in the future. Another, already thrice-delayed independence referendum might be held in the Chuuk State of the Federated States of Micronesia. The referendum was originally scheduled for 2015, then ultimately delayed to October 2022 but has yet to take place.[13] An independence referendum was also held in the Bougainville province of Papua New Guinea in 2019, in which Bougainville overwhelmingly favored independence.[14]

Unconstitutional independence referenda raise a number of additional issues, but they occur with increasing frequency, not least in the Kurdistan Region of Iraq or Catalonia.[15] In the Kurdistan Region of Iraq, for example, numerous foreign oil and gas companies hold rights regarding oil and natural gas exploitation, usually under

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10. *See* David Sheppard & Nathalie Thomas, *Scotland Faces up to Life after Oil*, FIN. TIMES (Apr. 20, 2021), https://www.ft.com/content/e6b42db9-1a73-4314-bd96-5409d0b3b774 [https://perma.cc/98YS-F7QF] (archived Sept. 13, 2023).

11. *See* Fiona Harvey, *New North Sea Oil and Gas Licences 'Incompatible with UK Climate Goals'*, GUARDIAN (Feb. 15, 2022), https://www.theguardian.com/environment/2022/feb/15/new-north-sea-oil-gas-licences-incompatible-uk-climate-goals [https://perma.cc/LR25-VULY] (archived Sept. 13, 2023).

12. Nouméa Accord, May 5, 1998, Fr.-New Caledonia, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 27, 1998, p. 8039.

13. *See Chuuk Independence Referendum Postponed Until 2022*, RNZ (Feb. 29, 2020, 9:28AM), https://www.rnz.co.nz/international/pacific-news/410655/chuuk-independence-referendum-postponed-until-2022 [https://perma.cc/8R6H-3VYT] (archived Sept. 13, 2023).

14. *See Bougainville Overwhelmingly Votes for Independence from Papua New Guinea*, FRANCE 24 (Nov. 12, 2019), https://www.france24.com/en/20191211-vote-count-complete-after-bougainville-referendum-on-independence-from-papua-new-guinea [https://perma.cc/8B4J-LDVN] (archived Sept. 13, 2023).

15. Both the Kurdistan Region of Iraq and the Spanish region of Catalonia held independence referenda not sanctioned by the respective central government six days apart in September and October 2017, respectively. *See Iraqi Kurds Decisively Back Independence in Referendum*, BBC (Sept. 27, 2017), https://www.bbc.com/news/world-middle-east-41419633 [https://perma.cc/B2LG-DJN6] (archived Sept. 13, 2023); *Catalonia's Bid for Independence from Spain Explained*, BBC (Oct. 18, 2019), https://www.bbc.com/news/world-europe-29478415 [https://perma.cc/N5WK-UNWA] (archived Sept. 13, 2023).

production-sharing or other types of oil and gas contracts.[16] The Kurdistan Regional Government itself, rather than the government of Iraq, is the party to these agreements.

Finally, there are sui generis situations involving disputed territories, such as the status of Western Sahara. Certain U.S. and European oil and gas and mining companies, including, among others, Kosmos Energy,[17] Glencore,[18] and Total S.A.,[19] at certain points reportedly entered into contractual arrangements with the government of Morocco for the exploration and possible exploitation in blocks offshore Western Sahara, a territory designated as non-self-governing under Article 73 of the UN Charter.[20] Some did so in purported reliance on a 2002 opinion by the then-U.N. Legal Counsel concerning Morocco's claimed authority to grant exploration licenses.[21] Would Western Sahara, should it ever become an independent state, be required under international law to honor any private property or contract rights relating to its territory? The status of non-self-governing or other dependent territories differs, and that status depends on internal constitutional arrangements. It seems artificial, for this reason, to apply the term "successor state" to any such territory wholesale when such territories gain independence. Still, many of the same issues arise.

Finally, the internationally unlawful annexations of Crimea and Sevastopol in 2014, as well as of Luhansk, Donetsk, Zaporizhzhia, and Kherson in 2022, demonstrate the reality that some attempted

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16. *See generally Contracts*, KURDISTAN REG'L GOV'T, https://gov.krd/mnr-en/publications/contracts/ (last visited Sept. 13, 2023) [https://perma.cc/T5BE-P585] (archived Sept. 13, 2023).

17. The company has since withdrawn its Western Sahara operations, but it maintains a website "to showcase [its] belief that responsible resource development has the potential to create significant social and economic benefits and to provide energy security for the region." *See* OIL & GAS EXPL. OFFSHORE W. SAHARA, https://www.westernsaharaoil.com/ (last visited Sept. 3, 2023) [https://perma.cc/T5TR-K8RY] (archived Sept. 13, 2023).

18. *See* Andy Hoffman, *Norway's KLP Pension Fund Drops Glencore Over Western Sahara Oil*, BLOOMBERG (Dec. 8, 2015), https://www.bloomberg.com/news/articles/2015-12-08/norway-s-klp-pension-fund-drops-glencore-over-western-sahara-oil. (permalink omitted).

19. *See* Lin Noueihed, *Total Renews Oil Licence in Disputed Western Sahara*, REUTERS (Feb. 7, 2014), https://www.reuters.com/article/total-westernsahara-idUSL5N0LC35Y20140207 [https://perma.cc/4FGB-JUH5] (archived Sept. 13, 2023).

20. *See Non-Self-Governing Territories*, UNITED NATIONS, https://www.un.org/dppa/decolonization/en/nsgt [https://perma.cc/Y6WZ-V5SM] (archived Sept. 13, 2023) (updated list of non-self-governing territories under Article 73 of U.N. Charter); *see also* Javier Blas, *Battle for Oil Fuels Africa's Lengthy Conflict*, FIN. TIMES (Sept. 17, 2014), https://www.ft.com/content/458a9ea6-3cc3-11e4-871d-00144feabdc0 [https://perma.cc/MBY7-C96U] (archived Sept. 13, 2023).

21. *See* U.N. Security Council, Letter dated Jan. 29, 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, U.N. Doc. S/2002/161 (Feb. 12, 2002). For Kosmos Energy's reliance on this opinion, *see U.N. Legal Opinion On Resource Development*, OIL & GAS EXPL. OFFSHORE W. SAHARA, https://www.westernsaharaoil.com/situation-overview/un-legal-opinion [https://perma.cc/NXP5-A3MH] (archived Sept. 13, 2023); *see also Oil Exploration in the Occupied Territories of Western Sahara,* EUROPEAN PARLIAMENT (July 12, 2016), https://www.europarl.europa.eu/doceo/document/E-8-2016-005645_EN.html [https://perma.cc/6E5F-FACY] (archived Sept. 13, 2023) (question for written answer E-005645-16).

transfers of territory may continue to be procured by force or coercion. Legally speaking, a "succession" of states, i.e., the replacement of one state by another in sovereignty over territory, only occurs where this replacement takes place in accordance with international law.[22] Where territory is forcibly annexed, that is manifestly not the case. Still, though, as a pure matter of fact, many of the same questions explored also arise in that scenario, even if—should the area be under military occupation—the special regime concerning property rights under the 1907 Hague Regulations would apply.[23] For example, in *PJSC CB PrivatBank & Finance Company Finilon v. Russian Federation*, the arbitral tribunal held in an interim award of March 2017 that Crimea was de facto Russian territory, and that consequently Russia's international obligations applied there.[24] Similarly, the Restatement notes, with respect to situations involving internationally unlawful succession and public debt, that "the illegality of the succession should not be a defense to the responsibility of the successor state for the debt of the predecessor."[25] In any event, the variety of situations illustrates the complexity of the issue, and sometimes the international lawfulness of a succession of states is not easy to determine. The remainder of this article, however, focuses on cases of internationally lawful succession.

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22. *See* Vienna Convention on Succession of States in Respect of Treaties art. 6, Aug. 23, 1978, 1946 U.N.T.S. 3; Vienna Convention on Succession of States in Respect of State Property, Archives and Debts art. 3, Apr. 8, 1983, 22 I.L.M. 306 (concluded April 8, 1983, not yet in force).

23. *See* Convention (IV) Respecting the Laws and Customs of War on Land art. 46, Oct. 18, 1907, 36 Stat. 2227, 205 Consol. T.S. 277 ("Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."); *see also id.* art. 56 ("The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property."). These provisions concern broad categories of private rights, suggesting that the survival of all these rights in times of occupation derives from a common justification.

24. *See, e.g.*, PJSC CB PrivatBank & Fin. Co. Finilon v. Russian Fed'n, PCA Case No. 2015-21, Interim Award, ¶¶165–87 (Mar. 27, 2017); *see* also Russian Fed'n v. Stabil LLC, Case 4A_398/2017, Judgment (Swiss Fed. Ct., Oct. 16, 2018) (an example of Russia's attempt to set aside a decision on jurisdiction arising out of the situation in Crimea; the Swiss Federal Court agreed with the arbitral tribunal that had issued the decision that the word "territory" in the applicable investment treaty did not only include lawful territory).

25. *See* RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 209 cmt. f (AM. L. INST. 2018). Just as succession of states must be distinguished from succession of governments, internationally unlawful succession must be distinguished from unlawful or unconstitutional governments. The Tinoco arbitration, for example, which also concerned liabilities to foreign private creditors, concerned a succession of governments. That decision is of interest primarily because the sole arbitrator, William Howard Taft, held that Costa Rica was not liable for the debts incurred by the Tinoco administration because these debts had an odious character. Aguilar-Amory & Royal Bank of Can. Claims (Gr. Brit. v. Costa Rica), 1 R.I.A.A. 369 (1923).

III. THE ABSENCE OF GENERAL RULES

A succession of states refers to the replacement of one state by another in sovereignty over territory.[26] That is the situation under consideration here, and it can take many forms. Critically, what occurs is a replacement, not a transfer. Territory can be transferred, but sovereignty over territory is replaced. The new sovereign, i.e., the successor state, is not necessarily privy to existing legal relations between private persons on the one hand and the predecessor state on the other. On what basis, if any, might the successor state be liable to honor such rights, at least at the moment of succession, when the successor state cannot (yet) be said to have accepted them through its conduct or otherwise?

When it comes to a state's liabilities, though, in whatever form and whoever the creditor may be, it might seem more plausible to speak of some kind of "transfer" than of a replacement. Can this occur automatically, without an agreement?[27] Significant portions of territory were redistributed after the First World War, and numerous agreements regulated rights against the state and, indeed, certain contractual relations between individuals in those territories.[28] Yet, does the successor state necessarily assume, by operation of law, liabilities for private rights simply by virtue of a replacement of sovereignty, in the absence of any negotiated transfer of rights and liabilities by agreement with the predecessor state? There is no equivalent to the purported rule—controversial and unsettled though it might be—of automatic succession to treaties that is reflected in the Vienna Convention on Succession of States in Respect of Treaties.[29]

General rules are hard to come by in this corner of international law and practice. To insist that a grand theory such as "universal succession" or the "clean slate doctrine" provides a comprehensive explanation is nowadays utterly naïve. This is true not only in respect of the so-called "field" as a whole but also in respect of individual areas

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26. Definitions of state succession in international instruments uniformly refer to the replacement of sovereignty. *See* Vienna Convention on Succession of States in Respect of Treaties, *supra* note 22, at art. 2(1)(b); Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, *supra* note 22, at art. 2(1)(a); Conference on Yugoslavia Arbitration Committee, Opinion No. 1, Aug. 27, 1991, 31 I.L.M. 1488, 1495–1496 (para. 1(e)); Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession art. 1(a), May 19, 2006, C.E.T.S. 200.

27. Professor Georg Ress, the Rapporteur of the Institut de Droit International on this topic, doubted whether such a transfer could occur without an agreement. *See* Georg Ress, *Note préliminaire présentée à la première réunion de la 7ème Commission à Lisbonne*, 2001 Y.B. INST. INT'L L. 121, 124 (2001).

28. *See, e.g.*, Peace Treaty of Versailles arts. 75(2), 92(4), 297(h), 299, June 28, 1919, 225 Consol. T.S. 188; Arrangement on the Application of Part X of the Treaty of St-Germain to Alsatians and Lorrainers art. 3, Austria-Fr., Feb. 7, 1921, 4 L.N.T.S. 251; Convention Between Belgium and Poland Concerning Certain Questions Relating to Private Property, Rights and Interests, Belg.-Pol. art. 11(b), Dec. 30, 1922, 21 L.N.T.S. 203; Convention Regarding the Delimitation on the Spot of the Frontier Between the Two States, and Also Regarding the Rights of the Citizens in the Frontier Zone and the Status of Immovable Property Intersected by the Frontier Line, Lat.-Lith. art. 7, May 14, 1921, 17 L.N.T.S. 211.

29. *See* Vienna Convention on Succession of States in Respect of Treaties, *supra* note 22, at art. 34.

such as financial liabilities. For instance, under Article 191 of the Treaty of Trianon, Hungary's property and possessions on territory formerly part of Austria-Hungary became the property of successor States. The Permanent Court of International Justice's (PCIJ) judgment in *Appeal from a Judgment of the Hungaro/Czecoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v. The State of Czechoslovakia)* noted that this provision "applies the principle of the generally accepted law of State succession."[30] This statement's appeal lies in its simplicity, but to speak of a "principle" or a "generally accepted law of State succession" can be misleading. No such "single dogma" exists,[31] much less one that can adequately account for the complexity and variety of situations and practices. At a minimum, all should be in a position to agree that no legal rules follow *a priori* from what are ultimately just the generalized labels "successor" and "predecessor." Much depends on circumstances and on the posture of other states in characterizing the situation.

International decisions suggest that private property and contract rights enforceable against the state are not affected by state succession, although those decisions for the most part involved a treaty that specifically secured such private rights.[32] In reality, these questions are typically at least in part regulated in an ad hoc manner by instruments of cession, which seek to prevent uncertainty and litigation, and thereby seek to achieve a degree of economic and fiscal stability. However, the position under general international law has escaped systematic study. Even where such a situation is governed by treaty, one must still inquire into the general principles against which those treaty provisions are applied. What are the residual rules governing such private rights not specifically covered by those treaties?

Some of the basic principles concerning the status of private rights in a succession of states were articulated by judicial organs and arbitration tribunals in the early twentieth century, in cases arising under the peace treaties concluded after the First World War. These disputes largely concerned private rights in territories ceded by Germany to Poland, as well as territory ceded to Greece after the Balkan Wars and the dissolution of the Ottoman Empire. This transfer of title to state property lay at the root of much international litigation involving private claims against successor states in the years following succession.

Because of certain broad statements of principle in these international decisions, it is easy to slip into the false assumption that there are general, internationalized rules and principles governing contractual and proprietary rights and causes of action. That is not the

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30. Appeal from a Judgment of the Hungaro/Czecoslovak Mixed Arbitral Tribunal (The Peter Pázmány Univ. v. The State of Czechoslovakia), 1933 P.C.I.J. (ser. A/B) No. 61, at 237 (May 12).

31. HERBERT A. WILKINSON, THE AMERICAN DOCTRINE OF STATE SUCCESSION 71 (The Johns Hopkins Press, 1934).

32. *See, e.g.*, Sopron-Köszeg Local Railway Company Case, 5 I.L.R. 57 (1929); Forêts du Rhodope Central (Greece v. Bulg.), 3 R.I.A.A. 1389 (1933).

case.[33] While patterns exist, and comparative lawyers spend entire careers parsing legal families, no claim about a general international law of property or of contract can confidently withstand scrutiny. As a result, there is no such general body of rules capable of providing international legal answers to the status of private rights, to the extent that such a body of rules makes claims about specific contractual or proprietary causes of action. Even notions such as concession, administrative contract, license, or state contract differ from system to system.

All this raises the issue as to which rights are concerned. It is to this question that we now turn.

IV. THE PROPERTY AND CONTRACT RIGHTS CONCERNED

The notion of private rights might ultimately be an artificial category. One who seeks to deliver a comprehensive taxonomy of possible private right claims against a successor state therefore does so to little avail. This is because private rights in international law generally derive their character from domestic law. These claims take many forms: contractual, proprietary, tortious, statutory, administrative, etc. Many distinctions divide types of rights or claims: *in rem* or *in personam*; executory or non-executory; liquidated or unliquidated; etc. It may simply not be possible to provide a universally satisfactory category of private rights. As to private persons, in some legal systems the state or state organs or regional or local governments can own property or contract *qua* private persons. Herbert Wilkinson, the author of one of the earlier works on state succession, written from a U.S. perspective and published in 1934, put it plainly when he said that "[t]here is also much legal dynamite in the term 'private person.'"[34] Domestic property and contract laws, in particular, can be arcane, even idiosyncratic, and the categorization of domestic property and contract rights might resemble a sliding scale. Even where causes of action arise under international law, such as in the law of international investment claims, the status of private property rights is also determined by reference to the relevant domestic law.[35]

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33. *Cf.* Prosper Weil, *L'élaboration d'un droit international des contrats*, 128 RECUEIL DES COURS 189 (1969) (Weil explores an international law of contracts concluded between a state and a private party).

34. *See* WILKINSON, *supra* note 31, at 46.

35. *See* Suez, Sociedad General de Aguas de Barcelona S.A., & Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, ¶151 (July 30, 2010); EnCana Corp. v. Republic of Ecuador, Award, ¶184 (Feb. 3, 2006); Saudi Arabia v. Arabian Am. Oil Co. (Aramco), 27 I.L.R. 117, 162 (1963). International tribunals typically also determine an entity's corporate form by reference to domestic law. *See also* Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, 33–34, ¶ 38 (Feb. 5); *see also* Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), Judgment, 1989 I.C.J. Rep. 15, 58, ¶ 93 (July 20). A similar position holds, at least with respect to immovable and, to an extent, movable property in private international law. *See, e.g.*, LAWRENCE COLLINS, DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, 1330 (Sweet & Maxwell 15th ed. 2012) (Rule 132) ("[a]ll rights over, or in relation to, an immovable (land) are … governed by the law of the country where the immovable is situate (lex situs) [sic]."). *See also id.* at 1336 (Rule 133) ("[t]he validity

The term private rights might thus seem vague,[36] but for the purposes of this article it describes property rights and contract rights enforceable against the state. In sum, there are good practical reasons for delineating the scope of the analysis by reference to property and contract rights, notwithstanding the uncertainties noted above regarding the category of private rights in general.

Conceptually, the rights at issue here conceivably fall under the broader rubric of state succession to debts. That said, as noted above, they do not include sovereign debt, such as bonds, or financial liabilities to international organizations, like the International Monetary Fund. Succession to sovereign debt has been the subject of study and practice. In 2001, the Institut de Droit International adopted a resolution on state succession in matters of property and debt.[37] This resolution places private claims against a successor state generally under the same rubric as succession to state debt.[38]

Certain international instruments make further distinctions as well. For instance, the Treaty on the Legal Succession in Respect of the External Public Debt and Assets of the USSR defines "external public debt of the USSR" as "any financial obligation undertaken by the USSR or by other persons lawfully empowered by the USSR, with respect to other state [sic], international organisation, or any foreign creditor."[39] There is space for a conceptual distinction, though, and for treating private property and contract rights as a separate category because they concern the rights of private persons rather than rights of a state.[40] The 1983 Vienna Convention on Succession of States in Respect of Property, Archives and Debts—an ill-fated instrument that will probably never enter into force—does not cover private rights since it is concerned only with property owned by a state rather than by private persons. Article 33 of that instrument defined "state debt" without any reference to local debt or debts to private creditors, or, indeed, other claims by private parties. The Restatement, for this

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of a transfer of a tangible movable and its effect on the proprietary rights of the parties thereto and of those claiming under them in respect thereof are governed by the law of the country where the movable is at the time of the transfer (lex situs)."). An international tribunal will generally treat domestic law as a fact. *See* Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), P.C.I.J. (ser. A) No. 7, at 19 (May 25).

36. The term was not, however, too vague to appear in certain international instruments and international decisions. *See, e.g.*, Treaty of Neuilly art. 181, Nov. 27, 1919, 226 Consol. T.S. 332. O'Connell employs the term as well. Daniel Patrick O'Connell, *Secured and Unsecured Debts in the Law of State Succession*, 28 BRIT. Y.B. INT'L L. 204, 212 (1951).

37. *See State Succession in Matters of Property and Debt*, INSTITUT DE DROIT INT'L (Aug. 26, 2001), www.idi-iil.org/app/uploads/2017/06/2001_van_01_en.pdf [https://perma.cc/3XSF-B4Z3] (archived Sept. 29, 2023).

38. *Id.* at art. 22.

39. Treaty on the Legal Succession in Respect of the External Public Debts and Assets of the USSR art. 1, Dec. 4, 1991, 2380 U.N.T.S. 95.

40. *Id.* at art. 24. Ress, the Institut's Rapporteur on the subject, believed that state debt towards private creditors should be included under the same rubric. *Cf.* Ress, *supra* note 27.

reason, rejects the view reflected in Article 33 and instead sides with the view that the rules governing public indebtedness should not only apply to indebtedness to other states or international institutions.[41]

However, the 1983 Vienna Convention in fact leaves open the question concerning state succession as it concerns private creditors. Article 36 specifies that "[a] succession of States does not as such affect the rights and obligations of creditors," and Article 6 provides that "[n]othing 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] These savings clauses are plausible where one conceives of private rights as third-party rights that remain unaffected under international law by transactions between states, especially where rights of third-state nationals are concerned.[43]

In any event, the 1983 Vienna Convention was in large part driven by a desire among certain members of the International Law Commission and certain states to address the position of newly independent states after decolonization—a process, however, that had already largely been concluded by the time the instrument was adopted. Not a single negotiating state at the conference signed that instrument on the date the text was opened for signature, and the conference adopted the final text of the convention without the affirmative vote of practically any industrialized state present.[44] Instead, situation-specific treaties or procedures typically regulate the apportionment of property and debt, and many concern the dissolution of states.[45] That was the case after the dissolution of the USSR, for instance, in the form of the December 1991 Treaty on the Legal Succession in Respect of the External Public Debt and Assets of the USSR.[46] Another example is the 2001 Yugoslavia Agreement on Succession Issues, which, among other things, governed succession in matters of acquired rights.[47]

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41. *See* RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 209, Reporters' Note 4 (AM. L. INST. 2018).

42. On first reading, the International Law Commission's draft article of what later would become this provision included the words "any other financial obligation chargeable to the State." After a difficult debate, these words were deleted. In effect, however, to the extent these words were intended to protect the rights of private persons, Article 36 arguably maintains them in substance. *Draft Articles on Succession of States in Respect of Treaties with Commentaries*, [1974] 2 Y.B. Int'l L. Comm'n 174, art. 6.

43. WILKINSON, *supra* note 31, at 118.

44. *See* Ress, *supra* note 27, at 123.

45. For a well-known example of a third-party apportionment of public debt between successor states, *see* the Ottoman Public Debt Arbitration (Bulg./Iraq/Palestine/Transjordan/Greece/It./Turk.), 1 R.I.A.A. 529 (Perm. Ct. Arb. 1925). Principles of debt apportionment—or perhaps the lack thereof—have also been applied in domestic, or quasi-international, situations. *See* Virginia v. West Virginia, 220 U.S. 1, 27 (1911) (Justice Holmes here stated that "[t]he case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this Court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either state alone.").

46. *See* Treaty on the Legal Succession in Respect of the External Public Debt and Assets of the USSR, Dec. 4, 1991, 2380 U.N.T.S. 95.

47. *See* Agreement on Succession Issues, June 29, 2001, 2262 U.N.T.S. 251.

The Institut de Droit International's 2001 Resolution on State Succession in Matters of Property and Debt is more to the point, given that it took a firm stance on the difference between public and private debt. According to this Resolution, "[i]n the event of succession, the States concerned should, in good faith, settle by agreement amongst themselves the apportionment of State property and debts,"[48] noting further that "States concerned should act likewise towards private creditors with respect to the allocation of debts."[49] Most pertinently, the Institut's Resolution asserts the critical notions that "[a] succession of States should not affect the rights and obligations of private creditors and debtors" and that "[s]uccessor States shall, in their domestic legal orders, recognise the existence of rights and obligations of creditors established in the legal order of the predecessor State."[50] What seems to underlie these claims is, in addition to a rule of customary international law hardly supported by theory, a duty to negotiate in good faith towards an equitable apportionment of debt.[51]

In the nineteenth century, one view—in certain British writings and decisions at least—was that a successor state was not bound by the predecessor state's financial liabilities. This could be a fairly extreme proposition. In *West Rand Mining v. The King*, the Divisional Court held, in connection with the UK's conquest and annexation of the South African Republic in 1900, that the conquering state did not succeed to the predecessor state's financial liabilities.[52] Indeed, Arthur Keith, a noted commentator on the subject, makes this a central point of his thesis in what is one of the earliest works on state succession. His point, conveyed forcefully in the context of conquest, is that no rule of universal succession exists in international law: the conquering state is not liable for the debts of the conquered state. He says that to make universal succession "a rule of law would be ruinous to any successor, but this does not prevent the exercise of tenderness towards the equitable claims of persons who bonâ fide have lent money or supplied goods to the conquered state."[53] The position sounds peculiar

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48. INSTITUT DE DROIT INT'L, *supra* note 37, art. 6(1). Article 18 of the 1983 Convention reflects this same principle. However, as far as succession to property rights is concerned, the rule's status as customary international law is uncertain. *See* Republic of Croat. v. Republic of Serb. [2009] EWHC (Ch) 1559 [¶36] (Eng.) (where the High Court of England and Wales rejected the suggestion "that a rule as to succession to the property of a dismembered state (however sensible) has yet become a sufficiently general or consistent practice among states to qualify as customary international law for the purposes of recognition by English common law.").

49. INSTITUT DE DROIT INT'L, *supra* note 37, art. 6(2) (emphasis added). Interestingly, Article 6(2) also provides that "private creditors should cooperate with the States concerned in respect of the apportionment of State property held by them." This supports the existence of an obligation to negotiate in good faith.

50. *Id.* at art. 24(1), (2).

51. *See* WILKINSON, *supra* note 31, at 95 ("it has been generally felt that the United States, as a great and just nation, ought to do 'equity' to public creditors").

52. *West Rand Central Gold Mining Company, Ltd. v. The King*, [1905] 2 K.B. 391, 412).

53. ARTHUR BERRIEDALE KEITH, THEORY OF STATE SUCCESSION WITH SPECIAL REFERENCE TO ENGLISH AND COLONIAL LAW 59 (1907).

not only for the nonchalance with which the author discusses conquest but also for the unfairness towards private creditors that he envisages. One author, writing in 1982, referred to "an almost Bismarckian Realpolitik which underlies, in [his] opinion, the history of public debt and state succession."[54] By now, though, it is safe to say that times have moved on, and private property rights are widely considered to enjoy greater protections, at least in situations involving a peaceful and negotiated replacement of sovereignty. The question is simply on what conceptual basis they do so.

Contracts can also be the source of claims against the state. For example, a production-sharing contract between a central or a regional government and a domestic or foreign oil and gas company can, among other things, create rights over an exploration block. These might take the form of exclusive exploration and exploitation rights in respect of that block for a certain term, say fifteen or thirty years. The cash flows under such a contract can have a significant monetary value, and the contractual right that the private party would seek to enforce would be the continued right to develop an oil or gas deposit for the duration of and under the terms of the contract. The status of such contractual rights in the event of a succession of states is not only a question of domestic law but also a question of international law. This is the case especially when state succession matters are "internationalized" through a treaty.[55]

What happens, though, when a private party who is a national of the successor state brings a property or contract claim against the successor state itself? Is this a question of international law, or one that falls exclusively within the successor state's domestic jurisdiction, as reflected, for example, in Article 2(7) of the UN Charter?[56] To the extent that an international legal rule is engaged, one according to which the successor state is under an obligation to honor private rights and claims, the question could be characterized as international. The real issue, in those circumstances, though, might be access to a forum, or the possibility of a diplomatic protection claim by the state of nationality. Foreign nationals may enjoy more promising avenues in this regard, unless a special tribunal accessible to nationals is established.[57] Ultimately, though, it depends on the forum itself. While, for example, an international tribunal may have no jurisdiction over an investment protection claim against the claimant's state of

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54. M. H. Hoeflich, *Through a Glass Darkly: Reflections upon the History of the International Law of Public Debt in Connection with State Succession*, 1982 U. ILL. L. REV. 39, 42 (1982).

55. This occurred, for example, by virtue of the Polish Treaty on Minorities in respect of territory ceded by Germany to Poland. Advisory Opinion Given by the Court on September 10th 1923 on Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 21 (Sept. 10) [hereinafter German Settlers in Poland].

56. U.N. Charter art 2, ¶ 7 (According to that provision "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.")

57. *See infra* note 132 (Interestingly, the German-Polish Arbitral Tribunal for Upper Silesia, for example, discussed further below, had jurisdiction to hear both claims by foreign nationals and nationals.).

nationality, nationality would generally not pose a bar to a human claim against a state of nationality before an international human rights court.

Private rights can also derive from a statutory basis. This is the case, for example, where state pensions are concerned. At the point of maturity, state pensions generally confer upon an individual a statutory entitlement to a monthly income for life. Indeed, there have been several cases before the European Court of Human Rights involving contracting states' proposed changes to pension schemes or other welfare benefits and the right to property under Article 1 of Protocol No. 1 to the European Convention on Human Rights.[58] Consider the example where part of a territory secedes, and it is acknowledged that the new state is a successor state under international law. Is that new state, even in the absence of a special agreement to this effect, under any international legal obligation to honor pension entitlements of individuals in its territory who would have had such entitlements in the predecessor state? While this article does not engage in depth with statutory rights, they are noted here for illustrative purposes to show that the catalogue of private rights potentially affected by a succession of states can be very large.

For these reasons, this article focuses on private rights deriving from state contracts and from property rights granted specifically by the state, while remaining conscious that these can take different forms.

Many governments of successor states would, in any event, likely make it their policy to honor existing private rights, because the societal, economic, and political cost of not doing so poses potentially high risks. They might lose their appeal as investment-friendly jurisdictions, particularly where foreign investment is much needed. Their credit rating and currency may also suffer, again with adverse economic effects. By contrast, there are instances in which new states may desire not to recognize existing rights, or at least only to do so under different terms, if it is politically or economically expedient to take this position. Such political and economic calculations are not, however, an answer to the legal problems at issue.

Political and economic calculations notwithstanding, a broadly held view is that, as a matter of customary international law, the successor state is required, within certain parameters, to leave pre-existing rights of private persons undisturbed to the extent possible. The trend among numerous international decisions certainly points in this direction. This purported rule of international law has been

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58. *See, e.g.*, Stec and Others v. United Kingdom, App. Nos. 65731/01 and 65900/01, Eur. Ct. H.R. (2005) (The first paragraph of Article 1 of Protocol No. 1 to the ECHR provides: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.").

referred to as the "rule of maintenance." It is to the conceptual basis of this rule that we now turn.

V. A "RULE OF MAINTENANCE" IN RESPECT OF PROPERTY AND CONTRACT RIGHTS: JUSTIFICATIONS AND LIMITATIONS

Even recognizing that private rights remain enforceable against a successor state, it is helpful, and sometimes necessary, to articulate a theoretical basis by reference to which one can defend that stance. But where can this be found when it is extremely difficult to identify general rules governing state succession, not to mention general categories of contract or property recognized under international law?

Sovereignty is replaced, yet certain private rights enforceable against the state—the new sovereign, that is—are deemed to survive. This rule may appear intuitively fair, but even that intuition might be a function of legal tradition or values. Indeed, there might be circumstances in which the equities or considerations of justice point the other way. The Institut's 2001 Resolution reflects these positions.[59] Early authors on the subject, including notably Ernst Feilchenfeld, the author of what is still the most comprehensively researched study on the subject of state succession and public debt,[60] supported such a "rule of maintenance"[61] (and indeed he coined the term), albeit one that only protects foreign nationals.[62] Georges Kaeckenbeeck, the president of the Arbitral Tribunal for Upper Silesia established under the 1922 Geneva Convention on Upper Silesia, also argued that a change in sovereignty did not affect private rights or the legal relations among individuals.[63] That Arbitral Tribunal decided hundreds of cases, many concerning the status of private property rights, contract rights, or professional licenses after the cession of Upper Silesia to Poland. Upon reflection, however, it is surprisingly difficult to articulate a coherent theory to explain this rule of maintenance. It is one thing to posit a rule of law but another to justify it.

How can one conceptually explain the notion that private rights continue as seemingly free-floating rights as a matter not of domestic law but of international law? How can one bridge the rupture brought about by the replacement of a sovereign, where the successor sovereign is not privy to the legal relations between the private party and the predecessor sovereign? To state that these private rights are qualitatively different from others, at least as far as economic significance is concerned, is a widely held view, but certainly not a universal one. In his work on the subject, for instance, Wilkinson

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59. INSTITUT DE DROIT INT'L, *supra* note 37, at arts. 24 ¶ 1, 25.

60. *See e.g.*, ALEXANDER NAHUM SACK, LES EFFETS DES TRANSFORMATIONS DES ETATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIÈRES: TRAITÉ JURIDIQUE ET FINANCIER (1927); *see also* Alexander Nahum Sack, *La succession aux dettes publiques de l'état*, 23 RECUEIL DES COURS 145 (1928).

61. ERNST H. FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION 630 (Macmillan & Co. 1931) (noting that the rule of maintenance "is still a rule of international law").

62. *Id.* at 627.

63. Georges Kaeckenbeeck, *The Protection of Vested Rights in International Law*, 17 BRIT. Y.B. INT'L L. 1, 8 (1936).

makes no secret of his traditional view concerning the role of the state: "It has been generally accepted that one of the fundamental purposes of a state and its government is to protect private property and private rights."[64] Certainly, not all states would accept this.

There may well be much to be said for such a view, but these preferences by themselves do not establish, let alone justify, the survival of these rights. A more nuanced analysis is called for. There are, in fact, several possible bases that have been invoked in support of the continued enforceability of private rights, at least in certain circumstances. Let us explore the main possibilities.

A. *Acquired Rights*

The doctrine of acquired rights is, to some degree, the doctrinal *locus classicus* for the rule of maintenance. Under this doctrine, certain private rights enjoy protections under international law against legislative or regulatory interference. Thus, for example, Feilchenfeld stated that the rule of maintenance "applies only to acquired rights, and generates only maintenance of the rights in their previous condition."[65] The doctrine of acquired rights is sometimes presented as received wisdom without being fully examined. Kaeckenbeeck, for example, viewed things slightly differently. According to him, preserving private rights upon a change of sovereignty was a "universally accepted rule of positive law," but, in principle, this rule preserved all private law rights and relations in existence at the change of sovereignty, not merely "acquired" rights.[66]

Historically, there has been a tendency to conceive of certain rights, primarily property rights,[67] as "acquired" if they were not subject to conditions. Under this view, these rights attached to right-holders themselves and did not owe their continued existence and enforceability to the national law under which they were created. This has particularly been so in cases of cession. Case law in this field has a rich history. *United States v. Percheman* concerned title to land granted in 1815 by the Spanish governor of Florida. Spain ceded Florida to the United States through the Adams-Onís Treaty of February 1819. Chief Justice Marshall concluded that, upon conquest or cession of territory, "[t]he 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."[68] He also stated a broader principle: "A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The King

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64. *See, e.g.*, WILKINSON, THE AMERICAN DOCTRINE OF STATE SUCCESSION 118 (Johns Hopkins Press 1934).

65. *See* FEILCHENFELD, *supra* note 61, at 627.

66. Kaeckenbeeck, *supra* note 63, at 9, 11 (on the mixed public-private nature of certain legal relations).

67. *See* DANIEL PATRICK O'CONNELL, THE LAW OF STATE SUCCESSION 79 (Cambridge Univ. Press 1956).

68. U. S. v. Percheman, 32 U.S. 51, 87 (1833).

cedes that only which belonged to him; lands he had previously granted were not his to cede."[69] Notice in this connection that systems of land ownership and tenure can differ widely.[70] Courts in the United States have, in assessing property rights granted by predecessor states, been satisfied with prima facie proof of title under the previous legal system.[71]

The continuity of private rights, whether by treaty or under general international law, has in certain historic contexts been balanced against other considerations, including economic sovereignty and, specifically, a newly independent state's sovereign rights over natural resources on its territory or in its maritime areas.[72] Indeed, a successor state's position could conceivably also be a countervailing policy consideration in determining whether, or to what extent, private claims should be enforceable against it, at least where such matters are negotiated.[73] Thus, whether a right is worth protecting in the first place—for whatever reasons—seems to influence views on whether it remains enforceable against a successor state, and in making this determination the acquiring state's public interest is sometimes considered as well.[74]

It is not difficult to see how this approach could lead to economic continuity and perhaps entrenchment, and such ways of thinking have been subjected to criticism in connection with decolonization and secession.[75] On the other hand, social and economic stability can also constitute important considerations after the transfer of sovereignty that might justify applying the principles associated with acquired rights.[76] Contemporary approaches to the theory of acquired rights are

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69. *Id.* (Chief Justice Marshall relied in part on the text of the treaty of cession in reaching this conclusion. However, the Supreme Court had held that the United States would be bound in the same way under international law even in the absence of a treaty provision.); *see also* Soulard v. United States, 29 U.S. 511, 512 (1830); Strother v. Lucas, 37 U.S. 410, 436 (1838); Knight v. U. S. Land Ass'n, 142 U.S. 161, 184 (1891); WILKINSON *supra* note 32, at 25 n. 17, 43–44.

70. O'CONNELL, *supra* note 67, at 83.

71. *See* Delassus v. United States, 35 U.S. 117, 134 (1835) ("A grant or a concession made by that officer who is by law authorized to make it carries with it prima facie evidence that it is within his power"); *see also* Strother, 37 U.S. at 436 ("This Court has also uniformly held that the term 'grant' in a treaty comprehends not only those which are made in form, but also any concession, warrant, order or permission to survey, possess, or settle, whether evidenced by writing or parol or presumed from possession.").

72. *See* G.A. Res. 1803 (XVII), at ¶ 4 (Dec. 14, 1962).

73. For instance, in Trans-Orient Marine Corp. v. Star Trading & Marine, Inc. & Republic of Sudan, the U.S. District Court for the Southern District of New York stated: "While the successor state is permitted to terminate existing contracts originally executed by the former sovereign and the private party, the successor state is liable to that party only for any amount due him as of the date of the change of sovereignty. ... But if the contract is totally executory, the successor state is released from the contract." Trans-Orient Marine Corp. v. Star Trading & Marine, Inc. & Republic of Sudan, 731 F. Supp. 619, 621 (S.D.N.Y. 1990).

74. O'CONNELL, *supra* note 67, at 82.

75. *See* PIERRE LALIVE, *The Doctrine of Acquired Rights*, *in* RIGHTS AND DUTIES OF INVESTORS ABROAD 145, 149, 167 (1965). Lalive describes the doctrine of acquired rights as ultimately a "necessary expression of justice and law." *Id.* At the same time, he queries whether a new state can be prevented from legislating for the future. *Id.*

76. *See* JACQUES BARDE, LA NOTION DE DROITS ACQUIS EN DROIT INTERNATIONAL PUBLIC 22–24 (1981) (noting the disruptive economic consequences that would follow if acquired rights did not enjoy protection).

somewhat lukewarm, though. In *Republic of Serbia v. ImageSat Int'l NV,* the High Court of England and Wales addressed the question whether the Republic of Serbia was bound by a contract originally concluded between the respondent and the State Union of Serbia and Montenegro, which split in 2006. In a 2010 judgment, the court did not find it necessary to address the respondent's arguments based on the acquired rights doctrine, but it took note in an obiter dictum of the fact that "[t]he acquired rights principle is controversial," adding further that "[i]t appears from the international law materials that there is no extensive and uniform state practice or opinio juris . . . as to the liability of a successor state for its predecessor's private contractual liabilities to a private person or entity."[77]

In practice, the doctrine of acquired rights was often closely associated with concessions and other investments. Nowadays, concessions involving property rights and the payment of royalties have largely given way to production-sharing contracts, which usually contain profit- and risk-sharing terms more favorable to the state. The same issues can arise, though, since these contracts often involve exclusive exploration and exploitation rights, but also reciprocal rights and duties between the contractor and the state.[78] Such rights can be protected through an investment protection treaty, but that is an entirely different situation.

Typically, acquired rights find protection where territory is ceded from one state to another, or in certain cases where a territory secedes and becomes independent. In these instances, the circumstances of the cession or secession can be relevant. Similarly, it is relevant—sometimes critically so—whether an instrument of cession or secession is negotiated that provides for protections. For example, a situation involving a peaceful and negotiated secession might look very different for the fate of private rights in the new state than a situation involving the unilateral secession or the violent dissolution of a state. Acquired rights are therefore frequently recognized in treaty practice concerning negotiated cession or secession. More generally, though, the concept of acquired rights, and the extent to which these rights are protected in unnegotiated or unconstitutional territorial rearrangements, is uncertain.

A negotiated protection for existing private property rights was a feature, for example, of the 1962 Évian Accords between France and

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77. Republic of Serb. v. ImageSat Int'l NV [2010] EWHC 2853, ¶139]. In the same paragraph, the court added an interesting observation on when a contractual right becomes acquired: "Even if there is an acquired rights doctrine, such steps as ImageSat had taken were, in the light of the contractual provisions, mere preparatory steps and did not constitute contractual performance." *Id.* For another case concerning the proper respondent, this time concerning the merger of the Yemen Arab Republic and the People's Democratic Republic of Yemen, *see* Compagnie d'Entreprises CFE S.A. v. Yemen, Case No. 7748 (ICC Int'l Ct. Arb. 1997). For a discussion of the case, *see* Dumberry, *supra* note 1, at 613–15.

78. *See* Daniel Patrick O'Connell, *Economic Concessions in the Law of State Succession*, 27 BRIT. Y.B. INT'L L. 93, 94 (1950).

Algeria concerning the latter's independence.[79] In the Declaration of Principles Concerning Economic and Financial Co-Operation, which forms part of the Accords, Algeria undertook to ensure "the free and peaceful enjoyment of patrimonial rights acquired on its territory before self-determination."[80] Further, in the Declaration of Principles on Co-Operation for the Exploitation of the Wealth of the Saharan Subsoil, under the heading "Guarantee of acquired rights and their prolongation," Algeria undertook to "confirm all the rights attaching to the mining and transport entitlements granted by the French Republic in pursuance of the Saharan petroleum code."[81] Similarly, the 2001 Agreement on Succession Issues between the five successor states to the Socialist Federal Republic of Yugoslavia—Croatia, Slovenia, North Macedonia, Bosnia and Herzegovina, and the Federal Republic of Yugoslavia[82]—also refers to acquired rights and provides for their survival and protection in the respective new states.[83]

In those cases, the treaty is the source of protections for these rights. Do they find protection under general international law as well, even when there is no specific agreement?[84] Indeed, the fact that treaties frequently make provision for the protection of these rights could indicate that there is no equivalent rule of general international law protecting them. Mohammed Bedjaoui, the International Law Commission's special rapporteur on this topic and later the president of the International Court of Justice and Algeria's minister of foreign affairs, doubted whether private rights enjoyed equivalent protections under general international law. He took the view that acquired rights were not permanently recognized, at least not in the context of decolonization.[85] Paragraph 4 of UN General Assembly Resolution 1803 concerning "permanent sovereignty" over natural resources

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79. *See* Exchange of Letters and Declarations Adopted on 19 March 1962 at the Close of the Évian Talks, Constituting an Agreement, Fr.- Alg., July 3, 1962, 507 U.N.T.S. 25.

80. Declaration of Principles Concerning Economic and Financial Co-Operation art. 12, Fr.-Alg., Mar. 19, 1962, 507 U.N.T.S. 57 (this provision falls under the heading "Guarantee of Acquired Rights and Previous Commitments.").

81. Declaration of Principles on Co-Operation for the Exploitation of the Wealth of the Saharan Subsoil, Fr.-Alg., Title I.A.1., Mar. 19, 1962, 507 U.N.T.S. 65.

82. The Federal Republic of Yugoslavia was later named Serbia and Montenegro. In 2006, Montenegro split from the Federal Republic of Yugoslavia and became an independent state. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, 49, 73-76, ¶¶ 1, 67–79.

83. *See* Agreement on Succession Issues Annex G art. 1, June 2, 2004, 2262 U.N.T.S 251; *see further* G.A. Res. 388 (V) pt. A, at 388 (Dec. 15, 1950) (concerning Libya).

84. *See* Soulard v. United States, 29 U.S. 511, 512 (1830) (O'Connell observes that these early American cases were premised on principles concerning the sanctity of private property, but that subsequent historical developments have led to the abandonment of that notion); *see also* O'Connell, *supra* note 78, at 117; O'Connell, *supra* note 105, at 240–241 ("As all of the cases which followed *U.S.* v. *Percheman* dealt with the question of the United States' duty to respect the ownership of land in the absorbed territories, it was inevitable that the doctrine of acquired rights should have become in America a doctrine of respect for land tenure. The sanctity of such tenure was upheld in a long series of cases in which often exaggerated language was employed ... .").

85. *See* Mohammed Bedjaoui, *First Report on Succession of States in Respect of Rights and Duties Resulting from Sources Other than Treaties,* [1968] 2 Y.B. Int'l L. Comm'n 94, at 104–05, UN Doc. A/CN.4/204. *See also id.* at 115.

steers a careful course between the acknowledgment of existing rights, the possibility of nationalization or nationalization or expropriation of such rights, the requirement to pay compensation in the event of expropriation, and the adjudication of disputes in an independent forum.[86] This raises a broader point: acquired property rights are, in any event, not fully protected in international law. Under customary international law, a state may in principle, subject to certain conditions, expropriate private property.[87]

The PCIJ and arbitral tribunals firmly supported the application of treaty provisions rendering acquired or "vested" rights enforceable against a successor state, as did some of the most authoritative of commentators of the mid-twentieth century, such as Arnold McNair.[88] In its judgment on the merits in *Certain German Interests in Polish Upper Silesia*, the PCIJ referred to "the principle of respect for vested rights, a principle which . . . forms part of generally accepted international law."[89] That case involved unusual circumstances, not least of which was that the applicable treaty specifically protected private rights.[90] On a more general level, though, the judgment nonetheless reflects an acknowledgment, in accordance with other international decisions of the time, that acquired rights enjoy a certain recognition and free-standing status under international law.[91] Several other international tribunals also endorsed the concept of acquired rights. Again, however, this was usually on the basis of an express provision in a treaty of cession protecting such rights, such as in the *Forests of Central Rhodope* case.[92] Several of these cases, including the *Zeltweg-Wolfsberg and Unterdrauburg-Woellan Railways* case,[93] the *Sopron-Köszeg Local Railway Company* case[94] and the *Barcs-Pakrac Railway* case,[95] concerned the enforceability of railway concessions against successor states, where a previously domestic railway now traversed into another state as a result of territorial redistributions after the First World War. Arguably, there

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86. G.A. Res. 1803 (XVII), at ¶ 4 (Dec. 14, 1962).

87. *See id.*

88. *See* Arnold McNair, *The General Principle of Law Recognized by Civilized Nations*, 33 BRIT. Y.B. INT'L L. 1, 16–18 (1957), cited with approval on this point in Sapphire Int'l Petroleums Ltd. v. Nat. Iranian Oil Co., 35 I.L.R. 136 (1963).

89. Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Merits, 1926 P.C.I.J. (ser. A) No. 7, at p. 42.

90. The case concerned the expropriation of German property interests in Upper Silesia, including in particular the property of two German firms, Oberschlesische Stickstoffwerke and Bayrische Stickstoffwerke. *Id.* at 5. It also concerned a nitrate factory in the city of Chorzów that would become the subject of later proceedings before the PCIJ. *Id.* The second part of the case related to the expropriation of so-called large rural estates. *Id.* at 15.

91. Niederstrasser v. Polish State, 6 I.L.R. 66 (1931); Rom. v. Ger. (Goldenberg & Sons v. Ger.), 4 I.L.R. 542 (1928); Sopron-Köszeg Local Railway Company Case, 5 I.L.R. 57 (1929).

92. *See, e.g.*, Forêts du Rhodope Central (Greece v. Bulg.), 3 R.I.A.A. 1389 (1933).

93. *See* Zeltweg-Wolfsberg & Unterdrauburg-Woellan Railways Case (Austria v. Yugoslavia), 3 R.I.A.A. 1795 (1934).

94. *See* Sopron-Köszeg Local Railway Company Case, 5 I.L.R. 57.

95. *See* Barcs-Pakrac Railway Case, 3 R.I.A.A. 1569 (1934).

should even be a separate rule for railways, telecommunications, and other infrastructure that, as a result of a succession of states, cross an international boundary. Given the critical nature of such infrastructure to populations and inter-state relations, the case for maintaining contract and property rights, when doing so upholds this infrastructure, seems all the stronger.

Not all such findings, however, were premised on express treaty provisions. In the *Nisyros Mines* case, for example, a dispute that involved an application to extend a concession on the island of Nisyros in the Dodecanese, against the background of Italy's occupation and annexation of the Dodecanese and its cancellation of concessionary rights, Greece's Council of State held in 1952 that an annexing state must respect acquired rights under international law.[96] The Council of State noted that "as soon as the annexing State has established sovereignty over the territory, it has the right to substitute its legislation in order to achieve consistency in its legislation as a whole."[97] It added, however, that, "in legislating concerning acquired rights, the successor State should deal with them on the basis of respecting them, in accordance with international agreements and international usage."[98] Italy had, in 1933, adopted a decree that retroactively nullified existing mining rights on the island.[99] While the Greek Council of State also found that the Italian decree violated Article 9 of Protocol XII of the Treaty of Lausanne, which, as explained above, protected private rights, it had already reached its conclusion independently of that provision.[100]

Ad hoc arbitral tribunals have likewise taken a firm view of acquired rights when doing so secured foreign capital investment, even in the absence of treaty protections. The tribunals in *Saudi Arabia v. Arabian American Oil Company (Aramco)*, *Sapphire Petroleums v. National Iranian Oil Company*, and *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Government of the Libyan Arab Republic* took a robust view of acquired rights in so-called "internationalized" concession agreements.[101] In *Aramco*, the tribunal, in its 1958 award, held that Aramco's concession was one for the development of national wealth and was contractual in character, such that the company's rights and obligations were in the nature of acquired rights and could not be modified by the state without the company's consent.[102]

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96. *See generally* Nisyros Mines Case, 19 I.L.R. 135 (1952).
97. *Id.* at 137.
98. *Id.*
99. *Id.*
100. *Id.*
101. On the purported "internationalization" of contracts, *cf.* Case Concerning the Payment of Various Serbian Loans Issued in France/Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France (Fr. v. Serb., Croat. & Slovn.), Judgment, 1929 P.C.I.J. (ser. A) Nos. 20-21, at 41 (July 12) ("Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.").
102. Saudi Arabia v. Arabian Am. Oil Co. (Aramco), 27 I.L.R. 117, 227 (1963); *see also* Sapphire Int'l Petroleums Ltd. v. Nat'l Iranian Oil Co., 35 I.L.R. 136 (1963); Texaco Overseas Petrol. Co./Cal. Asiatic Oil Co. v. Gov. of the Libyan Arab Republic, Award on the Merits 23 ¶ 67, Jan. 19, 1977, 17 I.L.M. 1 (1978).

The problem, though, is that in international law, no one seems to agree on what the term acquired rights exactly means.[103] The concept is not adequately defined,[104] and as a theory, therefore, it becomes ill-suited to explain the alleged survival of property or contract rights against a successor state. Has not every right been "acquired" in some sense of the word, since otherwise it might not count as a right?[105] It does not help to argue that acquired rights are those that are capable of being expropriated, because that argument turns its desired conclusion into a premise. To say that an acquired right is one that has "accrued" or "vested" or cannot be taken retroactively is equally question-begging. For Kaeckenbeeck, the term referred to a right resting on a special title of acquisition, rather than one with a statutory basis.[106] But Kaeckenbeeck's characterization could describe many rights,[107] and, as a criterion, it seems too thin a basis on which to build a theory in the law of state succession. Even "mere" contractual rights rest on such a "special title" of acquisition—a contract—but surely not all of them are acquired rights, not least because international decisions make it very clear that a mere breach of contract need not necessarily rise to the level of an expropriation.[108] Conversely, many rights we might intuitively describe as acquired—such as pensions or civil service employment rights—may not rest on any "special" title of acquisition, but rather on legislation. The question becomes to what extent a successor in sovereignty is required to guarantee rights of any nature conferred by its predecessor, and where to draw the line

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103. *See* LALIVE, *supra* note 75, at 148–49 (Lalive speaks of the term's "vagueness and obscurity."); *see generally* Ko Swan Sik, *The Concept of Acquired Rights in International Law: A Survey*, 24 NETH. INT'L L. REV. 120, 121 (1977) (the author notes that various theories have developed around acquired rights but that these theories have been unsatisfactory); DANIEL PATRICK O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW, VOL. I: INTERNATIONAL RELATIONS 239 (1967) ("The doctrine of acquired rights, although not adequately defined either in literature or in judicial or diplomatic practice, has long been accepted in international law, and has been sanctioned by a considerable body of decisions of international and municipal tribunals.").

104. *See* O'CONNELL, *supra* note 67, at 96.

105. *See* LALIVE, *supra* note 75, at 151 ("Every right is acquired, or it is not a right."). *See also* Barde, *supra* note 76, at 8 (stating that only transferable rights are capable of becoming acquired rights).

106. *See* Kaeckenbeeck, *supra* note 63, at 1–2; *see also* LALIVE *supra* note 75, at 151.

107. *See* Kaeckenbeeck, *supra* note 63, at 2.

108. A breach of contract does not necessarily amount to an expropriation: Phillips Petrol. Co. Iran v. Islamic Republic of Iran, The Nat'l Iranian Oil Co., Iran-U.S. Cl. Trib. Rep. 79, 128–9, ¶ 126 (1989); Waste Mgm't, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award, ¶¶ 73, 171–175 (April 30, 2004); Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶¶ 248–253 (Feb. 6, 2007). Notice that in certain jurisdictions concessions are conceived of as unilateral acts on the part of the state, even if at times the term concession "agreement" is used in this connection. In those jurisdictions, concessions do not have a contractual character, because they are effective against third parties. *See* Saudi Arabia v. Arabian Am. Oil Co. (Aramco), 27 I.L.R. 117, 159 (1963). In the Libyan oil arbitrations, however, the tribunals affirmed the contractual character of concessions. *See, e.g.,* Libyan Am. Oil Co. (Liamco) v. Gov't of the Libyan Arab Republic, 62 I.L.R. 140, 168–169 (1977) (Award).

between a legal requirement and a policy decision to do so.[109] Economic circumstance is not sufficient either, as the PCIJ held in the *Oscar Chinn* case between the UK and Belgium concerning commercial activities on the Congo River.[110]

In the end, the term acquired right may be little more than a shorthand[111] for the principle of inter-temporality in international law[112]—the rule under which the validity of a legal act is determined by reference to the law in force at the time it occurred. While this principle frequently comes to the aid of sovereign claims—in particular claims to territory[113]—there is no persuasive reason why it could not also underwrite the continued validity of private rights in international law. The principle of inter-temporality is closely related to questions concerning retroactive regulation.[114] Not only is the idea that regulation should not retroactively affect property or contract rights often associated with the doctrine of acquired rights in international law,[115] but it is, one could say, one of the very components of the concept of an acquired right. If a party has acquired a right in some legally significant sense and enjoys protections against certain forms of legislative or regulatory interference, then this is simply a different way of expressing that it is protected against retroactive taking or variation. In other words, an acquired right is one that was created in accordance with the applicable law in force at an earlier point in time. Pursuant to the principle of inter-temporality, subsequent changes in legislation or regulation, or indeed sovereignty, do not affect the validity of such a right, even if such changes might affect the extent or exercise of the right.[116]

When formulated this way, the doctrine of acquired rights suddenly becomes less controversial, and the principle of inter-temporal law gains importance in explaining why a successor state might be required, under international law, to respect acquired rights. If it is a general proposition in international law that the validity of a right is determined by reference to the law in force at the time it was created, then it is difficult to see why this rule should only concern the rights of states and not the rights of individuals, even where those rights were created under domestic law and derive their legal character and validity from domestic law. And while this still means that there is a moment of transition when these rights attach directly to private parties under international law, that should no longer be considered a problematic proposition under this view. On the contrary, treaty practice associated with territorial transfers distinctly

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109. *See* Kaeckenbeeck, *supra* note 63, at 16; Int'l L. Ass'n, *State Succession*, 54 INT'L L. ASS'N REP. CONF. 92, 102 (1970).

110. *See* Oscar Chinn (U.K. v. Belg.), Judgment, 1934 P.C.I.J. (ser. A/B) No. 63, at 88 (Dec. 12); *See also* Sea-Land Serv., Inc. v. The Gov't of the Islamic Republic of Iran, Ports & Shipping Org., 6 Iran-U.S. Cl. Trib. Rep. 149, 163 (1984).

111. *See* LALIVE, *supra* note 75, at 150 (Lalive states that the term is an "abbreviated way to describe a much more complex legal reality.").

112. *See id.*

113. *See* Island of Las Palmas case (Neth./U.S.), 2 R.I.A.A. 829, 846–847 (1928).

114. Lalive, *supra* note 75, at 153–54.

115. *See id.* at 153; *see also* Barde, *supra* note 76, at 27–30.

116. *See* Barde, *supra* note 76, at 30–32.

recognizes the independent status of private persons' property and contract rights under international law. The main question that remains is, rather than whether any rights can survive in the first place, how to draw the line between rights that are deserving of this inter-temporal protection and those that are not.

Acquired rights also have parallels to so-called traditional rights, even if their sources are different. Certain international decisions have, including in recent years, recognized or at least acknowledged the concept of traditional rights, at times even using the terminology of acquired rights.[117] However, these rights are different in character: they frequently concern historic fishing rights or historic hunting rights held by indigenous communities.[118] Nonetheless, the parallel question could also arise whether, in the event of a succession of states, such rights would be enforceable against the new sovereign.

Daniel Patrick O'Connell, the scholar most closely associated with this branch of international law, took a slightly different tack, arguing that an acquired right can describe either corporeal or incorporeal ownership, as long as it possesses an assessable monetary value.[119] Unliquidated tort claims are therefore not acquired rights under this conception,[120] and under the traditional view the successor state is not liable for them.[121] Both in the *Hawaiian Claims* arbitration and in the *Robert E. Brown* arbitration, the respective tribunal held that a successor state did not assume the predecessor state's liability for tort claims.[122] This might seem odd, though, if an existing tort claim against the state is otherwise capable of resulting in a money judgment, or of being assigned to a third party. In any event, the position would seem different if an actual money judgment had been rendered in favor of the injured private party and the liability had thereby been determined and quantified. In the *Lighthouses Concession* arbitration between France and Greece, the private rights in question, involving the transfer of territory from the Ottoman Empire to Greece, had a contractual basis. Nonetheless, the tribunal

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117. *See* Territorial Sovereignty & Scope of the Disp. (Eri. v. Yemen), 22 R.I.A.A. 209, 329–30 (1998); *see also* Award in the Arbitration Regarding the Delimitation of the Abyei Area (Gov. of Sudan/Sudan People's Liberation Movement/Army), 30 R.I.A.A. 145, 406–12 (Perm. Ct. Arb. 2009) https://www.un-ilibrary.org/content/books/9789210559690c004/read [https://perma.cc/8CHN-278C] (archived Aug. 24, 2023); *see also* Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nic. Intervening), Judgment, 1992 I.C.J. Rep. 351, 400–01 ¶ 66 (Sept. 11) (where the I.C.J. in fact even used the term "acquired rights"); *see also* Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. Rep. 213, 265–66 ¶¶ 140–44 (July 13, 2009). *See also* Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law*, 30 BRIT. YB INT'L L. 1, 51 (1953).

118. *Id.*

119. *See* O'CONNELL, *supra* note 67, at 81.

120. *See id.*

121. *See* Cecil J. B. Hurst, *State Succession in Matters of Tort*, 5 BRIT. Y.B. INT'L L. 163, 165 (1924).

122. *See Robert E. Brown Claim*, 5 BRIT. Y.B. INT'L L. 210 (1924); *see also Hawaiian Claims*, 20 AM. J. INT'L L. 370, 381 (1926). For discussion, *see* FEILCHENFELD, *supra* note 61, at 566–68.

in that case stated obiter that the same considerations would apply if the liability in question arose not from breach of contract but as a result of a delict.[123] Such tort claims could be significant: for example, they might involve personal injury claims arising out of armed conflict, or large-scale environmental claims. The Restatement notes of the *Hawaiian Claims* and *Robert E. Brown* cases: "These cases date from the date of colonialism when colonial powers resisted any rule that would make them responsible for the delicts of states which they regarded as uncivilized. The authority of these cases a century later is doubtful."[124]

The question also arises whether an acquired right could serve as a basis for an expropriation claim. Either the successor state is required to give effect to the original right, or it is under an obligation to pay some measure of compensation, or neither. Supposing the successor state does neither, does it risk exposure to an international claim, assuming a suitable forum is available and jurisdictional and admissibility requirements are met? Can a change in sovereignty by itself, without more, be characterized as a taking of property?

While there may be intentional elements of a taking when the new sovereign comes to power, that need not be the case. In the latter scenario, the "taking" would be inherent in the change of sovereignty. But that cannot be assumed, since it is precisely part of the question we are trying to answer. Once again, we trip over the gulf between the legal relations of a private person with the previous sovereign, to which the new sovereign is not privy, and the position of the private person vis-à-vis the new sovereign. Nonetheless, the stability of economic relations, and the livelihood of individuals, would benefit significantly if it were not possible for a successor state to run roughshod over existing property and contract rights. International practice certainly supports this view, even if courts and tribunals rarely give reasons for it.

Notice, though, that even if an expropriation could be said to have occurred, the measure of any compensation due would be that of a lawful expropriation, rather than an expropriation in breach of an international obligation, regardless of whether the state affirmatively offers compensation or whether the right-holder has to seek it through some dispute resolution process. This is the case *ex hypothesi*, given that, strictly speaking, a replacement of sovereignty over territory must be internationally lawful for the rules regulating a succession to become operative. Compensation for the lawful expropriation of an asset under customary international law, and even under certain treaties, is usually governed by one of a few standards: just, adequate, fair or reasonable, or full compensation. By contrast, the law of state responsibility requires "full reparation" for injury caused by an internationally wrongful act, as explained, for example, by the Iran-United States Claims Tribunal in *Amoco International Finance*

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123. *See* Lighthouses Concession Case (Fr. v. Ger.), 12 R.I.A.A. 155, 198 (Perm. Ct. Arb. 1956).

124. *See* RESTATEMENT (FOURTH) ON FOREIGN RELS. L., §209, Reporters' Note 7 (AM. L. INST. 1987).

Corporation v. Iran.[125] Referring to the judgment of the Permanent Court of International Justice in the *Factory at Chorzów* case, the Tribunal stated:

> Undoubtedly, the first principle established by the Court is that a clear distinction must be made between lawful and unlawful expropriations, since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking. . . . According to the Court in *Chorzów Factory*, an obligation of reparation of all the damages sustained by the owner of expropriated property arises from an unlawful expropriation. The rules of international law relating to international responsibility of States apply in such a case. They provide for *restitutio in integrum*: restitution in kind or, if impossible, its monetary equivalent. If need be, 'damages for loss sustained which would not be covered by restitution' should also be awarded. . . . On the other hand, a lawful expropriation must give rise to 'the payment of fair compensation,' . . . or of 'the just price of what was expropriated.' . . . Such an obligation is imposed by a specific rule of the international law of expropriation.[126]

In the law of international investment claims, tribunals have likewise held that the standard of compensation for lawful expropriation does not necessarily determine the amount of damages payable in the case of an unlawful expropriation.[127]

B. *Subrogation by Operation of Law*

Subrogation involves one party's assuming the legal rights and obligations of another. The subrogated party has the same rights and obligations as the predecessor. Whether subrogation of one state for another can occur by operation of law is a doubtful proposition. *767 Third Avenue Associates v. Consulate General of Socialist Federal Republic of Yugoslavia* involved a claim for recovery of unpaid rent for premises in New York, which had been leased to the Socialist Federal Republic of Yugoslavia for use as consular offices. On appeal, the U.S.

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125. *See* Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 246–47, ¶¶ 189–95 (1987).

126. *Id.* at 246–47, ¶¶ 192–93. *Cf.* Phillips Petrol. Co. Iran v. Islamic Republic Iran, The Nat'l Iranian Oil Co., Iran-U.S. Cl. Trib. Rep. 79, 121–22, ¶ 109 (1989) ("[c]learly, as the Amoco International Finance Award ... recognizes, that standard [full equivalent of the property taken] applies to takings that are 'lawful' under the Treaty [of Amity between Iran and the United States], but the Treaty does not say that any different standard of compensation would be applicable to an 'unlawful' taking"). *See id.* at 122, ¶ 110.

127. *See* ADC Affiliate Ltd. & ADC & ADMC Mgmt. Ltd. v. Hung., ICSID Case No. ARB/03/16, Award, ¶ 481 (Oct. 2, 2006); *see also* LG&E Energy Corp., LG&E Cap. Corp., LG&E Int'l, Inc. v. Arg., ICSID Case No. ARB/02/1, Award, ¶ 38 (July 25, 2007).

Court of Appeals for the Second Circuit stated (in what appeared to be an obiter dictum) that "there is no rule of law that automatically subrogates successor states to their predecessor's debt."[128] Ultimately, the court held that this question was not justiciable in federal court in the United States.[129]

It is difficult to see how international law could substitute itself for domestic contract law in the absence of special treaty provisions. How subrogation would occur by operation of general international law, absent a treaty provision, is therefore unclear. O'Connell's view was unambiguous: "[I]t cannot be admitted that international law recognizes so stringent a rule. Not only is subrogation not demanded by the doctrine of acquired rights, but the arguments against it are considerable."[130] What is certain, by contrast, is that the question concerning subrogation itself, where one state replaces another in sovereignty over territory, can plausibly be described as a question of international law. Thus, in that respect at least, the question could be characterized as falling outside the new state's "reserved domain" of domestic jurisdiction.[131]

Where it occurs, subrogation under international law is usually brought about by treaty rather than by operation of general international law. That was the case in the *Lighthouses Case* between France and Greece and in the later, related case of *Lighthouses in Crete and Samos* before the PCIJ,[132] as well as in the Lighthouses Concession arbitration, in which the tribunal determined damages in these cases.[133] The cases involved the subrogation of Greece to rights and obligations under a concession contract for the operation of certain lighthouses on the islands of Crete and Samos, originally granted by the Ottoman Empire when these islands formed part of its territory, as regulated by Article 9 of Protocol XII to the Peace Treaty of Lausanne of 1923.[134] Even where subrogation may not have occurred but there is

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128. *See* 767 Third Ave. Assoc. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia, 218 F.3d 152, 161 (2d Cir. 2000).

129. *See id.*

130. O'Connell, *supra* note 78, at 116.

131. On the concept of the reserved domain, *see* Nationality Decrees in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 23–24 (Feb. 7).

132. *See* Lighthouses Case between France and Greece (Fr. v. Greece), Judgment, 1934, P.C.I.J. (ser. A/B) No. 62, at 4, 15, 25 (Mar. 17); Lighthouses in Crete and Samos (Fr. v. Greece.), Judgment, 1937, P.C.I.J. (ser. A/B) No. 71, at 101–02 (Oct. 8).

133. *See* Lighthouses Concession Case (Fr. V. Ger.), 12 R.I.A.A. 155, v. 184–85 (Perm. Ct. Arb. 1956).

134. *See* Peace Treaty of Lausanne art. 9 Protocol XII, July 24, 1923, 28 L.N.T.S. 205. "In territories detached from Turkey under the Treaty of Peace signed this day, the State which acquires the territory is fully subrogated as regards the rights and obligations of Turkey towards the nationals of the other Contracting Powers, and companies in which the capital of the nationals of the said Powers is preponderant, who are beneficiaries under concessionary contracts entered into before the 29th October, 1914, with the Ottoman Government or any local Ottoman authority. The same provision will apply in territories detached from Turkey after the Balkan Wars so far as regards concessionary contracts entered into with the Ottoman Government or any Ottoman local authority before the coming into force of the Treaty providing for the transfer of the territory. This subrogation will have effect as from the coming into force of the treaty by which the transfer of territory was effected except as regards territories detached by the Treaty of Peace signed this day, in respect of which the subrogation will have effect as from the 30th October, 1918."

continuity of contractual obligations, there is a recognition that the terms of a concession, for example, cannot be applied wholesale against the successor state but are subject to variation in light of changed circumstances. In the *Barcs-Pakrac Railway Case*, for example, the tribunal concluded that, in light of the replacement of the company by the state in territory that now formed part of Yugoslavia, a different contractual relationship had come into existence that called for a variation of the original contractual terms.[135]

The *Mavrommatis Palestine Concessions* case concerned concessions for electricity and water supply in Jerusalem and Jaffa. Both cities had previously been in Ottoman territory but were, at the time, part of the British mandate in Palestine. With regard to Article 9 of Protocol XII to the Treaty of Lausanne, which was at issue in that case as well, the Court held that "[i]n territories detached from Turkey, the State which acquires the territory is subrogated as regards the rights and the obligations of Turkey."[136] The Court ultimately found that it had no jurisdiction *ratione temporis* over the dispute concerning the Jaffa concession under the British Mandate for Palestine.[137] Nevertheless, the Court stated in relation to the Jaffa concession that "[t]he 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."[138]

What do these international decisions tell us, given the range of views they reflect? All of them were decided in a very particular historical setting. Unless a subrogation can be established, the legal relationship remains *inter alios* as far as the successor state is concerned. It is precisely this point of rupture between the predecessor state and the successor state that creates an injustice if private rights fall into that chasm.[139] Foreign nationals may have access to an international forum for adjudication, or they may benefit from a diplomatic protection claim by their state of nationality. Nationals of the successor state would not have this protection,[140] unless a special international tribunal is created, as was the case in relation to Upper Silesia.

The situation concerning subrogation might look different where it was not the predecessor state itself but a territorial unit within it that had granted the rights in question. For example, a sub-federal territorial unit within a federal state might grant contractual rights and be a party to the contract in its own name, as is the case for

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135. Barcs-Pakrac Railway Case, 3 R.I.A.A. 1569, 1576 (1934).

136. *See* Mavrommatis Palestine Concessions (Greece v. U.K.), P.C.I.J. (ser. A) No. 2, at 27 (Aug. 1924).

137. *Id.* at 29.

138. *See id.* at 28.

139. In cases involving concessions, it may be artificial to say that a subrogation has occurred. *See* Kaeckenbeeck, *supra* note 63, at 10–11.

140. *See* O'Connell, *supra* note 103, at 237.

instance regarding oil and gas contracts in the Kurdistan Region of Iraq. In circumstances where such a sub-federal unit gains independence as a state recognized under international law, there may be a stronger basis for recognizing the enforceability of those original contractual rights even against the newly independent state than if the contract had been concluded with the predecessor's central government.[141] This is related to the continuity of institutions and to the so-called "territorialization" of rights, both of which are discussed further below.

This type of scenario might not even involve a subrogation in the first place. Even if, strictly speaking, the legal personality of the contractual counter-party changes from sub-federal unit to independent state, there may be a case for continuity where the contract was granted in the exercise of "sovereign" authority, such as in *EAP v. Republic of Surinam*, discussed below.[142] Views may differ on whether a sub-federal unit had any "sovereign authority" and to what degree it already existed as a subject of international law prior to gaining independence. To an extent, this depends on internal constitutional arrangements. Supposing, however, that such an entity enjoyed a significant degree of internal and possibly even a degree of external autonomy before independence, this might provide a bridge capable of justifying the continued enforceability of contract or property rights against the new state that it had granted when it was a constituent unit of a federal state. As Robert Jennings suggested in his Hague Academy lectures in relation to state succession, there may, strictly speaking, be no entirely new states.[143]

In practice, such questions would often be resolved through arbitration. For example, many concession contracts or production-sharing contracts contain arbitration clauses, which, in any event, would be considered severable. They typically also contain governing law clauses. Thus, for example, questions concerning legal personality and privity might ultimately be determined in a commercial arbitration seated in a domestic jurisdiction and governed by a domestic law. An arbitral tribunal could determine who the proper party is, and whether the tribunal has jurisdiction, notwithstanding the emergence of a new legal person or the disappearance of one.[144] That was one of the issues, for example, in the arbitration underlying the litigation in *Republic of Serbia v. ImageSat*. A tribunal determining who the proper respondent is would likely not be limited in its freedom

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141. This is related to the territorialization of rights. On this point, too, the Institut de Droit International's resolution takes a position. *See* INSTITUT DE DROIT INT'L, *supra* note 37, art. 28, 29.

142. *See* EAP v. Republic of Surinam, 87 I.L.R. 79, 81 (1980).

143. *See* Robert Y. Jennings, *General Course on Principles of International Law*, 121 RECUEIL DES COURS 323, 447 (1967).

144. An example is the *2019 Model Offshore Production Sharing Agreement of the Federal Republic of Somalia*, FED. REPUBLIC OF SOM. (Jan. 2019), https://mopmr.gov.so/wp-content/uploads/2019/07/Final-PSA-Model-Somalia.pdf (last visited Sept. 18, 2023). Article 47 of this model agreement provides for arbitration [https://perma.cc/KB7Z-4P53] (archived Aug. 24, 2023).

to adjudicate by considerations of justiciability or the act of state doctrine in the same way that a domestic court might be.[145]

C. *Continuity of the Predecessor State's Laws and Institutions in the Successor State*

Can private rights be enforceable against a new sovereign by virtue of the fact that the previous laws remain in force in its territory or that public institutions remain in place? In reality, this is a fiction, since legislation and other sources of legal rules, even if in substance the same, derive their validity and applicability from the new sovereign. There is always still some kind of rupture. Continuity of institutions, by contrast, seems a more factual proposition.

In any event, there is practice supporting even the contention that maintaining the predecessor state's system of law in force can have an impact on potential private claims against the state. The continuing applicability of the predecessor state's legal system, especially its system of private law, is sometimes a transitional arrangement created by a treaty of cession. The predecessor state's laws and regulations do not automatically remain in place by operation of general international law. In character, such a provision in a treaty of cession is akin to a negotiated stabilization arrangement between states.

The *German Settlers in Poland* advisory proceedings before the PCIJ concerned the effects of Germany's cession of Upper Silesia to Poland under Article 256 of the Treaty of Versailles on certain property and contract rights. The history of Upper Silesia during the inter-war period is complex. This heavily industrialized region was ceded to Poland in 1919, but it was home to a substantial German-speaking minority who had previously been German nationals. In the Polish Treaty on Minorities,[146] concluded in 1919, Poland undertook obligations to the League of Nations to extend certain rights and treatment to minorities. Moreover, the status of the region was heavily regulated by the 1922 German-Polish Convention on Upper Silesia, which contained almost twice the number of provisions as the Treaty of Versailles.

In this advisory opinion, the PCIJ made statements of principle to the effect that private rights continue in force even where sovereignty is replaced. The circumstances of the case, however, were unusual. The property and sale contracts at issue, called Rentengutsverträge and Pachtverträge in German, were instruments under Prussian civil law. A Rentengutsvertrag generated a legal, contractual right to property. This was a right *ad rem* rather than *in rem*, yet it was still enforceable at law even prior to a formal conveyance of title to the property. Essentially, it involved the limited transfer of state property for

145. *But see* Reliance Indus. Ltd., BG Expl. & Prod. India Ltd. v. Union of India [2018] EWHC 822 [113].

146. Peace Treaty of Versailles, June 28, 1919, 225 Consol. T.S. 188.

stipulated agricultural use against a rent in perpetuity. The Pachtvertrag was a more familiar lease contract.[147]

The counterparty under both types of contract had been the Prussian state, but, subsequent to the cession of the territory, the Polish Treasury replaced Prussia as the owner of the land in question in the land registry.[148] The question was whether Poland became liable for claims seeking execution on these contracts. Prussia had granted the lands subject to these contracts in pursuance of a policy of "Germanization."[149] The private right-holders were ethnic Germans who had now become Polish nationals as a result of the cession of Upper Silesia.[150] They fell under the protections of the Polish Treaty for Minorities concluded between the Principal Allied Powers and Poland on the same day as the Treaty of Versailles.[151] The question was whether the eviction of these individuals from these lands in which they held interests was compatible with the Polish Treaty for Minorities and the Treaty of Versailles.[152] The Court held that it was not, concluding that acquired private rights did not cease to exist simply by virtue of a change of sovereignty over territory.[153]

A central component in the Court's reasoning was the fact that, notwithstanding Prussia's cession of the territory where these lands were located to Poland, German civil law continued to apply there by virtue of the treaty of cession.[154] The PCIJ stated 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."[155] The Court added that "[n]o one denies that the German Civil Law, both substantive and adjective, has continued without interruption to operate in the territory in question,"[156] noting that "[i]t can hardly be maintained that, although the law survives, private rights acquired under it have perished."[157]

Moreover, in *Certain German Interests in Polish Upper Silesia*, a contentious case between Germany and Poland also relating to German nationals' property claims in now-Polish Upper Silesia, the Court added an additional element to these considerations. It held, in an apparent application of the inter-temporal principle, that Article 256 of the Treaty of Versailles, which related to the transfer of public property as a result of cessions of territory, must be construed in light of the law in force when the transfer of sovereignty occurred.[158]

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147. For examples of these types of contracts, *see* PCIJ, Ser. C, Advisory Opinion No. 6, Other Documents 297ff., 327ff.

148. *See* German Settlers in Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 35 (Sept. 1923).

149. *See id.* at 24.

150. *See id.* at 6.

151. *See id.* at 19–20.

152. *See id.* at 6–7.

153. *See id.* at 35–37.

154. *See id.* at 36.

155. *See id.*

156. *See id.*

157. *See id.*

158. *See* Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Merits, 1925 P.C.I.J. (ser. A) No. 7, at 41 (Aug. 1925).

However, as noted above, the continued applicability of Germany's civil law in Upper Silesia rested on a treaty provision. The 1922 German-Polish Convention on Upper Silesia provided specifically for a 15-year transitory period until 1937, during which German civil law would remain in force in the territory.[159] The treaty also protected private rights: Article 4(1) of the 1922 Convention on Upper Silesia provided that Germany and Poland would respect rights of any nature, in particular concessions and privileges acquired before the transfer of sovereignty. Thus, as in the case of acquired rights, the continued applicability of the civil law will in practice probably be governed by a treaty of cession, in which case it really amounts to little more than a settlement of private-rights succession issues by agreement.[160] Fundamentally, even if, as the PCIJ stated, "the German Civil Law, both substantive and adjective,"[161] continued to operate in the territory that was now under Poland's sovereignty, it would be a fiction to say that the same legal system was in place.[162] Even if legal rules remained unchanged, they were now part of Poland's legal system, from which they henceforth derived their validity. And while, in any event, one could just about see how an unaltered system of civil law might in some loose sense "contain" claims between private persons, it is harder to understand how claims against the state, indeed now a different state, could remain entirely unaffected.

A traditional view is that private law, as well as legal relations between private parties, remain in force in the territory over which sovereignty is replaced by default unless or until altered, whereas public law does not.[163] It is not at all uncommon for a newly independent state to maintain an existing system of private law and private law relations. Upending the entirety of private law could lead to chaotic consequences. This seemed to be the position adopted in *EAP v. Republic of Surinam*. The background to this case was that, from 1960 to 1970, the authorities of Surinam,[164] which at the time was still what was referred to as an "autonomous country" within the Kingdom of the Netherlands, made loans to EAP, the appellant in the case, for the purpose of pursuing studies in the Netherlands. These loans were subject to certain conditions, which the appellee allegedly had not fulfilled. In its judgment, the Court of Appeal of Amsterdam held that "there is continuity in law between the former country of Surinam [the entity's name before it gained full independence] and the Republic of Surinam,"[165] adding that "[t]he Republic of Surinam is the same legal entity as the former country of Surinam, albeit with a different kind of

159. *See* German-Polish Convention Regarding Upper Silesia, Ger.-Pol., art 1, ¶ 1, May 15, 1922, 9 L.N.T.S. 465. *See also* German Settlers in Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 20 (Sept. 1923).

160. *See* Shabtai Rosenne, *The Effect of Change of Sovereignty upon Municipal Law*, 27 BRIT. Y.B. INT'L L. 267, 268–9 (1950).

161. *See* German Settlers in Poland, 1923 P.C.I.J. at 36.

162. *See generally* O'Connell, *supra* note 103, at 101–104.

163. *See id.* at 104.

164. Notice that the name of the sovereign state is now spelled "Suriname."

165. EAP v. Republic of Surinam, 87 I.L.R. 79, 81 (1980).

government and with unrestricted powers."[166] On this basis, the court concluded that:

> Surinam's civil law has not been changed by the Declaration of Independence, and property rights and obligations remain the same as they were before independence . . . [A]s the holder of property rights and obligations, Surinam continued to be the same legal entity even after the constitutional change into a Republic.[167]

Notice, however, that the Court proceeded on the assumption "that Surinam was an autonomous State even before 25 November 1975, with its own Constitution and a sovereignty which, whilst being restricted in some respects because of the ties with the Netherlands and the Netherlands Antilles, developed into full sovereignty on 25 November 1975 when these ties were severed."[168] Previously, Surinam had, as the autonomous "country of Surinam," formed part of the Kingdom of the Netherlands.[169] The situation therefore appeared to be somewhat sui generis, and strongly informed by constitutional arrangements and Surinam's status before independence.[170] But this also tells us something more fundamental. The continuation of rights is sometimes taken for granted, especially when, as here, a territory transitions from semi-autonomous to fully independent. Sometimes this even occurs without being called into question, for example in the investment treaty proceedings in *Active Partners v. South Sudan*, where the contract at issue had been concluded with South Sudanese authorities prior to the country's independence.[171] The continuity of these contractual relations was not raised as an issue in these proceedings, and it went unaddressed in the decision.

A comparable question concerning "sovereign authority," albeit in relation to sovereign immunity, arose in 2015 in *Pearl Petroleum and Others v. The Kurdistan Regional Government of Iraq*. Here, the High Court of England and Wales had to determine whether the Kurdistan Region of Iraq was a "separate entity" that benefited from the Republic of Iraq's sovereign immunity under the UK's 1978 State Immunity Act. In doing so, the court held that the Kurdistan Region had, in granting oil and gas contracts under its constitutional authority, been exercising its own sovereign authority and not the sovereign authority of the

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166. *See id.*
167. *See id.*
168. *See id.*
169. *See id.* at 80.
170. Although different, there are interesting parallels to the status of protectorates. According to the ICJ's judgment in Rights of Nationals of the United States of America in Morocco, for example, the French protectorate of Morocco retained its personality as a state under international law, France's protector status notwithstanding. *See* Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. Rep. 176, 185 (Aug. 27).
171. *See* Active Partners Grp. Ltd. v. The Republic S. Sudan, Award, PCA Case No. 2013/4 (2016); *see* Dumberry, *supra* note 1, at 621.

Republic of Iraq under the Iraqi Constitution.[172] The Court concluded that the Kurdistan Regional Government "entered into this agreement in the exercise of sovereign authority,"[173] but "that this was an exercise of the sovereign authority of the Kurdistan Region itself, not of Iraq."[174]

We tend now to apply rigid understandings of sovereignty and legal personality at the international level. In the past, however, these forms of status were more gradated. As the judgments EAP and Pearl show, nuanced understandings of the line between "internal" and "external" sovereignty are possible.[175] There is an interesting parallel here to the responsibility of a newly independent state for acts of an insurrectional movement. Although such acts were internal prior to independence, they automatically become acts of the state under international law post-independence if the insurrectional movement becomes the government of that state.[176] The broader point is that the line between internal acts and those significant for international legal relations is not always a sharp one.

By contrast, in his first report on state succession in respect of matters other than treaties, Mohammed Bedjaoui stated that there existed no rule of law providing for the continued applicability of municipal law *ipso jure* in the territory in which sovereignty was replaced.[177] Yet what is at issue is not as such whether private or public law remains in force, but whether the new sovereign is required by any rule of international law to give force of law to private rights granted by the previous sovereign in legal relations to which the new sovereign was not privy.

D. *Territorialization of Rights*

What is the relevance of the "territorialization" of private rights? Certain contract or property rights, for example, are "attached to the land" in some relevant sense: they might concern infrastructure, for example, a production plant, a hydroelectric dam, or an oil or gas field. Should such circumstances be relevant in ascertaining whether these rights survive and are enforceable against the new sovereign? They may well be, provided that the new sovereign has, by operation of state succession or otherwise, acquired territorial rights over the area to which these private rights relate.

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172. *See* Pearl Petrol., Dana Gas PJSC, Crescent Petrol. Co. Int'l Ltd. v. Kurdistan Reg'l Gov't of Iraq [2015] EWHC 3361 (Comm.) [36]-[37].

173. *See id.* at [36] (emphasis in original).

174. *See id.*

175. *See, e.g.*, Jennings, *supra* note 143.

176. *See* G.A. Res. 56/83, 2001 Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001), at 10.

177. *See* Bedjaoui, *supra* note 85, at 115. *Cf.* WILKINSON, *supra* note 31, at 37–39 (as far as private law is concerned: Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511 (1828); Chicago, Rock Island & Pac. R.R. Co. v. McGlinn, 114 U.S. 542 (1885); Delassus v. United States, 34 U.S. 117 (1835).

The Restatement casts this as the most plausible basis for the enforceability of certain private rights against the successor state. It provides that, subject to agreement between the predecessor state and successor states, "where part of the territory of a state becomes territory of another state . . . rights and obligations of the predecessor state under contracts relating to that territory[] are transferred to the successor state."[178] The Restatement further provides that "where part of a state becomes a separate state . . . rights and obligations of the predecessor state under contracts relating to the territory of the new state, pass to the new state."[179] The Restatement's position on private property rights is more clear-cut: "In general, private property rights are not affected by a change in sovereignty over the territory in which the property is located or in which its owner resides."[180]

Taking the territorialization of rights as a reference point is intuitively attractive. In doing so, one need not rely entirely on the doctrines of acquired rights and inter-temporal law. The reference point for the justification why these rights are deemed to survive is no longer the individual, or even the state as a legal person, but rather a place. This theory is arguably the most objective because its only reference point is location.

Immediately, though, issues arise, particularly if one adopts a different view of what economic independence means. As Mohammed Bedjaoui asserted in his second report, in such circumstances, "[t]he successor State would be indebted almost in perpetuity—a situation which would place an intolerable strain on its finances."[181] He added that "[p]ayment of such compensation [for such property] would almost be tantamount to repurchasing the whole country."[182]

This basis for the continued enforceability of property and contract rights against a new sovereign also finds support by drawing parallels to equitable principles on the apportionment of property and debt upon succession.[183] According to Article 11(1) of the Institut's 2001 Resolution, such "[a]pportionment is to be carried out, first, according to the territoriality principle."[184] The concepts of "local" and "localized" debt are both familiar in the context of state succession to debt. "Local" debt is a broader term that often refers to debt incurred by a local government or authority within a state. "Localized" debt more specifically refers to debt incurred for a purpose related to a particular place.[185]

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178. *See* RESTATEMENT (FOURTH) ON FOREIGN RELS. L., §209(2) AM. L. INST. 2018) (emphasis added).

179. *Id.* at §209(2)(a) and (c).

180. *Id.* at cmt. a.

181. Mohammed Bedjaoui, *Second Report on Succession of States in Respect of Matters Other than Treaties–Economic and Financial Acquired Rights and State Succession*, U.N, Doc. A/CN.4/216/Rev.1, [1969] Y.B. Int'l L. Comm'n, Vol. II, 69, 94.

182. *Id.*

183. Notice, however, that the Restatement draws no such distinction and generally treats the liabilities of the state in succession matters as a single category.

184. INSTITUT DE DROIT INT'L, *supra* note 37, art. 11(1).

185. *Draft Articles on Succession of States in Respect of State Property, Archives and Debts with Commentaries*, [1981] 2 Y.B. Int'l L. Comm'n 75, art. 30, ¶¶ 18–20.

All of this, of course, is subject to any succession agreement that might have been concluded between successor states or between a predecessor state and a successor state. This is a principle reflected in Article 17 of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debt, which, although not in force, stands as a general proposition. For example, in *Sudapet Co. v. Republic of South Sudan*, the tribunal held that a secession agreement between the Republic of Sudan and the Republic of South Sudan had modified any otherwise generally applicable principles governing succession to state property.[186] In that agreement, the Republic of Sudan and the Republic of South Sudan had agreed on the territorial principle as a governing rule for succession to state property,[187] albeit with certain modifications.[188] Although that case primarily concerned succession to state property, it is nonetheless relevant to the question whether Sudapet's assets at issue in what became South Sudan were state property or, rather, private property.[189]

Returning to the question of debts, a local debt might have been incurred by either the federal or metropolitan government on a local government's behalf, or indeed it might have been incurred by the local government itself on its own behalf. Situations differ widely, but many territories or sub-federal entities in a federal state are empowered to incur their own debt. Where a debt was incurred by what was previously a local government that now continues to exist as an authority in the successor state, one could speak of "structural continuity,"[190] which, as noted above, seems to be based as much on fact as on law. This is not as far-fetched as it might sound. In international law, like in domestic law, certain burdens "run with the land." A good example concerns boundaries, which are generally not affected by a succession of states and are deemed to have an existence independent even of the instrument that created them.[191]

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186. Sudapet Co. Ltd. v. Republic S. Sudan, ICSID Case No. ARB/12/26, ¶ 1, 403 Award (Sept. 30, 2016).

187. *Id.* at ¶ 424. *See also id.* at ¶ 431.

188. *Id.* at ¶¶ 442–443.

189. *Id.* at ¶ 457. The tribunal stated that "[t]he question for this Tribunal is whether the Sudapet Interests are State property or private property." However, it continued that "[t]his question is not answered by the invocation of either permanent sovereignty or the protection of private property rights."

190. Dumberry, *supra* note 1, at 595.

191. *See* Articles 11 and 12 of the Vienna Convention on Succession of States in Respect of Treaties respectively provide that a succession of states does not affect a boundary established by a treaty and related rights or obligations, or rights or obligations attaching to a territory. Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3. According to the International Law Commission's commentaries on the Draft Articles on Succession of States in Respect of Treaties, "[t]he weight of opinion amongst modern writers supports the traditional doctrine that treaties of a territorial character constitute a special category and are not affected by a succession of States." *See also* Int'l L. Comm'n, *supra* note 42, at 197 (Commentary to Draft Articles 11 and 12, para. 2). *See* further Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. Rep 6, 37 (¶¶72–73): "Once agreed, the boundary stands, for any other approach would vitiate the fundamental

A similar issue has also arisen, controversially but unsurprisingly, in relation to the apportionment of debt between newly independent states and former colonial powers. One example involved the former Belgian Congo. The Civil Tribunal of Ghent in the *De Keer v. Belgium* case in 1963, which concerned succession to the debt of the Belgian Congo, came to a comparable conclusion. The Civil Tribunal of Ghent seemed to take it for granted that the territorial nexus was determinative, holding that "the debts that have been made in its own and exclusive interest by a territory, legally benefiting from financial autonomy, follow pro facto that territory in the event of a modification of its political status."[192] By contrast to such local debt, that is, the debt assumed by a local entity, localized debt might pertain to assets on a particular territory: for example, it might pertain to the location of a property, to a source of funding for that property,[193] or to the location of an issuing bank.[194] Frequently, the distribution of debts between former colonies and colonial powers, and the status of property and contract rights in the newly independent state, were the subject of negotiated devolution agreements. And while this may not be the most common scenario in the future, such devolution agreements can still serve as a template for negotiated succession issues.

Local and localized debt can have important effects for apportionment. One example concerned the significance of local debt incurred by the constituent republics of the Socialist Federal Republic of Yugoslavia, for all of which (plus a determined share of the federal debt) each republic was responsible to the International Monetary Fund.[195] The relevance of territorialization of debt could be equally important, perhaps even far more important, where private rights are concerned, given that these rights can, and often do, concern property or other land-related rights.

E. *A Human Right to Property*

Human rights law, specifically the right to property, could conceivably also form an international legal basis for private-right

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principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court. . . . A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy."

192. The Tribunal further held: "[T]here is cause to conclude that the debts, which were contracted by the Colony in the framework of its legal financial autonomy and which, as has been said before, must be considered as local debts, were transferred entirely and ipso jure to the property of the Republic of the Congo and that the Belgian State has not been responsible for these debts since June 30, 1960, any more than it was before that date." The Tribunal tied the enforceability of these debts against the Republic of the Congo to the original responsibility for these debts. De Keer v. Belgium (Civ. Trib. Ghent, Dec. 9, 1963), 3 I.L.M. 666, 667 (1964).

193. INSTITUT DE DROIT INT'L, *supra* note 37, at 1, 9. In his First Report, Mohammed Bedjaoui stated: "Questions relating to succession to debts following decolonization are dominated by the fundamental distinction between the general debt of the predecessor State and local debts" Bedjaoui, *supra* note 85, at 94, 109 (emphasis in original).

194. *See, e.g.*, Mortimer v. Ger., 615 F.3d 97, 100 (2d Cir. 2010).

195. *See* Agreement on Succession Issues, arts. 3–5, June 29, 2001, 2262 U.N.T.S. 251 (entered into force June 2, 2004).

claims against a successor state, even if this theory is less visible in this connection. Yet, as a general matter, outside of the narrower confines of state succession, the right to property in human rights instruments has been invoked in numerous, sometimes creative, ways. One example is litigation in which claimants asserted historic sovereign-bond claims against defaulting states, notably claims by French holders of imperial Russian bonds.[196]

Returning to the context of state succession, however, it is unclear how the successor state breaches any human rights by failing to honor property rights—unless a positive requirement to give effect to property rights is inherent its status as a successor state. That proposition would require justification, though, and it, too, suffers from the weakness that it assumes its desired conclusion.

The right to property has characteristics of a human right that attaches to the person and enjoys protection, but it has never quite shed some of its political connotations. The Universal Declaration on Human Rights does not mention property, and neither does the International Covenant on Civil and Political Rights.[197] The American Convention on Human Rights contains a specific provision safeguarding the right to property under certain conditions.[198] By contrast, the African Charter on Human and Peoples' Rights provides in Article 14 that "[t]he right to property shall be guaranteed," subject to certain conditions.[199] The European Convention on Human Rights originally contained no provision on the right to property, but Protocol No. 1 to the Convention does.[200] Indeed, the right to property under Protocol No. 1 is now frequently the subject of litigation.[201] Article 17 of the 2012 EU Charter of Fundamental Rights, one of the more recent human rights instruments, also protects the right to property.[202]

Notice, however, that a state's breach of this obligation, in particular in the jurisprudence of the European Court of Human Rights (ECtHR), does not necessarily give rise to a right to full compensation in all circumstances. In *The Holy Monasteries v. Greece*,

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196. *See, e.g.*, De Dreux-Breze v. Fr., App. No. 57969/00, Eur. Ct. H.R. (2001); Catherine Abraini Leschi & Others v. Fr., App. No. 37505/97, Eur. Comm'n. H.R. (1998); Simone Thivet v. Fr., App. No. 57071/00, Eur. Ct. H.R. (2000); Abrial & Others v. Fr., App. No. 58752/00, Eur. Ct. H.R. (2001). For futher discussion on this point, *see* MICHAEL WAIBEL, SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS 183–186 (Cambridge Univ. Press 2011).

197. *See generally* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 172.

198. American Convention on Human Rights art. 21, Nov. 22, 1969, 1144 U.N.T.S. 143 (entered into force July 18, 1978).

199. African Charter on Human and Peoples' Rights art. 14, June 1, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986).

200. Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1 art. 1, Mar. 20, 1952, 213 U.N.T.S. 221 (entered into force May 18, 1954).

201. *See, e.g.,* Chigarov v. Armenia, App. No. 13216/05 (June 16, 2015) (The ECtHR found that there was an ongoing breach of the applicants' rights under Article 1 of Protocol No. 1 because the defendant prevented them from accessing their property).

202. *See* Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 1, 391.

for example, the ECtHR stated that "the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 [of Protocol No. 1] only in exceptional circumstances." The ECtHR then added that this provision "does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of 'public interest' may call for less than reimbursement of the full market value."[203]

There is also an intersection here between state succession and private rights on the one hand and state succession in respect of treaties on the other. There are voices in favor of *ipso jure* succession to human rights treaties, even if that principle is not otherwise particularly well established where treaties with other subject matters are concerned. The UN Human Rights Committee, for example, has supported the principle of *ipso jure* succession to the ICCPR in its General Comment No. 26.[204]

Are property claims against the state human rights that the successor in sovereignty is under an obligation to honor? That would be a significant claim, and it is not clear, even if the right to property featured among those human rights, that specific performance or restitution rather than monetary compensation would necessarily be the appropriate remedy for a failure to recognize such rights. Moreover, contractual rights would, on the basis of the human right to property, only acquire any protection under this conception if they have a proprietary character.

Invoking the protection of property as a human right under general international law is not all that different from invoking the doctrine of acquired rights. That might sound provocative because the statement may appear to cheapen human rights. But the point is rather that in this context the doctrines are similar and, in fact, complementary. Both take the private party as the reference point, and, under both conceptions, rights attach to the person directly under international law—they do not simply vanish upon a change of sovereignty over territory. But while the doctrine of acquired rights is primarily an economically driven theory, human rights principles provide the normative basis for why individuals should continue to enjoy certain property rights under international law. One is well advised, therefore, to read and invoke both theories, acquired rights and human rights, together rather than separately.

F. *Equitable Interests of Private Persons*

Equitable considerations play an important role in the theoretical justifications for maintaining private-right claims against a successor

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203. The Holy Monasteries v. Greece, App. Nos. 13092/87 & 13984/88, 20 Eur. H.R. Rep. 1, 30 (1994). *See also* WAIBEL, *supra* note 196 at 185.

204. Office of the High Comm'r for Hum. Rts., *ICCPR General Comment No. 26: Continuity of Obligations*, ¶ 4, U.N. Doc. A/53/40, annex VII (Dec. 8, 1997).

state.[205] It is no surprise that the Institut's 2001 Resolution refers to equity or equitable considerations in no fewer than seventeen provisions, and it can fairly be characterized as the guiding principle. Equitable interest is originally a concept of domestic property and trusts law, especially in the English common law tradition. In international law, however, the term has a less technical and specific meaning than in domestic settings.

Suppose that a company holds an exploration license and has obtained a lease under a contract concerning a major gas field on the territory of a state that has recently become independent. These rights might run, for example, for a term of 25 years under the contract. This successor state might be eager to renegotiate the profit-sharing terms under the contract to increase revenue with the stated aim, for instance, of paying for new roads or hospitals. Could equity or equitable considerations alone prohibit the successor state from doing so under international law? That would seem unusual today, but in early international decisions equity was at times specifically invoked as a remedial basis. In the *Landreau (United States of America/Peru)* claim, for example, the Protocol of Arbitration required the arbitral commission to determine "what sum if any is equitably due the heirs or assigns" of the injured party.[206] The commission found that "there is equitably due the heirs or assigns . . . the sum of one hundred and twenty-five thousand dollars."[207]

Instead of asserting that a right survives in unmodified, original form, this approach acknowledges that the legal right itself may have been destroyed, but that in its place an equitable interest survives, one that—critically—becomes enforceable against the successor state. This interest would have to derive from a factual state of affairs, legitimate expectations, and detrimental reliance, rather than from positive rules of law. The successor state must take and accept this state of affairs as it finds it. For O'Connell, this equitable interest is the same as an acquired right but simply describes a different perspective. He observes that "[w]hat is 'inherited' is the state of facts to which the now extinguished legal relationship has given rise," and that "[t]he equitable interest which the lender has in this factual situation is an acquired right which the successor state must respect."[208]

This view does not seem quite correct, though. What survives under this conception is a state of affairs and an associated equitable interest, which together could generate a new equitable claim against the successor state. Under the acquired-rights view or the human-rights view, by contrast, continuity is ascribed to an existing right, which seemingly never ceased to exist or to be enforceable. Whether the successor state's domestic law recognizes such an interest is one question. Whether there exists a rule of general international law that

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205. *See, e.g.*, Hans J. Cahn, *The Responsibility of the Successor State for War Debts*, 44 AM. J. INT'L L. 477, 478–79 (1950).

206. Landreau Claim (Peru/U.S.), 1 R.I.A.A. 347, 349 (1922).

207. *Id.* at 349, 353.

208. O'Connell, *supra* note 36, at 204, 205.

requires a successor state to recognize and give effect to such equitable interests is another. It is this second question that concerns us.

There are, again, different practical considerations. One relates to the status of private rights under the applicable domestic law. Another concerns the distinction between situations where the original debtor, i.e., the predecessor State, has ceased to exist. Another variation is where the predecessor state continues to exist, but the performance of the contract relates to territory over which the predecessor State has ceased to be sovereign. Again, the status of such contract rights is of obvious practical relevance in resource-rich regions where there is at least an outside possibility of independence at some future point.

Where the apportionment of liabilities between several successor states is concerned, domestic courts adjudicating private debt claims against successor states will also be reluctant to engage in an apportionment, or might even precluded from doing so. In *767 Third Avenue Associates v. Consulate General of Socialist Federal Republic of Yugoslavia*, for example, the Second Circuit accepted the possibility in an obiter dictum that "principles of equity and international comity suggest some equitable assumption of a predecessor state debt."[209] It added, however, that "the federal courts do not have the authority or the means to determine the equitable distribution of the public debt of a foreign state among several successor states [the successor states to the Socialist Federal Republic of Yugoslavia]."[210]

Equity can thus serve as a guiding principle, but it is an imperfect source of obligations or remedies in modern international law.[211]

G. *Unjust Enrichment*

Closely related to the question of equitable interest is, by corollary, the question of whether there exists a rule against unjust enrichment. In international law, this term has at times been employed in a manner quite different from the way it is understood in domestic law,[212] including in the common law, for example.[213] Still, tribunals, commentators, and expert bodies alike have appealed to and critically examined principles associated with unjust enrichment, both in general and with specific reference to the law of state succession.[214]

The Institut's 2001 Resolution invokes the principle against unjust enrichment without specifying its elements.[215] Article 8(3) of the Institut's Resolution simply provides that "[u]njust enrichment

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209. 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia 218 F.3d 152, 161 (2d Cir. 2000).

210. *Id. See also* Can. v. United States, 14 F.3d 160, 160 (2d Cir. 1994).

211. For a critical examination of equity in international law, see Vaughan Lowe, *The Role of Equity in International Law*, 12 AUSTRALIAN Y.B. INT'L L. 54 (1989).

212. *See* Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, *in* 159 RECUEIL DES COURS 1, 300 (1978).

213. JEFF KING, THE DOCTRINE OF ODIOUS DEBT IN INTERNATIONAL LAW: A RESTATEMENT 161–62 (Cambridge Univ. Press 2016).

214. *See, e.g.*, Daniel Patrick O'Connell, *Unjust Enrichment*, 5 AM. J. COMP. L. 2, 3–4 (1956); Christoph H. Schreuer, *Unjustified Enrichment in International Law*, 22 AM. J. COMP. L. 281, 283 (1974).

215. INSTITUT DE DROIT INT'L, *supra* note 37, at arts. 8(3), 11(1), 13(2).

shall be avoided."[216] Eduardo Jiménez de Aréchaga, president of the International Court of Justice from 1976 to 1979, wrote in his General Course at the Hague Academy of International Law in 1978, in relation to compensation for nationalization, that "[t]he doctrine which constitutes the legal foundation of the conduct actually followed by States is the principle of unjust enrichment."[217]

In *Sea-Land Services, Inc. v. Iran*, the Iran-United States Claims Tribunal, having rejected claims for breach of contract and expropriation, decided to award damages on an unjust enrichment basis. According to the Tribunal, the rule against unjust enrichment has an equitable foundation and "involves a duty to compensate which is entirely reconcilable with the absence of any inherent unlawfulness of the acts in question."[218] The Tribunal then set out what it saw as the elements of the rule:

> There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched.[219]

Although views differ as to the basis on which a defendant must account to the claimant for the enrichment, in particular whether the loss to the expropriated party or the benefit to the state is determinative (and, if the latter, whether actual benefit is the same as actual use),[220] tribunals have made awards on a *quantum meruit* basis.[221] Unjust enrichment has also been a yardstick for measuring compensation due in state succession or occupation cases, where enrichment was measured by the actual benefit to the new sovereign. In *Zilberszpic v. (Polish) Treasury*, a contractor had, before the First World War and pursuant to a contract with the Russian Orthodox Charitable Society of Kielce, built an apartment house on land at the

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216. *Id.* at art. 8(3).

217. Jiménez de Aréchaga, *supra* note 212, at 299.

218. Sea-Land Serv., Inc. v. Iran, 6 Iran-U.S. Cl. Trib. Rep. 149, 169 (1984). *Cf.* Lena Goldfields Arbitration (Lena Goldfields, Inc. v. Soviet Union), Award (Sept. 30, 1930), reprinted in 36 Cornell L. Q. 42, 51 ("The Court further decides that the conduct of the Government was a breach of the contract going to the root of it. In consequence Lena is entitled to be relieved from the burden of further obligations thereunder and to be compensated in money for the value of the benefits of which it had been wrongfully deprived. On ordinary legal principles this constitutes a right of action for damages, but the Court prefers to base its award on the principle of 'unjust enrichment,' although in its opinion the money result is the same") (emphasis added).

219. *Id.* A claim for compensation based on alleged unjust enrichment can fail if one or more of these elements is not satisfied. *See, e.g.*, Socony Mobil Oil Company Claim, United States Foreign Claims Settlement Commission, 40 I.L.R. 111 (1962).

220. *See generally* Jiménez de Aréchaga, *supra* note 212; Schreuer, *supra* note 214; Sea-Land Serv., Inc. v. The Gov't of the Islamic Republic of Iran, Ports & Shipping Org., 6 Iran-U.S. Cl. Trib. Rep. 149, 169 (1984) (Holtzmann J., diss.).

221. Landreau Claim (U.S./Peru), 1 R.I.A.A. 347, 364 (1922).

time under Russian rule.[222] After Russian troops withdrew from the territory in 1918, part of the money due to him under the contract remained unpaid.[223] Under the peace treaty, Poland became the owner of all former Russian state property on its territory.[224] The land on which construction had occurred had been granted by the Russian state.[225] The Supreme Court of Poland held that "the rule against unjustified enrichment at the expense of another [was] one of the fundamental rules of law," and that on that basis "the plaintiff can claim from the Polish Treasury, whose property the building has now become, that part of his expenditure which would not exceed the increase in the value of the land due to the construction of the building, deduction being made of the sum already paid for the construction of the building."[226]

Invoking unjust enrichment in connection with state succession to justify the survival of claims—at least for compensation— is an attempt to circumvent problems arising from the lack of privity between right-holders and the new state. The successor state should not, so the argument goes, be enriched at the expense of private persons' rights or interests, and it certainly should not be entitled to benefit economically from such an enrichment. Several issues arise.

First, and most obviously—does such a rule even exist in international law? Where does this purported rule come from, and how is it a distinct remedy, if at all? It might be possible to derive such a rule from the far more general requirement that states act in good faith and the rule against abuse of rights in international law. Yet, to say that these principles of good faith and abuse of rights allow you to derive a much more specific rule against unjust enrichment where private rights are concerned, especially in the highly particular field of state succession, is a bolder proposition.

Arguing from first principles is not, in itself, objectionable. One doctrinal way of doing so would be to characterize a rule against unjust enrichment as a general principle of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.[227] Principles accepted under this rubric, however, often have a procedural

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222. Zilberszpic v. (Polish) Treasury, 4 I.L.R. 82, 82 (1928)

223. *Id.* at 82.

224. *Id.*

225. *Id.*

226. *Id.* A similar question arose in the *German Railways* case, which involved a claim against Austria for payment of money originally due to the appellant by the government of the German Reich. The claim was based on liabilities the German Railway Administration had incurred in Austria between 1938 and 1945. The Landesgericht of Vienna dismissed the claim on the ground that Austria was not a successor state to the German Reich. The court added that, apart from legal considerations, "it would not be in accordance with equitable principles to require a person to make a payment for something which has been given to another who is in no way connected with him and at a time when the powers of the latter were not capable of being exercised." German Railways (Austria) Case, 16 I.L.R. 61 (1949). See further Tax Legislation (Austria) Case, 16 I.L.R. 66 (1949) ("[d]octrine and jurisprudence alike reject the view that the Republic of Austria is the legal successor of the German Reich.").

227. Statute of the International Court of Justice art. 38, ¶ 1.

or evidentiary character, and they are usually not rules prescribing or prohibiting conduct.[228]

Second, there are two more nuanced questions: Is the new state even enriched in these circumstances? And even if it is, is that enrichment unjust?[229] Those who argue that there is no enrichment, and that in any event such an enrichment would not be unjust, may find support in the International Law Commission's work on state succession in relation to property, archives and debts. Concerning debt, the International Law Commission, as noted above, adopted the "clean slate" doctrine in relation to "newly independent states."[230] Other states strongly opposed this, and the United Nations Conference on Succession of States in Respect of Property, Archives and Debts is broadly regarded as a failure.[231] Also, the Convention was political in its objective.[232] It articulated special and favorable rules for newly independent states, providing in Article 38(1) that "[w]hen the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State."[233]

Where an existing state replaces another in sovereignty over territory, it is easy to see how the replacing state could be enriched if it refuses to honor private rights. But where a new state comes into existence, how can it be enriched in the normal sense of the word sense if there is no independent earlier reference point, economic or otherwise, against which the current state of affairs can be measured? The benchmark for comparison would be the situation in which the successor state is liable to honor the rights of private parties. But if such an obligation to honor existing rights is incumbent upon the successor state, a claimant could simply claim under that obligation and would not need to invoke unjust enrichment. Unjust enrichment, which primarily has a remedial character anyway, cannot establish such an obligation.

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228. *See* Daniel Costelloe, *The Role of Domestic Law in the Identification of General Principles of Law under Article 38(1)(c) of the Statute of the International Court of Justice*, *in* GENERAL PRINCIPLES AND THE COHERENCE OF INTERNATIONAL LAW 181, 189 (Mads Andenæs, Malgosia Fitzmaurice, Attila Tanzi & Jan Wouters eds., 2019).

229. *See* Bedjaoui, *supra* note 181, at 70, 95.

230. Int'l L. Comm'n, *supra* note 185, at 91–105 (article 36).

231. *See, e.g.*, Ress, *supra* note 27, at 121, 123; INSTITUT DE DROIT INT'L, *Réponses et Observations des Membres de la Commission*, 2001 Y.B. INST. INT'L L. 128, 130. As noted above, no negotiating state signed the treaty on the date it was opened for signature. Of those states that subsequently signed it, not a single one has ratified it. One reason for this lukewarm reception is the so-called "clean slate" principle, reflected in Article 38(1), under which newly independent states would be unencumbered by any share of the predecessor state's debt. In the view of capital-exporting states, this provision would have upset international economic relations.

232. *See* Bedjaoui, *supra* note 85, at 95, 99; Michael Waibel, *Decolonization and Sovereign Debt*, *in* SOVEREIGN DEBT DIPLOMACIES: RETHINKING SOVEREIGN DEBT FROM COLONIAL EMPIRES TO HEGEMONY 1, 215–17 (Pierre Penet & Juan Flores Zendejas eds., 2021).

233. Vienna Convention on Succession of States in Respect of State Property, Archives and Debts art. 38(1), Apr. 8, 1983, 22 I.L.M. 306 (concluded April 8, 1983, not yet in force).

Next, would any such failure to honor existing private rights be unjust? Again, the second preliminary question identified above is not really a legal one. According to certain commentators, a newly independent state is entitled to economic independence as much as it is to political independence.[234] However, some might counter that the new state's clean slate is highly unjust, not so much because the state itself is reaping economic gains, but because in doing so it is harming private persons. Indeed, as noted above, that might amount to a violation of the right to property under applicable human rights instruments.

VI. AN OBLIGATION UNDER INTERNATIONAL LAW TO NEGOTIATE IN GOOD FAITH WITH PRIVATE PERSONS?

All of this raises a more fundamental question: supposing there is no theory in international law capable of bridging the rupture from one sovereign to another as far as private property and contract rights against the state are concerned, what is left as a theoretical foundation? Acquired rights, subrogation, continuity of laws and institutions, territorialization, human rights, equitable interests, and unjust enrichment are all incapable of accounting in full, it seems, for the survival of certain private property and contract rights and their enforceability against a new sovereign in the event of a succession of states.

International decisions strongly suggest an accepted policy objective of protecting private property and contract rights against the state and the importance of doing so. Still, the doctrines courts and tribunals have invoked in support are intellectually imperfect. They are useful when read together, but they may sooner seem a post facto patchwork than a coherent and practically useful theory to apply in future cases. Is the whole theoretical foundation misconceived? That would seem an odd conclusion in circumstances in which, under modern international law, accommodation is made for such private rights in many instances, and indeed the survival of these rights is widely accepted as a rule of customary international law based on state practice and opinio juris. Put more bluntly, it would be deaf and blind to reality. Circumstances differ, but to let these private rights fall prey to a change in sovereignty seems intuitively unjust in most cases. The PCIJ's general statements of principle in *German Settlers in Poland* retain much, perhaps most, of their force.

At the same time, there are strong reasons to conclude that the successor state is most clearly under an obligation to negotiate in good faith with natural and legal persons who held property and contract rights enforceable against the predecessor state. This is certainly not the only legal rule that remains, but it is an important one, and one that rests on a confident foundation, given the general duty for states to act in good faith. By way of parallel, for example, the successor state is also under an obligation to negotiate in good faith with other states as far as the apportionment of state property and debt is concerned.

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234. *See* Bedjaoui, *supra* note 85, at 95, 105.

There is little reason why this duty should be limited to negotiations concerning state property and debt and not extend to private rights. On the contrary, it may be even more important in relations with private persons. The reality is that succession matters, whether in situations where a state dissolves into two or more states, where a state lawfully secedes from another, where one state (or part of it) is incorporated into another, or where a newly independent state comes into existence out of a former dependent territory, are often not left to default rules, but are the subject of intense negotiations. It is difficult to generalize in categories by reference to the "type" or circumstances of state succession. Sometimes it is even difficult to characterize the type of succession that has occurred, as the examples of the former Soviet Union and the Socialist Federal Republic of Yugoslavia show. It is all the more important in a negotiation setting, where rights are disposed over by agreement, to acknowledge a duty to negotiate in good faith with respect to the survival of private rights.

Indeed, the European Economic Community Arbitration Commission of the Conference on Yugoslavia specifically identified this duty to negotiate with other states as one incumbent upon a successor state under general international law.[235] The Institut did so as well.[236] But the principle has also been extended to negotiations with private parties, even in international instruments. A particularly pertinent example is U.N. Security Council resolution 1022 (1995), concerning Yugoslavia, which "encourages all States to make provision under their national law for addressing competing claims of States, as well as claims of private parties affecting funds and assets."[237] The resolution uses the verb "encourages,"[238] which falls far short of "decides," but it still seems to reflect a positive posture towards negotiated settlements. The volume of individual property- or contract-related claims against a successor state can run into the thousands or more, rendering them unsuitable for judicial determination. The ECtHR, for example, appeared to acknowledge this in *Kovačić v. Slovenia*, a case that concerned claims to hard foreign currency deposits in a Croatian branch of the Slovenian Ljubljanska banka following the dissolution of the Socialist Federal Republic of Yugoslavia.[239]

How different would it be for such an obligation to negotiate to bind successor states in respect of private property and contract rights against the state? Public debt is a broader category than private property and contract rights, but as a matter of principle it is not necessarily different in kind, at least at a very general level. The Institut's 2001 Resolution, for example, asserts such an obligation to negotiate on the part of the predecessor and successor states, as well

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235. Conference on Yugoslavia Arbitration Committee, Aug. 27, 1991, 31 I.L.M. 1488, 1525 (para. 4).

236. INSTITUT DE DROIT INT'L, *supra* note 37, at art. 10(3). *See also id.* art. 10(4).

237. S.C. Res. 1022, ¶ 6 (Nov. 22, 1995).

238. *See id.*

239. *See* Ivo Kovačić, Marjan Mrkonjić & Dolores Golubvić v. Slovn., App. Nos. 44574/98, 45133/98 & 48316/99, Judgment, 1, 2 (Oct. 3, 2008).

as—interestingly—on the part of private creditors and debtors themselves.[240]

VII. CONCLUSIONS

As is so often the case, no theory explains all outcomes. Each theory examined above might explain the continued enforceability of private rights against a successor state in certain circumstances, but not in all. As a generally applicable rule, an obligation to negotiate in good faith might be the centerpiece to this puzzle, and one that these theories can support. This would be an obligation under general international law, but one that is difficult to enforce in an international or even domestic forum.

Yet it is a feature of the field of state succession that it places a premium on negotiated solutions over general rules, and it is towards these negotiated solutions that states and their legal advisers should generally strive. It is a field characterized by variation. What may seem like occasional or even frequent departures from an all-explaining general doctrine of succession are not departures from an otherwise coherent system of rules but rather one of the very features of the so-called law of state succession itself.

240. INSTITUT DE DROIT INT'L, *supra* note 37, at art. 24(3). *See also* Ress, *supra* note 27, at 121, 125 (the author evaluates the possible merits of extending the principles of apportionment to private creditors).