

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT

CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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**The impact and consequences of
Brexit on acquired rights of EU
citizens living in the UK and British
citizens living in the EU-27**

STUDY for the AFCO Committee



DIRECTORATE GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

CONSTITUTIONAL AFFAIRS

The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27

STUDY

Abstract

On the request of the AFCO Committee, the Policy Department for Citizens' Rights and Constitutional Affairs commissioned this study, which examines the concept of acquired (or 'vested') rights in public international law, analyses the gradual establishment and evolution of these rights and draws from case law as well as other precedents in order to establish the validity and force of acquired rights in customary and conventional international law. It also analyses the protection of such rights within the EU legal order, and examines the citizenship rights that will have to be taken into account during the UK withdrawal negotiations as well as their potential permanence in the EU and UK legal orders after Brexit. It concludes with an assessment on the legal force of acquired rights after Brexit and recommendations for their treatment during and after the withdrawal negotiations.

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LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EP	European Parliament
EU	European Union
ILC	International Law Commission
ICJ	International Court of Justice
PCIJ	Permanent Court of International Justice
PIL	Public International Law
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaties

EXECUTIVE SUMMARY

The United Kingdom's withdrawal from the European Union will have undeniable consequences for the legal status, rights and duties of UK nationals living in the remaining 27 EU Member States and of EU citizens living in the United Kingdom from the moment such withdrawal takes effect. In a bid to minimise these consequences, it has been suggested that what doctrine and case law called, a century ago, the acquired rights of individuals might still apply today and be of use in the case of Brexit.

This study examines the possibilities of using the concept of acquired rights to safeguard and maintain the rights of these individuals following the UK's withdrawal. The study therefore looks into the judicial precedents, some international documents and doctrine and concludes that there are no acquired rights with regard to the rights contained in the status of European citizenship and in relation to the four fundamental freedoms of the single market. However, in international law there is nothing to prevent the withdrawal agreement itself from providing protection for the rights and freedoms of nationals of the States parties – granted to date by EU law – for a transitional period or beyond, as if EU law extended its applicability for the people covered by it thus far. Therefore, in view of the two possible scenarios (withdrawal with or without agreement), it would always be better for the citizens on both sides if the negotiators reached an agreement.

Articles 9 TEU and 20.1 TFEU stipulate that Union citizenship is additional to and does not replace national citizenship. Thus, every person holding the nationality of a Member State shall be a citizen of the Union. The European Union's obligation to respect the rights covered by the status of European citizenship and the four freedoms of the single market is limited, as a result, to those persons who hold the nationality of a Member State. The subjective rights conferred by EU law on nationals of a Member State derive from their condition as citizens of that Member State. Consequently, UK nationals will lose those rights from the moment the United Kingdom withdraws.

Meanwhile, the EU Treaties and secondary legislation will remain in full effect until the United Kingdom's negotiations with the European Union are completed or for two years after the country's notification of its intention to withdraw if, in the latter case, the agreement referred to in Article 50 TEU has not been reached.

Irrespective of whether there is an agreement or not, the European Convention on Human Rights will continue to offer a means of defending the right to residence and other related rights, such as the right to private and family life and the right to private property, for as long as the ECHR remains part of UK law.

GLOSSARY¹

Conventional international law: The body of international legal principles contained in 'international conventions' or treaties between states, which establish rules expressly recognised between the states as recognised in the Statute of the International Court of Justice 1945 Article 38.

Statute of the International Court of Justice 1945, Article 38 (1)(a)

Customary or general international law: General practice accepted as law and legal general principles which are common across a large number of legal systems, such as the rule of law. The International Court of Justice (ICJ) refers to general international law in Article 38(1) of the Statute of the ICJ.

Statute of the International Court of Justice Article 38(1), (b) and (c)

Economic freedoms: At a European Union level 'economic freedoms' can be used in reference to the European Single Market and the 'four freedoms' the market encompasses; the free movement of goods, capital, services and people across the European Union, the rights to which are enshrined in various EU treaties. More generally, 'economic freedom' is an economic term used to refer to the protection of property and contractual rights embodied in the rule of law.

https://ec.europa.eu/growth/single-market_en

Injury: A general term used through different legal systems to refer to damage of a legal person(s), such as physical or fiduciary harm to a person or property, the loss or infringement of a legal right or a breach of contract. Depending on the intent and circumstances behind the injury, legal liability or criminal charges may arise.

Law and Martin, A Dictionary of Law, 7th edition, 2014

<http://www.oxfordreference.com/search?source=%2F10.1093%2Facref%2F9780199551248.001.0001%2Facref-9780199551248&q=injury>

International Law Commission: Established by the United Nations General Assembly in 1947 to undertake the mandate of the Assembly under Article 13 (1) (a) of the Charter of the United Nations, the International Law Commission will "initiate studies and make recommendations for the purpose of [...] encouraging the progressive development of international law and its codification".

<http://www.un.org/en/charter-united-nations/>

<http://legal.un.org/ilc/>

Intertemporal law: The doctrine of intertemporal law requires the interpretation or assessment of the legal effects of past transactions in the light of international law as it existed at the time of such transactions. In the law of treaties, it is usually affirmed that intertemporal law consists of two branches. The first provides that "a treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up". The latter that "subject to the previous paragraph, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied".

http://legal.un.org/ilc/documentation/english/a_cn4_167.pdf

<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1433>

Jus cogens (compelling law): *Jus cogens* refers to certain fundamental, overriding principles in customary international law, from which no derogation is ever permitted. Article

¹ This glossary has been prepared by the Policy Department on Citizens' Rights and Constitutional Affairs.

53 of the 1969 Vienna Convention on the Law of Treaties recognises *jus cogens* by declaring void all treaties, which conflict with a peremptory norm of general international law.

Brownlie, I, Principles of Public International Law, 5th edition, Oxford, 1998

Fox, J, Dictionary of International and Comparative Law, 1997, p172

Jus dispositivum (Dispositive law): Contrary to *jus cogens*, it is a law that may be changed or adopted with the consent of the group to which it applies.

Fox, J, Dictionary of International and Comparative Law, 1997, p172

Legitimate expectations: A general principle found in several legal systems, whereby legal persons who have acted in good faith based on a law should not be frustrated in their expectations. The principle of 'legitimate expectations' has been explicitly recognised by the CJEU as a sub-principle of the rule of law since *Lemmerz-Werke v High Authority of the ECSC* 1965. Kaczorowska, Alina 'European Union law' 2013

Lemmerz-Werke GmbH v High Authority of the ECSC, ECSC [1965] ECR 677

Real right (or jus in re): Many legal systems separate rights into distinct categories of rights. Real rights are rights in a thing, usually referring to property rights and are enforceable against the world at large. Real rights include ownership, use, pledge, usufruct, mortgage, habitation and servitude.

European University Institute, Real Property Law and Procedure in the European Union, 2005, p15

<http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/GeneralReport.pdf>

Subjective rights: In European continental law, the concept of subjective rights, as opposed to the notion of Objective Law (which refers to the totality of the set of rules that constitute a legal order) refers to legal rights granted to individuals by the law. They are also described as interests protected by the law. The CIJ distinguishes between 'mere economic interests' and 'genuine subjective rights' (in the *Barcelona Traction* and *Sadio Diallo* cases). Such rights are primarily rights of private citizens.

INTRODUCTION

The prospect of the UK's withdrawal from the European Union, following the outcome of the EU referendum of 23 June 2016, constitutes a major political development, in the European and international scene, with considerable consequences for the United Kingdom, for European integration and for Europe as whole. The formal withdrawal process started on 29 March 2017, after the UK government submitted the notification to the European Council of its intention to withdraw, as provided for in Article 50 of the Treaty on the European Union (TEU). Following this notification, negotiations will start on the withdrawal agreement and on the framework for the future relations between the EU and the UK. Being the first in its kind, the entire process is fraught with uncertainties in all aspects of the negotiations and their outcome.

A major issue during the negotiations, both for the UK and the EU, with significant ramifications of a legal as well as a of political nature will undoubtedly be the fate of the rights of EU citizens living and working in the UK and businesses established or operating in the UK and, conversely, of UK citizens living and working in other EU Member States and companies established there (often described under the terms of vested or acquired rights²). This issue is important not only because it touches upon the lives and security of people (estimates put the number of EU citizens living, studying and working in the UK reaches almost three million and that of UK citizens in the other 27 Member States of the EU is around one million); it is also linked to elements of EU citizenship and to the very nature of EU law.

Both parties in the negotiations (the UK government, as expressed by Prime Minister Theresa May in her speech at the Lancaster House on 17 January 2017 and the EU negotiator Michel Barnier on several occasions) have stressed that they recognize the particular character of the issue and expressed their willingness to deal with this matter swiftly and early giving this priority during the negotiations. The European Council's *Draft Guidelines following the United Kingdom's notification under Article 50 TEU* of 31 March 2017 point out that "*the right for every EU citizen, and of his or her family members, to live, to work or to study in any EU Member State is a fundamental aspect of the European Union. Along with other rights provided under EU law, it has shaped the lives and choices of millions of people. Agreeing reciprocal guarantees to settle the status and situations at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union will be a matter of priority for the negotiations. Such guarantees must be enforceable and non-discriminatory*".

Notwithstanding such willingness though, the unprecedented character of Brexit means that the issue of acquired rights raises a degree of legal controversy and includes unresolved and novel questions which revolve around one main issue: whether subjective rights, legitimately acquired by individuals, as citizens of the European Union over the long period of time that the United Kingdom has been a member of the EU, may be relied upon or continued, under EU and/or international law, after the UK's withdrawal from the EU. It has been argued that the EU legal order does not cater for the protection of acquired rights in the case of a Member State's withdrawal. Therefore, the rights of individuals affected by the Brexit should obey the logic of the wider process of the withdrawal negotiations and in particular be guided by the relevant principles of international law. For other legal analysts, the EU legal order does not only include legislation but also general principles, such as the principle of legal certainty,

² The two terms (vested or acquired rights) have the same meaning in the English language literature and are interchangeable. For the sake of legibility, the study will use the term acquired rights unless it is a citation.

and has conferred upon its citizens a number of rights, which have acquired an independent existence, directly enforceable by the courts and that, therefore, such acquired rights must be dealt as a separate and distinct aspect of the negotiations.

The object of this study is to clarify the implications of Brexit on the citizens' rights and analyse whether such rights can exist - and to what extent - following the withdrawal of the UK from the EU. It does so both under public international law and under European Union law providing a detailed analysis of how to treat this issue in the withdrawal agreement based on EU and international law, doctrine and case law.

The study is divided **in two main parts. The first part examines the concept of acquired rights, its content and evolution thereof under public international law.** Section 1 analyses how the doctrine of acquired rights appeared and developed in public international law and in the practice of states after-World War I in the context of state succession and later on during the discussions on states' international responsibility.

Section 2 examines whether the doctrine of acquired rights has been accepted, in international law, as covering also economic freedoms, such as the right to establishment and exercise commercial activities, besides real property rights. It examines relevant cases in the International Court of Justice to determine that jurisprudence does not accept that market freedoms or economic interests can constitute acquired rights. Section 3 looks into whether acquired rights could be validly invoked under the provisions of the 1969 Vienna Convention on the Law of Treaties (VCLT) and elaborates as to whether and, if yes to what extent, the Convention could be a useful tool in the delimitation of acquired rights in the Brexit negotiations.

Sections 4 and 5 examine other precedents in comparable situations. Section 4 briefly analyses the possible precedent in the case of the withdrawal, in 1985, of Greenland from the EEC. In this context it examines whether the case of Greenland's withdrawal from the EEC can be used in order to confirm or infirm the permanence of acquired rights in the EU legal order. Although there are very few cases where acquired rights were involved in the withdrawal of a state from an international organisation, the study also examines one such rare case: the withdrawal of the UK and the USA from UNESCO in the 1980s and 1990s raised the issue of the rights acquired by nationals of these two states who were employed by UNESCO. Section 5 therefore examines whether this episode can represent a valid precedent in the current withdrawal negotiations.

Finally, section 6 of the first part examines whether the case law of the Court of Justice of the European Union (CJEU) on the direct effect of EU law can be used in order to justify the permanence of acquired rights after the UK withdrawal.

The second part examines, more specifically how European law deals with citizenship rights, that is, rights that stem from being a citizen of the Union. Section 7 examines the rights that are included in the European citizenship status (free movement and residence, active and passive suffrage in the elections to the European Parliament and municipal elections, consular protection and the right to petition as well as economic freedoms and other rights of a social nature) and their origin and content in primary and secondary EU legislation.

Section 8 delves on the rights that will form part of the withdrawal negotiations and studies, in particular the right of free movement and residence, this being the most powerful citizenship right. It analyses the legal basis for these rights in order to assess whether they

can be qualified as possible acquired rights. Section 9 examines whether citizens' rights can receive other forms of protection, in particular with reference to the European Convention on Human Rights (ECHR). Finally section 10 examines how to legally deal with the rights of citizens in the context of the UK's withdrawal.

The study concludes that both public international law jurisprudence and European Union law including their case-law, can confirm resolutely that rights of citizenship or at least the most rights linked to EU citizenship will not remain valid after the UK's withdrawal from the EU. It suggests to provide for them expressly during the negotiations under Article 50 TEU and include them into the withdrawal agreement in order to maintain them with the requisite degree of legal certainty going forward.

PART I: ACQUIRED RIGHTS IN INTERNATIONAL LAW

With the exception of legal provisions that protect essential human rights – such as the right to privacy, family and home (Article 12 of the UDHR, Article 8 of the ECHR and Article 7 of the Charter of Fundamental Rights of the European Union) or the protection of private property (Article 17 of the UDHR, Article 1.1 of the Additional Protocol to the ECHR and Article 17 of the Charter of Fundamental Rights of the European Union) – the legal regime existing under general international law and under European Union law on the subjective rights of persons is of a dispositive nature (*jus dispositivum*).³ This means that such rights may be regulated by a treaty, as in the TFEU, and may be modified by specific agreements among the parties in the forthcoming negotiations between the European Union and the United Kingdom, on the basis of reciprocity.

However, with a view to these negotiations, it is important to examine whether one of the negotiating parties could start off with a positional advantage because they could argue in favour of their nationals retaining certain acquired rights: in other words, **whether subjective rights, legitimately acquired over the long period of time that the UK has been a member of the European Union, may be maintained or continued after the UK's withdrawal from the EU.** The question of whether such acquired rights exist has to be posed both under public international law (PIL) and under EU law: under PIL, because once the UK's withdrawal is concluded, and barring what might exceptionally be agreed to in the withdrawal agreement itself, EU law will cease to apply to the UK and the relations between the EU and the UK will be governed by PIL; and under EU law, insofar as a series of subjective rights that revolve around the basic right of the free choice of residence cannot be retained by nationals of EU Member States in the UK and vice versa unless stipulated in the withdrawal agreement, an issue that will be examined in the second part of this study.

In its first part, this study will analyse the doctrine of acquired rights in international law, how this concept was formed and the relevant practice of states, especially in the area of international responsibility as it was considered under classic international law. This part will aim to assess to what extent such practice recognises the existence of general principles of law or of state conduct in such a constant and uniform manner that they could constitute a material element of a customary norm. However, as stated in the case law of the International Court of Justice (ICJ), such practice should not only be constant, uniform and come from 'especially interested' states, but also incorporate the subjective element of *opinio juris* in order for it to have regulatory value.⁴

Moreover, this part will examine whether we can find precedents to show respect for rights acquired by foreigners and from a prior legal framework, taking, however, into careful consideration whether such precedents occurred in comparable situations. The only

³ That is to say, the provisions governing them do not form part of *jus cogens* or compelling law, but *jus dispositivum*, or dispositive law, and thus may be modified by a differing provision with the agreement of the group to which it applies.

⁴ ICJ, *North Sea Continental Shelf Cases*, Judgment of 20 February 1969, paragraph 77: 'The essential point in this connection - and it seems necessary to stress it - is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris* - for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.'

comparable situation found by the authors of this study referred to the withdrawal of certain member states from UNESCO (see section 5) and the issue that could arise in the present negotiations over the status of EU officials holding the nationality of the withdrawing state. However, these are exceptional situations that we must interpret with restrictive criteria.

1. ACQUIRED RIGHTS: CONCEPT, CONTENT AND HISTORICAL DEVELOPMENT

This chapter analyses the evolution of the doctrine of acquired rights in international law, paying particular attention to the development of acquired rights under the so-called intertemporal law and their connection with the discussion on the international responsibility of States.

The expression 'acquired rights' refers to **subjective rights of a permanent nature**. However, there is no agreement in doctrine when it comes to formulating a definition.⁵ We could define them as **subjective rights which had their origin under a certain legal system and are intended to remain in force in a different legal system from the original one**, be it in space or in time.

In **private international law** the term is used to describe the effectiveness of subjective rights generated by regulations of a certain national legislation when the legal situation created is incorporated into the legal system of another state (the spatial or **territorial projection of an acquired right**).

In **public international law**, the concept is used to describe **the subjective rights which are generated for a private individual by the norms of one legal system** – or rather by the contracts, acquisitions, investments or other acts undertaken under that initial legal framework – **and which are intended to remain in force in a different legal framework**, such as the one created by a succession of states or governments after an armed conflict, a revolution or a coup d'état (projection in time after the change of the legal framework in force). The term, thus described, is linked to two general principles of law: on the one hand, the general **principle of non-retroactivity**; on the other, the principle of **unjust enrichment** or enrichment without cause, at least in relation to the right to private property.

However, two different conceptions of acquired rights are deliberately confused. According to the correct one, acquired rights refer to maintaining the validity of the act which created the subjective right and to the respect for the effects produced during the period prior to the change of legal framework in force; this is based on the general rule of non-retroactivity. The opposite would imply to seek the invalidity *ex tunc* of the initial act; that – both in civil law and in international law – can only be done by virtue of the theory of defect of consent. However, different to this absolute *ex tunc* invalidity is another type of legal mechanism (which is called **invalidity** in civil law, and **termination, denunciation or withdrawal** in international law) which has *ex nunc* effects, as of the moment it is declared or from the moment it enters into force, without affecting the legal effects legitimately produced previously. **As a rule, once the act or legal situation from which the subjective rights stem is terminated, those rights expire.** This means that the 'acquired' character of these rights will not suffice to maintain respect for them beyond the termination of the act that created them. These rights will no longer be effective in the future (*pro futuro*) if they are adversely affected by the rules of the new applicable legal framework.⁶

⁵ Lalive, P., 'South Western Legal Foundation', *Selected Readings on the Protection on Foreign Investment*, 1964, p. 151.

⁶ It is not unwarranted here to refer to the so-called '*stabilisation clauses*', a form of clause inserted into oil agreements after World War II to prevent situations where a change of legal system in the state that granted the licence might affect what was agreed in the contract. At the moment of truth, these clauses did not serve to prevent new nationalisations, though they did give more work to arbitrators. See: Schachter, O., 'International Law in Theory and Practice. General Course of International Law', 178 *RCADI*, 1982, Vol. V, pp. 295-326.

On the other hand, is there any true right (not just an expectation thereof) that is not an acquired right? That is precisely what Leon Duguit points out ironically: '*Jamais personne n'a su ce que c'était qu'un droit non acquis. Si l'on admet l'existence de droits subjectifs, ces droits existent ou n'existent pas; telle personne est titulaire d'un droit ou non. Le droit non acquis est l'absence de droit*'.⁷

1.1. Acquired rights and intertemporal law

In any case, in general terms, the maintenance of such rights over time would be regulated by the rules of intertemporal law. It seems an opportune moment to point to the position of Max Huber on the matter. Huber was the sole arbitrator in the well-known *Island of Palmas* case.⁸ On the question as to which one of a number of different legal systems at successive periods had to apply in a particular case, he said that a distinction had to be made between the creation of rights and the (continued) existence of rights. Specifically he pointed out that:

*"both Parties are also agreed that **a juridical fact must be appreciated in the light of the law contemporary with it**, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled";*

And

*'As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), **a distinction must be made between the creation of rights and the existence of rights**. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law'.*

Two years earlier, Max Huber had been the president of the Permanent Court of International Justice on the case concerning *Certain German Interests in Polish Upper Silesia*, which is often cited on matters of acquired rights. Therefore, from the point of view of the application of law over time, **the notion of acquired rights does not appear to be a solid argument to defend a future exercise of economic freedoms granted by the EU law if their legal framework is modified on termination of the applicability of those rules to the United Kingdom and vice versa.**

1.2. Acquired rights in the context of a state's international responsibility

In the past, the argument of a state's international responsibility was used to defend certain acquired rights of private individuals (private property), both in the context of the cession of territories after an armed conflict (1.2.1) and in the context of colonial succession (1.2.3).

⁷ 'No one has ever known what a non-acquired right is. If we recognize the existence of subjective rights, these rights either do exist or do not exist; any person is either entitled to a right or is not. A non-acquired right is the absence of the right' (translation by the authors) Duguit, L., *Traité de Droit Constitutionnel*, vol. II, p. 201.

⁸ Reports of International Arbitral Awards. Recueil des Sentences Arbitrales, Nations Unies, Vol. II, *Island of Palmas* case, 4 April 1928, p. 845.

1.2.1. Expropriation of property belonging to foreigners

The case concerning *Certain German Interests in Polish Upper Silesia* was brought before the Permanent Court of International Justice (PCIJ) from 1925 to 1926. The PCIJ's judgment on the merits (1926) in this dispute between Germany and Poland after World War I⁹ has been mentioned as a precedent for the general recognition of acquired rights at international level.¹⁰ However, if we put it into its context, its interpretation is less likely to give it such a wide value.

The Bolshevik Revolution might have put an end to Czarist Russia in early November 1917, but Silesia had not even reached the bourgeois revolution by the end of World War I. A good part of the 'large rural estates' whose adjudication was the object of the litigation belonged to rich aristocrats¹¹. The signing of the Treaty of Versailles in 1918 put an end to the Great War. Under its provisions, Germany ceded Upper Silesia to Poland. Three and a half years later, Germany and Poland signed the Geneva Convention of 15 May 1922 concerning Upper Silesia. Article 19 of this bilateral convention provided for the creation of an arbitral tribunal¹² and also granted the PCIJ competence which was not coincident with that of the arbitral tribunal. Article 6 of the Geneva Convention states as follows:

"Poland may expropriate in Polish Upper Silesia, in conformity with the provisions of Articles 7 to 23, undertakings belonging to the category of major industries including mineral deposits and rural estates. Except as provided in these clauses, the property, rights and interests of German nationals or of companies controlled by German nationals may not be liquidated in Polish Upper Silesia".

The use of two different terms – expropriation and liquidation – was not clear to the PCIJ when it was called to interpret the provision,¹³ but this did not prevent it from assuming jurisdiction over a matter unrelated to acquired rights, only to take a position on acquired rights later, in the judgement on the merits.¹⁴ In turn, the judgement on the merits dealt with the question as to whether the Polish expropriation law of 1920 was compatible with Articles 6 to 22 of the Geneva Convention of 1922. We have to bear in mind that the Geneva Convention was a special bilateral convention as regards the Versailles Peace Treaty. This treaty – framed under the ironically termed *jus victoriae* – did not even enunciate expressly the principle that '*in the event of a change of sovereignty, private rights must be respected*'¹⁵. In other words, the Convention was under twice as particular a situation, drawn up under the law of war; it was not a situation which was not regulated conventionally and where the Court had to form the law applicable to it by turning to customary norms and general principles.

⁹ The judgment on preliminary objections on the same subject is from 25 August 1925, PCIJ, Series A, No 6. The judgment on the merits is from Series A, No 7, of 25 May 1926.

¹⁰ *Brexit: some legal and constitutional issues and alternatives to EU membership* (by Paul Bowers et al.). House of Commons, Briefing Paper No 07214, 28 July 2016 (hereinafter, 'British Parliament report').

¹¹ Count Nikolaus Ballestrem, Prince Hohenlohe-Oehringen, Baroness Maria Ana Goldschmidt-Rothschild, Prince Lichnowsky.

¹² Chaired by G. Kaeckenbeeck, also the author of a much-cited article, 'The protection of vested rights in international law', *British Yearbook of International Law*, 17, 1936, pp. 1-17.

¹³ We probably have to take liquidation to be a confiscation without any compensation whatsoever. Some paragraphs of the ruling (for example, p. 22, para. 3 and p. 24, para. 4) lead one to think that the Polish law of 1920 did not provide for any compensation after expropriation.

¹⁴ Therefore, according to the Court, '*it was contended on behalf of Poland that the question was one of vested rights, a question governed by Articles 4 and 5 of the Geneva Convention, in regard to which the Court was not given jurisdiction. The German Government, on the contrary, had maintained that the applicable clauses are those contained in Articles 6 to 22. These conflicting contentions, by emphasizing the fact that the difference of opinion relates to the sphere of application of the articles last mentioned, corroborate the view adopted by the Court*', PCIJ, judgment of 25 August 1925, Series A, No 6, pp. 16-17.

¹⁵ Although according to the Court, this principle was '*clairement admis*' ('clearly recognised') by the Treaty - see: *Certain German Interests ...* (the merits), p. 31, para. 3.

In favour of Poland, the Geneva Convention provided for a right to expropriation which – according to the Court, even if not expressly stated in the Convention – constituted ‘*an exception to the general principle of respect for vested rights*’.¹⁶ Article 6, referred to above, was the lynchpin of the Convention, as it distinguishes what could be expropriated (major industry and large rural estates, in other words, the means of production) and what could not be expropriated without compensation (liquidated).

Therefore, the Convention provided for two blocs of rights for properties belonging to German nationals and companies controlled by them: those that could be expropriated and those that could not. How did the property rights of the first bloc and the second bloc differ, from a doctrinal point of view? Why could those rights belonging to the second bloc be considered ‘acquired’, and why were those belonging to the first bloc considered rights which were ‘not acquired’ and which could therefore be lost to the detriment of their owner by means of an expropriation?

The only thing this precedent demonstrates is that, if a general principle of respect for acquired rights is deemed to exist, it should accept exceptions formulated by means of a treaty; therefore, it would have a dispositive nature. Thus, two states sign a bilateral convention in which – because of economic policy considerations – they agree upon a special set of rules, whereby some property rights are going to be respected and others – which cover decisive assets for the economic and social transformation of the region – are not. Everybody is aware that ‘*qui peut le plus, peut le moins*’. Therefore, if the rights of the big rural and industrial owners were not sufficiently *acquired* to have to put up with an expropriation, why should those belonging to small owners who, by contrast, were left out of the expropriation measure, when they were of the same legal nature? Therefore, **the idea of acquired rights does not appear to be sufficient to account for the respect or lack thereof that the new legal system has or does not have for private rights legitimately generated within the framework of a previous legal system.**

1.2.2. Acquired rights in the context of the responsibility of the state for injuries caused to the person or property of aliens

The question of nationalisations and expropriations should not be focused, then, on the viewpoint of the subjective rights of individuals, but on that of a state’s capacity to manage its own political, economic and social system, for which it is going to use the rules of its law. This is the modern approach to the issue, and international norms are limited to outline the guarantees that should accompany an expropriation. After World War II, nationalisations occurred in many states, not only in communist countries,¹⁷ but also in others such as Austria,¹⁸ France and the UK.

The Cuban *Francisco V. García Amador* was the first Special Rapporteur on State Responsibility (1956-1961) for the International Law Commission (ILC). He collected precedents relating to the practice of states with a view to drawing conclusions on ‘the responsibility of the State for injuries caused in its territory to the person or property of

¹⁶ *Certain German Interests...* (the merits), pp. 20-21.

¹⁷ Rado, A. R., ‘Czechoslovak Nationalization Decrees: Some International Aspects’, *AJIL*, vol. 41, No 4, 1947, pp. 795-806.

¹⁸ Langer, E., *Les nationalisations en Autriche*, Faculté de Droit, Université de Liège and Martinus Nijhoff, The Hague, 1964.

aliens¹⁹. In his fourth report (1959), the Rapporteur referred to the notion of acquired rights²⁰ as being **closely linked to that of unjust enrichment**, while aware of the need to revise 'traditional conceptions', insofar as the idea of 'respect' (for such rights) is not equivalent to their 'inviolability'²¹ and it is necessary to take into account the social function of property. In both cases, the aim of his project would be to protect private property against the 'arbitrary' action of the state. Yet his construct is flimsy from a doctrinal point of view.

García Amador worked on the premise that norms relative to the acquisition of private rights of a patrimonial nature are found in municipal (that is domestic) laws and, therefore, a state may lawfully prevent or restrict acquisition by foreigners of those rights in its territory. Therefore, the problem does not refer to acquisition, but to the protection of the private property (once acquired) of foreigners against 'arbitrary' actions of the state and, in this respect, to the protection of the acquired rights of those persons²². The notion of arbitrariness (not unlawfulness), then, constitutes the central point around which his construct revolves. However, he did not outline it clearly. Sometimes he appeared to relate it to what was subsequently described as '*responsibility for the harmful consequences of lawful acts*', while on other occasions arbitrariness is added to illegality.²³ We must bear in mind that the basis of his conception lies in the notion that **there is (only) responsibility if there is injury**. Therefore, agreement with or opposition to the legal system of the act causing injury is not decisive, in contrast to the constructs that have prevailed subsequently in the ILC.

The Rapporteur associated the notion of arbitrary action with the terminology used in Article 17(2) of the Universal Declaration of Human Rights ('*No one shall be arbitrarily deprived of his property*') and examined what the elements constituting it would be. He concluded that the most important criterion in order to avoid such arbitrariness is to avoid discriminating between nationals and aliens, identifying the idea of arbitrary action with the '**doctrine of abuse of rights**'.²⁴ However, when he tried to differentiate between '*illegal*' expropriation and '*arbitrary appropriation*', his construct failed to uphold the most basic legal logic. Thus he claims: '*According to a generally accepted principle, an expropriation is not necessarily 'unlawful' even when the action imputable to the State is contrary to international law [sic]*', and that, rather, '*an expropriation can only be termed "unlawful" in cases where the State is expressly forbidden to take such action under a treaty or international convention*', adding that '*by analogy, acts of expropriation which do not satisfy the requirements of form or substance stipulated in an international instrument are deemed to fall within the same category*'.²⁵ He further claims that '*arbitrary*' expropriations would be those that '*are not in conformity with international conditions and limitations to which the exercise of the right of expropriation is subject and which, consequently, involve an 'abuse of rights*'.²⁶ Such abuse

¹⁹ First report (Doc. A/CN.4/96) and ACDI, 1956, vol. II, 8th session (Doc. A/CN.4/Ser. A/1956/Add.1).

²⁰ 'Responsibility of the State for injuries caused in its territory to the person or property of aliens – measures which affect acquired rights', fourth report (Doc. A/CN.4/119), 11th session, 26 February 1959 (henceforth, García Amador report).

²¹ "The protection extended to patrimonial rights is particularly 'relative' ... Respect for acquired rights is conditional upon [subordination] to the paramount needs and general interests of the State ... Private interests and rights ... must yield before the interests and rights of the community" (García Amador report, pp. 5-6, point 15). A subsequent passage states: "There is no denying the need for revising it, with a view to bringing the principle of respect for the acquired rights of aliens fully into line with the idea that private ownership and all other patrimonial rights – as sources of social obligations – require, regardless of the nationality of the person in whom they are vested, constantly increasing sacrifices in the interests of the community at large" (p. 6, point 19).

²² García Amador report, pp. 4-5: the author sees the notion of 'arbitrariness' as "the basic notion on which international responsibility of the State on the subject lies" (p. 5).

²³ The following sentence serves as an illustration of the author's confusing theory: "**Arbitrary acts or omissions, on the other hand, although they also involve conduct on the part of the State that is contrary to international law, occur in connection with acts that are intrinsically legal**"- García Amador report, p. 7, point 24.

²⁴ García Amador report, p. 9, point 29.

²⁵ *ibid.*, p. 14, point 50.

²⁶ *ibid.* p. 9, point 29.

would occur if the requirements laid down in international law regarding motives, procedure, and *'above all, the compensation given for the expropriated property'*²⁷ were not fulfilled.

However, for the purposes of this study, it should be emphasised that even with the aim of constructing an international set of rules that respected acquired rights, from the precedents of international practice that the rapporteur had found it was inferred that **'as a general rule, the freedoms relating to the employment of labour and to gainful activity, which rest on the general freedom of industry and trade, are not acquired rights'**.²⁸ Even with an archaic terminology, the reference to what the EU calls fundamental economic freedoms is very clear: **there are no precedents in case law on acquired rights to what today we would call freedom of establishment, freedom to provide services or freedom of employed persons**. This affirmation will be a constant feature in the rest of this study.

1.2.3. Acquired rights and nationalisations in the context of colonial succession

As of 1961, the guidance advocated by García Amador on the codification of international responsibility was dropped. Since then, expressions of that position have been residual, confined to certain arbitral rulings following a nationalisation and to bilateral treaties promoting and protecting investments²⁹, but there are no new expressions in general international law, not even multilateral treaties on the subject, because of the general recognition of a state's right to nationalise or expropriate. The agreements on reciprocal promotion and protection of investments reached by European states, the United States or Japan have no uniform model. Even if they had, these are bilateral agreements whose aim is precisely to establish an agreed set of rules contrary to general rules.³⁰ And not even the most representative authors of Western doctrine have ever expected their repetition to give rise to a new norm of general or customary law.³¹

The validity of acquired rights was put forward in the context of so-called 'colonial succession' and of the nationalisations that came as a result of the changes in ownership from the former colonial administrator of a territory to the new territorial sovereign. Yet the objective to maintain them did not succeed, generally speaking, as it clashed with the principle of **permanent sovereignty of peoples over their wealth and natural resources** recognized in Article 1.2. of the International Covenant on Civil and Political Rights, in Article 1.2 of the International Covenant on Economic, Social and Cultural Rights,³² as well as in

²⁷ *ibid.*

²⁸ García Amador report, p. 11, point 37. García Amador only cites the *Jablonsky* case, resolved by the Arbitral Tribunal of Upper Silesia, but also refers to p. 224 of the work [misquoted] of Bindschedler, R.: 'La protection de la propriété privée en droit international public', *RCADI*, vol 90, 1956,-II, vol 90, pp. 186-207. Despite this, immediately before he refers to the *Oscar Chinn* case (PCIJ, Series A/B, No 63, 1934), in which the object of the litigation was an intangible asset, with nonetheless unquestionable commercial interest, that of 'loss of customers'.

²⁹ Dolzer, R. and Stevens, M., *Bilateral Investment Treaties*, Dordrecht, 1995; García Rodríguez, I., *La protección de las inversiones exteriores. Los APPRIS celebrados por España*, Valencia, ed. Tirant Lo Blanch, 2005.

³⁰ A claim has been made that the principle of permanent sovereignty forms part of *jus cogens*, as it a corollary of the principle of the free determination of peoples. It is an estimable argument in theory, but the practice of States is not consistent with that assertion. In fact, the agreements on reciprocal promotion and protection of investments are an alteration of the rules derived from permanent sovereignty and such an alteration could not be agreed if the principle formed part of *jus cogens*. Moreover, the ICJ did not take a position thereupon, either, on the two occasions. (*Phosphates from Nauru* and *East Timor*).

³¹ Schachter, *op. cit.*, p. 299, is very clear on the subject: "We should bear in mind that these agreements are bargained-for arrangements, often involving a variety of mutual concessions. For that reason, they cannot simply be considered as evidence of customary law that would favour the investor in the absence of such mutual concessions. Whether the protective provisions will be followed in general State practice outside out of the treaties remains to be seen. Until that occurs, they will not be regarded as general customary law".

³² International Covenant on Civil and Political Rights of 16 December 1966 (in force since 23 March 1976); International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (in force since 3 January 1976).

several resolutions of the UN General Assembly³³. As a result of this notable change of perspective, nationalisation or expropriation is no longer considered as an unlawful action, but as a right of the state derived from its sovereignty, or even as a human right of a collective nature whose beneficiary would be the people as a whole. The consequences of this structural change in terms of international responsibility are clear. The criteria for calculating compensation arising from a nationalisation cannot be the same if it is considered an unlawful act as if it is considered a legitimate legal action in accordance with international law.

Following this swift historic development, what is the current situation? The traditional rule was applied again by some arbitrators when it came to justifying compensation.³⁴ However, at the other extreme, in the practice of states we find numerous cases in which a nationalisation justified on the basis of the principle of permanent sovereignty ended up being belatedly settled through the acceptance – by both parties – of a lump-sum agreement.³⁵ The minimal figures of these agreements were a long way from what would have resulted from the application of the traditional rule on the subject.

It is true that the traditional criteria regarding compensation for expropriation are reflected in Article 36.2 of the ILC articles on Responsibility of States for Internationally Wrongful Acts of 2001. Yet this article, which requires the confluence of an unlawful act and, moreover, of damage – a breach of subjective rights and not just of economic interests that are 'financially assessable' – has a much broader scope than the one relating to foreigners' right to private property, as it encompasses 'both damage suffered by the State itself (to its property or personnel, or in respect of expenditures reasonably incurred to remedy damage flowing from an international wrongful act), as well as damage suffered by nationals of that State'.³⁶ Therefore, when the contemporary codifier of international law systematises the criteria for calculating compensation, we are not talking about a comparable situation to the one dealt with by the PCIJ 90 years ago. Nor would the current provisions be the same if today the action of a state causing damage to an individual were not considered wrongful. All that shows that **the practice of states is very far from being general, constant and uniform, not even in the European countries**. On the other hand, as the ICJ stated on the hypothetical existence of a regional custom, the practice of states '*discloses so much uncertainty and contradiction, so much fluctuation and discrepancy ... and ... has been so much influenced by considerations of political expediency ... that it is not possible to discern*

³³ 1863 (XVII) of 1962; 2158 (XXI), of 1966; 2386 (XXIII), of 1968; 3016 (XXVII), of 1972 on applying it to the sea; 3041 (XXVII) of 1972; 3171 (XXVIII), of 1973, the most radical; 3201 and 3202 (S-VI), of 1974; and 3281 (XXIX), the so-called Charter of Economic Rights and Duties of States, of 12 December 1974.

³⁴ Especially clear was the *Aramco* case (president of the tribunal, Sauser-Hall) between Saudi Arabia and the Arabian American Oil Company, of 23 August 1958, which expressly mentioned *acquired rights* (comment in Lalive, P., op. cit., p. 177 and ss.). On the other hand, the big Libyan arbitrations (BP, decision of 10 October 1973 [*International Law Rep.*, 1979, pp. 297 ff., sole arbitrator: Lagergren] and *Texaco Calasiatic* or TOPCO [*International Legal Materials*, 1978, pp. 1-37], sole arbitrator: R. J. Dupuy) made no express mention of the term. Perhaps the existence of stabilisation clauses agreed in a renegotiation enabled a more appropriate defence of the interests of the plaintiff in the matter. Nor were acquired rights mentioned in *Aminoil v Kuwait* (decision of 12 April 1977 [*International Legal Materials*, 1981, pp. 1 ff., sole arbitrator: Mahmassani).

³⁵ Generally speaking, the most complete work is Lillich, R. B. and Weston, B. H., *International Claims: their Settlement by Lump-Sum Agreements*, 2 vols. University Press of Virginia, Charlottesville, 1975. On Spanish practice with regard to Cuba, Egypt and Morocco, see the case law of the Spanish Supreme Court: STS of 17 February 1998, STS of 12 December 2003, STS of 19 February 2004 and STS of 30 June 2004.

³⁶ As the commentary to Article 36 states: "Damage to the State as such might arise out of the shooting down of its aircraft or the sinking of its ship, attacks on its diplomatic premises and personnel, damage caused to other public property, the costs incurred when responding to pollution damage, or incidental damage arising, for example, out of the need to pay pensions and medical expenses for officials injured as a result of a wrongful act. Such a list cannot be comprehensive and the categories of compensable injuries suffered by States is not closed" - Draft articles on responsibility of States for internationally wrongful acts with commentaries. Report of the International Law Commission, 53rd session, 23 April to 1 June and 2 July to 10 August 2001, UN, New York, 2001 (General Assembly, 56th session, Supplement No 10, A/56/10), Article 36, commentary, p. 262.

in all this a constant and uniform custom accepted as law'.³⁷ Therefore, **the practice of states currently does not indicate that there exists a general – or regional – rule or principle as regards respect for acquired rights.**

³⁷ This paraphrases what the ICJ said on the *Right to Asylum* case (Colombia v. Peru, judgment of 20 November 1950, p. 15): “*The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy ... and in the official views expressed on various occasions, there has been so much inconsistency ... and the practice has been so much influenced by considerations of political expediency in the various cases, that is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule*”.

2. ACQUIRED RIGHTS AND ECONOMIC FREEDOMS AND ACTIVITIES

The right to property is a real right and that is why it can remain over time, attached to the thing with which it lies. On the other hand, the contractual obligations relative to providing a service are personal. If the contract (or the treaty) that gives rise to them ends, it is not possible to maintain them. **In the context of economic freedoms** (free movement of goods, freedom of establishment, freedom to provide services, free movement of workers, free movement of capital), **the precedents found show that the notion of the maintenance of acquired rights beyond the end of the legal act that creates them is groundless.**

2.1. Acquired rights and commercial freedoms, profit expectations and loss of customers

On 12 December 1934, the PCIJ passed judgement on the *Oscar Chinn case (United Kingdom v. Belgium)*³⁸, which dealt with the interests of a British subject against those of the administrative power of the then Belgian Congo. Mr Chinn had set up a transport services trading company on the River Congo. Subsequently, the colonial administrator increased its capital in the state firm Unatra and – arguing that raw material prices had slumped following the 1929 economic crisis– adopted a regulation slashing charges for rail and river transport and undertaking to repay part of the losses that the measure caused Unatra, most of whose shares were property of the colonial administrator. The action led to the bankruptcy of the six companies of the competition, and Unatra thus acquired a de facto monopoly on river transport along the Congo.

From the point of view of the British Government, this stopped Mr Chinn from carrying on his business and constituted a breach of respect for his '**acquired rights, protected by the general principles of international law**'.³⁹ Today, we would regard this as a case of dumping and abuse of dominant position in the market, and the legal right being protected that of free competition. In that time, though, such notions had not yet taken root, and it is highly doubtful that they have ever formed part of general international law.⁴⁰ The United Kingdom argued that the monopoly created prevented freedom of trade and that Mr Chinn had lost his customers. The Belgian state, on the other hand, denied the existence of a monopoly or the intention to bankrupt the competition, arguing that its conduct was not contrary to the obligations imposed on it by conventional or customary international law.

The PCIJ observed that the prohibition of monopolies appeared in the General Act of the Berlin Conference of 1885, but not in the Convention of Saint-Germain-en-Laye of 1918. It said that Mr Chinn could not ignore Unatra's relationship with the colonial government and its power to set the river transport charges, and that a government action aimed at lowering the prices of the services offered by a company in competition with Mr Chinn could not be described as a de facto monopoly; nor could a company be prevented from temporarily operating at a loss if that was the only way of keeping it going.

With regard to the argument of acquired rights, the PCIJ stated:

³⁸ PCIJ, Series A/B, Fascicule No 63, 13 December 1934.

³⁹ PCIJ, *Oscar Chinn*, p. 82; reference to a "*breach of the general principles of international law, and in particular of respect for vested rights*", pp. 86 ff.

⁴⁰ A different thing, naturally, is its existence within the framework of international treaties, the most significant instance here being former Article 82 TEC, now Article 102 TFEU.

"The Court, though not failing to recognize the change that had come over M. Chinn's financial position, [...], is unable to see in his original position which was characterized by the possession of customers and the possibility of making a profit-anything in the nature of a genuine acquired right. Favourable business conditions and goodwill are transient circumstances, subject to inevitable changes; the interests of undertakings may well have suffered as a result of the general trade depression and the measures taken to combat it.

*No enterprise-[...] the success of which is dependent on the fluctuating level of prices and rates-can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change. **Where this is the case, no acquired rights are violated by the State**"⁴¹*

For the doctrine, this leading case fixes '**the possible limit of the domain of acquired rights**'⁴², based on the **distinction between the right to property and contractual rights that could be protected** by applying that concept **and other rights or interests outside its domain**. Thus, '*this example illustrates the idea, indicated by the majority of writers, that individual liberties, such as freedom of trade or industry, although protected by the constitution in many countries, are not acquired rights*'.⁴³

It goes without saying that the authors of the present study agree with that doctrinal position. Whatever the value of the concept of acquired rights may be at present, this case is a clear negative precedent in relation to the possibility of applying this to fundamental economic freedoms of the market, such as freedom of establishment, freedom to provide services and free movement of workers. We are not talking about subjective rights derived from those and deserving protection by the law, but about simple economic interests subject to the inherent risk of business activity, which sometimes yields profits and sometimes does not. Under no circumstances does it fall to the international legal system to protect what are nothing more than simple expectations of profit.

2.2. Are subjective rights independent from the treaties that create them?

In its judgment of 27 August 1952 ("*case concerning the rights of nationals of the United States of America in Morocco*" (*France v. United States*, 1952), the International Court of Justice (ICJ) settled a case involving the import of goods from Morocco, the preferential trade treatment that benefited France (given its protectorate over the eastern zone of Morocco), the establishment of exchange controls (as a limit on economic freedom) and their maintenance through a Moroccan decree of 1948, the possibility of the United States benefiting from the privileged treatment given to France in an indirect way, through application of the 'most-favoured nation clause', and even (if one is to use terminology typical of the EU law that obviously did not appear in the ICJ ruling) the legality of the use of '*measures having an equivalent effect*' (in this case, the refund of consumption taxes on products imported from France). This was coupled with the application of successive treaties concerning the same (and other) matters, signed by Morocco with a number of states, namely the treaty signed between the United States and Morocco in 1856, the treaty between Spain

⁴¹ PCIJ, *Oscar Chinn*, p. 88.

⁴² Lalive, op. cit., p. 187.

⁴³ Ibid. p. 188.

and Morocco of 1861, the Convention of Madrid of 1880, the Act of Algeciras of 1906, and the treaty establishing the French protectorate over Morocco in 1912.

In this complex framework, the ICJ rejected the French claim that the US could not invoke the most-favoured nation clause in its own favour. On the other hand, it also rejected the US argument on the supposed right to '*fiscal immunity*'; and it is on that point that we find an interesting paragraph for the purposes of this analysis. Notice that there is no literal use of the term acquired rights, but the line of argument is the same. In this context, the ICJ stated:

*"It is submitted on behalf of the United States that the most favoured nation clauses in treaties with countries like Morocco were not intended to create merely temporary or dependent rights, **but were intended to incorporate permanently these rights and render them independent of the treaties by which they were originally accorded.** It is consequently contended that the right to fiscal immunity accorded by the British General Treaty of 1856 and the Spanish Treaty of 1861, was incorporated in the treaties which guaranteed to the United States most-favoured-nation treatment, with the result that this right would continue even if the rights and privileges granted by the Treaties of 1856 and 1861 should come to an end.*

*For the reasons stated above in connection with consular jurisdiction, **the Court is unable to accept this contention**".*⁴⁴

As we can see, the view that certain subjective rights originating from the application of a treaty would have an existence that was permanent and independent from the treaty that created them, surviving the termination of that treaty, **was an argument that the Court did not accept, at least in the sphere of market freedoms.**

2.3. Subjective rights and economic interests in ICJ jurisprudence

More than half a century after the above mentioned *Rights of nationals of the United States of America in Morocco* case, on 30 November 2010, the ICJ ruled on the merits on the case *Ahmadou Sadio Diallo*.⁴⁵ The case is of interest because the Court entered in the substance of the case, which it did not do in the leading case in its case law on the matter of diplomatic protection, the *Barcelona Traction* case. It should be recalled that in this latter the Court had stated that:

*"Persons suffer **damage** or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. **Not a mere interest affected, but solely a right infringed involves responsibility**".*⁴⁶

And in another passage, earlier,

*"Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. **But the mere fact***

⁴⁴ ICJ, *Case concerning the rights of nationals of the United States of America in Morocco* (France v. United States), judgment of 27 August 1952 (204-205), p. 32, paragraphs 5 and 6.

⁴⁵ ICJ, *Ahmadou Sadio Diallo*, judgment of 30 November 2010 (Republic of Guinea v. Democratic Republic of the Congo), merits.

⁴⁶ ICJ, judgment of 5 February 1970, *Barcelona Traction* case paragraph 46.

that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation".⁴⁷

On the other hand, the *Sadio Diallo* case shows that **the protection of private property and business freedoms (trade, establishment and provision of services) can be linked to the protection of the fundamental rights of the individual**. Because of Mr. Diallo's attempt to assert his rights, he was arrested,⁴⁸ imprisoned (1988) and expelled (1995). The Guinean government argued that the purpose of the expulsion was to prevent him from continuing to act to recover his outstanding claims.⁴⁹ As a result, Guinea complained not only of the lack of protection of the rights of a shareholder, but of the expulsion of the owner of those from the territory in which lies the company's head office, thus making it practically impossible to exercise such rights⁵⁰. But the Court recalled what was said in the *Barcelona Traction* case by postulating that, even if both the company and the shareholder suffer economic loss, only the company's **rights** are affected, since in the case of the shareholder, it is only its **interests** that have suffered damage. Given that there is no evidence that any dividends were ever declared or that any action was ever taken to wind up the companies, Guinea's claims should be rejected, argued the Court.⁵¹

Ultimately, the issue here is whether general international law protects the individual against **indirect expropriation**, in the same way as some bilateral investment protection treaties currently do. The term '*indirect expropriation*'⁵² is used in cases where an individual, without being deprived of his property rights, is deprived of powers related to it and necessary for their full exercise. For this reason, Guinea maintained that Mr. Diallo "*no longer enjoying control over, or effective use of, his rights as associé, has suffered the indirect expropriation of his parts sociales in Africom-Zaire and Africontainers-Zaire because his property rights have been interfered with to such an extent that he has been lastingly deprived of effective control over, or actual use of, or the value of those rights*".⁵³

Similarly, according to the judges of the dissenting minority⁵⁴, if the reason for Mr. Diallo's expulsion was to prevent him from defending his societies, how can the Court conclude that there is no violation of his social rights when the purpose of the expulsion was to prevent him from exercising them? As far as indirect expropriation is concerned, judge Bennouna agreed with the argument that Mr. Diallo "*was not formally deprived of his right to property over his parts sociales, but the fact is that he was completely deprived of the usus and fructus of that right, since he could neither draw dividends from them nor actually do with them as*

⁴⁷ Ibid. Paragraph 44.

⁴⁸ Nevertheless, the Court rejected the request to examine the conformity of such detention with international law when examining the case in the merits.

⁴⁹ ICJ, *Ahmadou Sadio Diallo* Judgment of 24 May 2007. preliminary objections, paragraph 57: "*Guinea considers that the arrest, detention and expulsion of Mr. Diallo not only had the effect "of preventing him from continuing to administer, manage and control any of the operations of the companies Africom (Zaire) and Africontainers (Zaire), but were specifically motivated by the intent to prevent him from exercising these rights, from pursuing the legal proceedings brought on behalf of the companies, and thereby from recovering their debts."*

⁵⁰ *Ibidem*, p. 23, par. 58; "*Guinea maintains that it is [...] unrealistic to claim, as the DRC does, that Mr. Diallo could have exercised, from abroad, his rights of supervision and control, or indeed convoked, taken part in and voted at the general meetings*".

⁵¹ ICJ, *Ahmadou Sadio Diallo*, judgment of 30 November 2010, merits, p. 47, para. 155.

⁵² Dolzer, R., "Indirect Expropriation of Alien Property", *ICSID Review Foreign Investment Law Journal*, 1986, p. 33 and ff; Nouvel, Y., "Les mesures équivalent à une expropriation dans la pratique récente des tribunaux arbitraux", *RGDIP*, 2002, p. 79 and ff.; Stern, B., "In search of the Frontiers of Indirect Expropriation", *Contemporary Issues in International Arbitration and Mediation: the Fordham Papers*, 2007-2008, p. 29 and ff.

⁵³ CIJ, *Sadio Diallo*, preliminary objections, p. 45, para. 149; in French "*ont fait l'objet d'une atteinte*".

⁵⁴ On the one side, the *Joint Dissenting Opinion of Judges Al-Khasawneh and Yusuf* and on the other the *Dissenting Opinion of Judge Bennouna*.

he wished",⁵⁵ given that it was impossible for him in practice to carry out the winding-up and liquidation of his companies and to realize the remainder of their assets.

On the other hand, *ad-hoc* judge Mahiou, agreed with the other dissenting judges and stated that:

"In the present case, each of the various measures taken against Mr. Diallo (breach of contract, interrogation and arrest, obstruction and refusal to pay debts, denial of justice, expulsion) does not individually constitute an expropriation measure. However, when taken together and topped off by the expulsion, they have had an equivalent effect, which allows us to speak of indirect expropriation. Mr. Diallo's property rights [...] were not directly affected by each of these measures, but they were jeopardized by the fact that their holder was materially and legally unable to carry out the necessary acts of management in order to safeguard them and, more importantly, to make them profitable. He became the proprietor of companies which have been turned into empty shells with the passing of time".⁵⁶

It should be stressed that all judges originating from Western states sided, in this case, with the majority. To the extent that their vote reflects the *opinio iuris*, this means that, despite the multitude of bilateral treaties for the promotion and protection of investments and despite the arbitral awards which recognize the right to compensation in cases of loss, general or customary international law has not varied on the matter in the last fifty years.

⁵⁵ *Dissenting Opinion of Judge Bennouna*, p. 4, para. 17.

⁵⁶ *Dissenting Opinion of Judge ad-hoc Mahiou*, p. 12.

3. ACQUIRED RIGHTS UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES

The TEU and the TFEU are treaties agreed among the EU Member States (and not by the EU itself). The same applies to any accession agreement (Article 49.2 TEU)⁵⁷. On the other hand, a withdrawal agreement is an agreement signed by the EU and the withdrawing Member State. This derives from the fact that it is the Council that signs the withdrawal agreement on behalf of the Union, in accordance with the literal sense of Article 50(2) TEU.

Therefore, on the face of the fact that the withdrawal agreement is not an international treaty signed between States, the Vienna Convention of 1969 on the Law of Treaties (VCLT)⁵⁸ would not apply to it. Nor would the Vienna Convention of 1986 on the Law of Treaties between States and International Organisations or between International Organisations, since this treaty has not yet entered into force. Nevertheless, the VCLT also codifies customary international law in the area of international treaties between states or between states and international organisations. This has been expressly declared in the case law of the Court of Justice of the European Union (CJEU), in the *Racke* case:

"By way of a preliminary observation, it should be noted that even though the Vienna Convention does not bind either the Community or all of its Member States, a series of its provisions, including Article 62, reflect the rules of international law which lay down, subject to certain conditions, the principle that a change of circumstances may entail the lapse or suspension of a treaty. Thus the International Court of Justice held that "this principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respect be considered as a codification of existing customary law ...

It should be noted in that respect that ... the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law...

*It follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order".*⁵⁹

Therefore, these elements in the VCLT whose content consists in the codification of customary international law would be applicable to the situation created by the withdrawal agreement; it would also constitute the most suitable tool to underline the use of customary international law in international treaties, such as the situation under consideration.

Within the customary content of the VCLT, we should analyse the possibility that the state that withdraws retains certain rights, as per article 70.1 (b) of the Treaty, deriving from the

⁵⁷ We should distinguish the accession agreement from the Act of Accession, which appears as an annex to the accession agreement, the latter having a dual nature – Community and interstate – and simultaneously forming part of the primary and secondary legislation of the European Union.

⁵⁸ The text of the VCLT was adopted by the International Law Commission on the basis of the reports of four successive special rapporteurs of British nationality: J.L. Brierly, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice and Sir Humphrey Waldock. A broad and accurate commentary may be found in: Corten, O. and Klein, P., *The Vienna Convention on the Law of Treaties. A Commentary*, Oxford University Press, 2011.

⁵⁹ CJEU, judgment of 16 June 1998, *Racke*, C-162-96, paragraphs 24 ff.

situation prior to the cessation of the treaty's applicability to that state. Therefore, the analysis should deal with the legal concept of the denunciation of or withdrawal from a treaty by one of its parties⁶⁰ and with its effects, both for the withdrawing state and for states that remain parties to the treaty in force.

Article 70 of the VCLT (Consequences of the termination of a treaty) reads as follows:

"1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
(a) releases the parties from any obligation further to perform the treaty;
(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect."

Even when the provisions of Article 70 primarily apply to the concept of termination (among all the parties to the treaty), the provisions of the first paragraph also apply to cases of denunciation or withdrawal, between a state that ceases to be party to the treaty and *"each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect"*. And the fact is that, while the Vienna Convention does not offer a definition of withdrawal, we can take the definition provided by the Spanish Law of Treaties and Other International Agreements (Ley de Tratados y otros Acuerdos Internacionales) in its Article 2(u), namely the *"action ... [carried out by a state, through which] it terminates the obligations on it derived from a treaty"*. Evidently, the remaining states parties to the treaty will do the same with regard to that state. Hence it is only natural that Article 70.2 should stipulate that the provisions on termination of Article 70.1 should apply to withdrawal, given that withdrawal is nothing other than a termination, for the state concerned, of its obligations derived from that treaty.

It follows that **ex tunc invalidity** of a treaty is one thing and its **termination** is quite another. Invalidity would destroy the effects prior to its declaration (except for *"acts performed in good faith before the invalidity was invoked"* as stipulated in Article 69.2(b) VCLT, provided the invalidity was not because of the concurrence of certain causes [those of Articles 49, 50 and 52 VCLT]), since this concept results in the conclusion that the act of creating the treaty never existed in a legally valid way, as the initial consent was flawed. On the other hand, termination presupposes the validity of both the legal act of the signing the treaty and of all the effects produced by it during its validity. However, as a rule, those effects cease when termination is declared or when, at a later date fixed by the parties, the termination, denunciation, or withdrawal takes effect.

3.1. Acquired rights under the termination provisions of the Vienna Convention

The rule laid down in Article 70.1 of the Vienna Convention begins with the formulation *"unless the treaty otherwise provides or the parties otherwise agree"*, indicating the

⁶⁰ See Remiro Brotons, A., *Derecho internacional público. 2. Derecho de los tratados*, Madrid: Tecnos, 1987, p. 466, for whom both terms refer to the same concept: *"[The denunciation] is called withdrawal when it affects the constituent treaty of an international organisation"*. However, a denunciation may not be motivated (pp. 474-475, if there was no cause established as leading to it in the treaty in question), while in the case of withdrawal the treaty itself should have provided for such possibility.

dispositive nature of the rule. It is possible that the treaty itself has regulated on the matter (as Article 50 TEU does). However, if there are no provisions in the treaty itself, termination and withdrawal – alternatively – will be governed by the VCLT, thanks to the final sentence of Paragraph 1 of Article 70 (*"under its provisions or in accordance with the present Convention"*). The substantive content of the rule is quite simple. On the one hand, termination or withdrawal under Article 70.1(a) *"releases the parties from any obligation further to perform the treaty"*. On the other hand, under Article 70.1(b), *"it does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination"*.

A report published by the House of Commons⁶¹ summarises the opinion of Lord McNair⁶² on the maintenance of rights of States Parties after the termination of a treaty and the provisions of Article 70.1(b) VCLT. The terms of this report (*'have acquired an existence independent of it; the termination cannot touch them'*) are usefully linked to examples (*'a payment made under a treaty does not become repayable; a settlement of a dispute effected by a treaty does not become reopened because the treaty is denounced; demarcated frontiers are not rendered indeterminate; cessions of territory are not cancelled, etc.'*⁶³). However, Lord McNair projects the **validity of those rights on to the period prior to the change of the applicable legal system**, in accordance with the general rule of non-retroactivity. Despite this, in none of the examples does he refer to the future exercise of those rights (he does not mention subsequent payments, the demarcation of frontiers or cessions of territory pending materialisation in several connected acts, etc.). Rather, he refers to **situations originating in the treaty's period of validity that would not be extinguished (from their origin) by the subsequent termination of the treaty**. It is true that (in a very few cases) the execution of a treaty can give rise to situations that remain beyond the treaty's loss of validity. An example is that of the treaties that establish a border. In this respect, it is unquestionable that there is a customary rule, reflected in Article 11 of the 1978 Vienna Convention on Succession of States in respect of Treaties, according to which a succession of states in respect of treaties will not in itself affect *"a boundary established by a treaty"*, but nothing more.

The issue did not escape the notice of the delegations of the states during the negotiations leading to the adoption of the Vienna Convention. It is worth examining their observations and the respective responses of Sir Humphrey Waldock, the Special Rapporteur on the Law of Treaties, in order to get a better sense of the text. The Special Rapporteur asked whether:

*"it is completely sufficient to provide that the termination of a treaty "shall not affect the legality of any act done in conformity with the provisions of the treaty or that of any situation resulting from the application of the treaty", adding: 'The Commission certainly assumed that obligations already accrued and rights already acquired under the treaty before its termination could not be affected by the latter event, unless the treaty otherwise provided or the parties otherwise agreed ... However, the implication from that provision may not be so unambiguous as to exclude any possibility of misunderstanding'".*⁶⁴

⁶¹ *Brexit: some legal and constitutional issues and alternatives to EU membership* (by Paul Bowers et al.), House of Commons, Briefing Paper No 07214, 28 July 2016, pp. 22-23.

⁶² *The Law of Treaties*, 2nd ed., 1961, pp. 531-532.

⁶³ *ibid.* p. 532.

⁶⁴ Yearbook of the International Law Commission, 1966, Vol. II, A/CN:4/SER.A/1966/Add.1, p. 56.

He therefore proposed a new wording in which part (b) of the article would read:

"b) [It shall] not affect the legality of any act done in conformity with the treaty or that of a situation resulting from the application of the treaty.

c) [It shall] not affect any rights accrued or any obligations incurred prior to such termination, including any rights or obligations arising from a breach of the treaty".⁶⁵

In the discussions that followed, The Netherlands insisted that *"the very nature of the treaty may indicate that it is intended to have certain legal consequences even after its termination, [which] ought not to be expressly excluded".⁶⁶*

In reply to that and other observations, the Special Rapporteur argued:

"The paragraph must cover not only cases where a situation comes into existence after the treaty terminates but also cases where a situation which arose during the currency of the treaty continues to exist after the treaty ceases to be in force".⁶⁷

And:

"The possibility of taking this view of the effect of stipulations which expressly provide for particular obligations to continue after the termination of the treaty was not overlooked by the Commission. However, that view was rejected because it scarcely seems admissible to disregard the expressed will of the parties in a case like article XIX of the Convention on the Liability of the Operators of Nuclear Ships that the treaty, as such, shall terminate although a particular provision is to continue to be applicable".⁶⁸

He further added:

*"The United States Government ... suggests that account should be taken of acquired rights resulting from the operation of a treaty when it was in force ... The Special Rapporteur has proposed that a new clause should be added to paragraph 1 which would state that the termination of a treaty 'shall not affect any rights accrued or any obligations incurred prior to such termination' ... **Paragraph 2 of the present article does not appear, on close examination, to touch the question of the survival of acquired rights,** but to relate only to the further application of the treaty's provisions after its termination. **Acquired rights of a kind which will survive the termination of the treaty, although they may have their origin in provisions of the treaty, acquire an independent legal existence of their own.** When the treaty terminates, it is the rights which are afterwards enforceable rather than the provisions of the treaty which gave them birth".⁶⁹*

What has been cited so far might lead one to think that the possibility that rights like those established regarding the status of European citizenship may have 'an independent legal

⁶⁵ *ibid.* p. 57.

⁶⁶ *ibid.* p. 62.

⁶⁷ *ibid.* p. 63.

⁶⁸ *ibid.* pp. 63-64.

⁶⁹ *ibid.* p.64.

existence of their own' after the United Kingdom's withdrawal from the Treaties. However, it is not the case at all. In the final draft of the text of what was then Article 66, the ILC comment on the text referred again to the example of the Convention on the Liability of Operators of Nuclear Ships of 25 May 1962, stated that the denunciation by a state of the ECHR⁷⁰ "shall not release the State from its obligations with respect to acts done during the currency of the Convention"⁷¹ and adds a paragraph which clarifies the nature of the rights, obligations and situations to which Article 70 of the VCLT refers.

"On the other hand, by the words "any right, obligation or legal situation of the parties created through the execution of the treaty before termination", the Commission wished to make it clear that paragraph 1(b) relates only to the rights, obligations or legal situations of the States parties to the treaties created through the execution and is not in any way concerned with the question of the vested interests of individuals".⁷²

This paragraph is so clear that it warrants no further comment. **The Vienna Convention of 1969 refers to the rights, obligation or situations created by a treaty between states and applicable to them and not to rights arising between states and individuals.** It bears no relation to the problem of the vested rights of individuals. The text of the current Article 70 and its commentary were adopted by 101 votes to zero⁷³ at the Vienna Conference on the Law of Treaties. That is the true interpretation of the rule that forms part of customary international law. Anything else is groundless speculation about a sentence taken out of context.

3.2. The interpretation of Article 70.1(b) of the VCLT and its application in EU law

International law must be interpreted in accordance with its own rules, as they are codified in the 1969 Vienna Convention. Following the case law of *Racke* (see above), the provisions of the VCLT are considered as customary international law and form part of the law of the European Union. This statement applies also to the rules laid down in Articles 31 to 33 VCLT regarding the interpretation of treaties. The general rule, formulated in Article 31, lays down the grammatical, systematic and final interpretation. Complementary rules to that general rule (Article 31, paragraphs 2 and 3) indicate what has to be taken as 'context' in relation to the systematic interpretation and to what extent subsequent agreements and 'subsequent practice' followed by the parties can be taken into account to interpret a treaty. With regard

⁷⁰ The denunciation clause of the ECHR deserves a specific comment. Article 58 (formerly Article 65) establishes six months' notice in paragraph 1. In paragraph 2, it states that the denouncing state will remain bound by its obligations under the Convention until the denunciation becomes effective. That is to say, for a period of six months after notification of the denunciation, the ECHR will remain in effect for the denouncing state (this provision may compare with the provisions of Article 50.3 TEU for the period between notification of withdrawal and the withdrawal agreement taking effect). Hence a case can be brought against the denouncing state during that six-month period. ECHR practice illustrates this with the example of the *Greek Case* - see the main commentators on the Convention: Van Dijk, P. and Van Hoof, G.J.H., *Theory and Practice of the European Convention on Human Rights*, 3rd ed., Kluwer, The Hague, 1998, p. 15; Jacobs, F.G. and White, R.C.A., *The European Convention on Human Rights*, 2nd ed., Clarendon Press, Oxford, 1996, pp. 21, 362-363 and 398-399. After the 1967 colonels' coup, Greece withdrew from the Council of Europe and denounced the ECHR on 12 December 1969. The denunciation was due to take effect on 13 June 1970. However, in April 1970 Denmark, Norway and Sweden brought a case against Greece and the European Commission of Human Rights considered that the case was admissible as it understood that it still had jurisdiction (Appl. 4448/70, *Denmark, Norway and Sweden v. Greece*, Yearbook XIII [1970], p. 108).

⁵⁸ Report of the International Law Commission on the work of the second part of its 17th session and of its 18th session (4 May to 19 July 1966), A.G., Doc. Of., 21st session, Supplement No 9 (A/6309/Rev.1), pp. 97-98.

⁷² *ibid.* p. 98 (point 3). The word *States* (*Estados*) appears in italics in the Spanish version.

⁷³ The numbering was then different: at the time of the vote during the Vienna Conference, it was numbered as Article 66. United Nations Conference on the Law of Treaties, Vienna, Second Session, 9 April-22 May 1969; Doc. A/CONF.39/SR.23, 23rd plenary meeting, p. 126.

to this last aspect, the CJEU has made important clarifications in the recent case of *Polisario Front v. Council*:

"86. It must be pointed out that ... the General Court was bound not only to observe the rules of good faith interpretation laid down in Article 31(1) of the Vienna Convention but also that laid down in Article 31(3) (c) of that convention, pursuant to which the interpretation of a treaty must be carried out by taking account of any relevant rules of international law applicable in the relations between the parties ...

...120. In that regard, it should be noted that, under Article 31(3) (b) of the Vienna Convention, for the purposes of the interpretation of a treaty, account must be taken, inter alia and together with the context thereof, of any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation...

...122. It must be held that, contrary to the requirements of Article 31(3) (b) of the Vienna Convention, the General Court did not pursue the question whether, in certain cases, that application reflected the existence of an agreement between the parties to amend the interpretation of Article 94 of the Association Agreement...

...124. Such implementation would necessarily be incompatible with the principle that Treaty obligations must be performed in good faith, which nevertheless constitutes a binding principle of general international law applicable to subjects of that law who are contracting parties to a treaty".⁷⁴

As we can see, the CJEU considers even the details of the content of the rules formulated in the VCLT to be applicable in EU law. Therefore, the same assertion must be made regarding the rule of interpretation relating to '*supplementary means of interpretation*', laid down in Article 32 of the Convention. Under it, "*recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable*".

The rules contained in the Vienna Convention of 1969 govern the treaties signed between subjects of international law. **No reference is made to the subjective rights of individuals.** These rules have the character of a subsidiary provision in relation to those that may exist in the actual treaty from which a State withdraws. Article 70.1 applies to the withdrawal of a state, by virtue of Article 70.2. The possibility that any right, obligation or situation between states parties may survive after the termination of the treaty is an exceptional hypothesis that can be subdivided into two. The first situation would arise when "*a treaty shall terminate although a particular provision is to continue to be applicable*". The second would arise when '*such rights could maintain an independent legal existence of their own, irrespective of the treaty that brought them about*'. The preparatory work confirms the meaning of a systematic interpretation (the Convention [only] governs rights and obligations between states). It also determines the meaning of an ambiguous text (which lends itself to erroneous interpretations to the advantage of individuals). In any case, it does not support the maintaining of any subjective right whatsoever of UK nationals in the rest of the Member States of the Union – or vice versa – that the Treaties may have created before the UK's withdrawal takes effect.

⁷⁴ CJEU, Grand Chamber, judgment of 21 December 2016, Case C-104/16 P.

4. ACQUIRED RIGHTS AND THE TERRITORIAL APPLICATION OF THE TREATIES: THE CASE OF GREENLAND

In 1985, Greenland, a self-governed territory of Denmark, left the then European Economic Community (EEC), following a referendum held in 1982. The withdrawal took place with the consent of Denmark, which remained an EEC Member State. Greenland's withdrawal from the EEC and the rules established by the Treaties, in order to provide for the island's withdrawal, could appear to be a precedent for the situation created by the United Kingdom⁷⁵.

However, there is a fundamental difference. **Greenland is only a region which is part of a Member State. What stands outside the scope of EU law is only a part of the territory of that Member State.** Therefore, from the point of view of international law, we would be looking at a problem of territorial scope in the application of a treaty⁷⁶. In that respect, the rule laid down in Article 29 of the VCLT states that "*unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory*". Denmark did not express a different intention when it signed its accession agreement. However, the States Parties to the EEC Treaties amended it (Articles 39 and 40 of the Vienna Convention), in accordance with the procedure laid down in these Treaties. The Danish Government proposed an amendment so that Greenland would have the status of Overseas Territory, in accordance with Part IV of the Treaty of Rome (cf. the current Article 204 TFEU). The proposal was received favourably by the Commission and the European Parliament. The Council approved the proposal and the Member States unanimously approved the amendment⁷⁷, as well as a new agreement on fishing zones (currently Protocol 34 to the Treaties).

On the other hand, besides the small population of the territory,⁷⁸ we must also take into account that **Community law was then at an incipient level of development.** The status of European citizen did not exist. The problems linked to the freedoms of movement and residence that might arise today could not have arisen in that situation. It has been duly recalled⁷⁹ that in its opinion 1/83 the Commission highlighted the fact that the change of situation of the territory raised "*certain transitional problems*",⁸⁰ and used the term '*rights acquired*' to refer to "*those of Community nationals in Greenland and vice versa*". Therefore, the Commission was of the opinion that the '*new arrangements*' (in other words, the amendment agreement) had to contain a clause allowing the Council to adopt such transitional measures as might be required, especially regarding consolidation of the rights relating to the pensions "*acquired by workers during periods of employment in a territory which has subsequently ceased to belong to the Community*".⁸¹ This fell under the heading

⁷⁵ Kramer, H.R., 'Greenland's European Community Referendum, background and consequences', *GYIL*, 1982, pp. 273 ff.

⁷⁶ In that vein ('*reduction of the territorial jurisdiction of the Treaties*'), European Parliament *Briefing* (Author: Eva-Maria Poptcheva), *Article 50 TEU: Withdrawal of a Member State from the EU*, February 2016, p. 3.

⁷⁷ Friel, R., 'Providing constitutional framework for withdrawal from the EU: article 59 of the Draft European Constitution', *ICQL*, Vol. 53, April 2004, pp. 407-428.

⁷⁸ Harhoff, F., 'Greenland's Withdrawal from the European Communities', *CMLR*, 1983, pp. 13 ff. Just 32 391 registered voters in a territory of 2 175 000 square kilometres could exercise the right to vote in the referendum held on 23 February 1982.

⁷⁹ Tell Cremades, M. and Novak, P., *Brexit and the European Union: General Institutional and Legal Considerations*, Committee on Constitutional Affairs, European Parliament, PE 571.404, January 2017 (hereinafter AFCE report), p. 23.

⁸⁰ 'Status of Greenland: Commission opinion' (COM(1983)0006), 2 February 1983, p. 12.

⁸¹ *ibid.*, p. 21.

'retention of vested rights', it being made clear that this situation concerned an "extremely small number of persons".⁸²

Nevertheless, the terminology used by the Commission could cause a degree of confusion, since in most cases the initiated expectations or rights that it sought to protect had not yet become consolidated rights in the brief period of time (1973-1984) that the EEC law applied in the territory of Greenland. In this case, services rendered in order to obtain a right that had not yet become consolidated when the amendment agreement took effect, the future rights of the individuals concerned to draw a pension did not spring from the Community *acquis* prior to it, but from the amendment agreement itself or from the subsequent measures adopted by the Council according to its provisions. Without those provisions, the workers concerned would have been unprotected, which means that **the mere term '*acquired right*' would not have been enough to guarantee continued enjoyment of a pension.** Mutatis mutandis, the same could be said of the United Kingdom and the withdrawal agreement, although the current situation is much more complex and the long period of time that the UK has been a member of the Union will have given rise to situations consolidated prior to the future withdrawal agreement - at least on matters of permanent residence, as we shall see in the second part of this study.

⁸² *ibid.*, p. 21.

5. ACQUIRED RIGHTS IN THE CONTEXT OF A STATE'S WITHDRAWAL FROM AN INTERNATIONAL ORGANISATION: THE CASE OF UNESCO

Membership status of an international organisation (admission, suspension, expulsion, withdrawal) is governed primarily by the treaty constituting that organisation – which is a treaty between states to which the content of the 1969 Vienna Convention applies, under Article 5 of that Convention. In addition, any possible gaps in the VCLT are to be covered by the rules of the organisation or failing that, by its practice.

The UN Charter does not provide for the withdrawal of a Member State of its own volition. In spite of that, in the practice of the organisation the case arose of Indonesia, which abandoned its seat in 1965 in protest at the election of Malaysia as a non-permanent member of the Security Council. Indonesia's return, in the following period of sessions, was not preceded by a new admission procedure: rather, Indonesia resumed 'full cooperation with [the organisation] ... and its participation in the activities [of the organisation]⁸³. That is why doctrine considers that this case is not a real withdrawal from the treaty but rather a case of an 'empty chair'⁸⁴, in other words, a temporary suspension of its membership condition unilaterally decided by the member state itself. In fact, in 1966 the President of the UN General Assembly stated: "*It would therefore appear that the Government of Indonesia considers that its recent absence from the Organisation was based not upon a withdrawal from the United Nations but upon a cessation of cooperation*".⁸⁵

The organisation in the United Nations system that has witnessed the largest number of withdrawals (and returns) is UNESCO. Poland and Hungary withdrew in 1952 and Czechoslovakia did so in 1954, but all three countries returned in 1954. Indonesia also left UNESCO for the same period as it was outside the central organisation. Portugal, in turn, did so between 1971 and 1974.⁸⁶ Without prejudice to examining these cases in more detail, they could provisionally be described as 'empty chair' cases.

However, the most significant episode took place in the mid-1980s when **the United States and the United Kingdom withdrew from UNESCO** in protest at the policy pursued by its Director-General, Amadou-Mahtar M'Bow. According to official UNESCO sources⁸⁷, the UK was a member of the organisation between 4 November 1946 and 31 December 1985, when it withdrew, to re-join on 1 July 1997. Likewise, the US was a member of UNESCO between 4 November 1946 and 31 December 1984, when it withdrew,⁸⁸ to re-join on 1 October 2003.⁸⁹

⁸³ El Erian, A., 'Organización jurídica de la sociedad internacional', in Max Sorensen (ed.), *Manual de Derecho Internacional Público*, Mexico City, Fondo de Cultura Económica, 1973, p. 121.

⁸⁴ Pérez González, M., *Retirada y 'silla vacía' en la Organización Internacional*, Madrid, CSIC, 1974.

⁸⁵ General Assembly of the United Nations, Off. Doc., A/PV, 1420, of 28 September 1966. See also: 'Resumed participation of Indonesia in the activities of the United Nations'. Legal opinions of the Secretariat of the United Nations. Office of Legal Affairs, *United Nations Juridical Yearbook*, 1966, p. 222 ff.

⁸⁶ Hajnal, P.E., *Guide to UNESCO*, Nueva York, Oceana, 1983, pp. 20-21.

⁸⁷ <http://es.unesco.org/countries/e>.

⁸⁸ Imber, M. F., *The USA, ILO, UNESCO and IAEA: Politicization and Withdrawal in the Specialized Agencies*, New York, Palgrave Macmillan, 1989.

⁸⁹ Although during the period of absence, it maintained observer status. See Murphy, S.D., 'United States return to UNESCO', *American Journal of International Law*, October 2003, pp. 977-982.

Like most of the other specialised agencies of the United Nations,⁹⁰ UNESCO provides for the possibility of withdrawing from its constituent treaty.⁹¹ The duration of the US and British withdrawals (12 and 19 years, respectively) and the use of a new admission procedure for their return makes them true withdrawals and, therefore, *mutatis mutandis*, they could represent comparable cases as to the situation now arising regarding the UK's withdrawal from the EU.

UNESCO's Constitution has an interesting provision on the matter. The withdrawal takes effect "*on 31 December of the year following that during which the notice was given*". The explanation as to why withdrawal has its effects deferred for over a year is that UNESCO, like the UN, approves its budget biennially.⁹² Thus, **the member that withdraws has to continue to contribute to the organisation's budget throughout the budgetary period**, since withdrawal shall not '*affect the financial obligations owed to the Organisation on the date the withdrawal takes effect*'. The taking effect of the notice determines the timeframe of those financial obligations, putting an end to the production of the parties' rights and duties. There are no obligations on the state that withdraws beyond the closing date for that purpose. An attempt is made to ensure that it coincides with the end of the budgetary period.

In the course of this analysis, the only case where it was possible to find anything relating to so-called '*acquired rights*' in public international law in the cases of withdrawal of a member state was that of UNESCO as far as officials from the states that withdrew were concerned. Doctrine⁹³ shows that, after the UK' and USA's withdrawals, an attempt was made to protect already serving officials from the states that withdrew. Although the organisation decided not to recruit new officials with the nationality of the withdrawing state, it kept these officials who were already serving UNESCO, either offering early retirement or keeping them in the posts that they held and for which they had been chosen because of their '*high standards of ability, efficiency and integrity*',⁹⁴ though accepting resignations from management posts in the organisation that an official of that nationality might hold.

It would exceed the scope of this report to conduct an investigation into whether a similar practice has occurred in other international, universal or regional organisations. In any case, even if the results of such research were positive and we could establish the existence of a customary practice on the matter, we would come up against the Regulation laying down the staff regulations of officials and the conditions of employment of other servants of the European Union.⁹⁵ According to a literal interpretation, officials who are UK nationals would have to resign, although it has been said that the wording of Article 49 is permissive ('*may be*')⁹⁶ rather than imperative ('*must*'), which is an additional element in favour of a flexible

⁹⁰ Dock, M.C., 'Le retrait des membres des organisations internationales de la famille des Nations Unies', *Annuaire Français de Droit International*, 1994, pp. 106-155.

⁹¹ UNESCO's Constitution stipulates in its Article 2.6: "*Any Member State or Associate Member of the Organisation may withdraw from the Organisation by notice addressed to the Director-General. Such notice shall take effect on 31 December of the year following that during which the notice was given. No such withdrawal shall affect the financial obligations owed to the Organisation on the date the withdrawal takes effect. Notice of withdrawal by an Associate Member shall be given on its behalf by the Member State or other authority having responsibility for its international relations*". http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁹² In practice UNESCO has proceeded to approve a biennial budget, at least since 1956-1957. However, the UNESCO General Conference of 2011 approved the decision that the budget would be every four years, and that provision applies at present.

⁹³ Dock, M. C., *op. cit.*, pp. 137-142.

⁹⁴ Article 27 of the Regulation laying down the Staff Regulations of Officials of the EEC and the EAEC.

⁹⁵ Regulation No 31 (EEC), 11 (EAEC). Official Journal of the European Communities, 1385/62, 14.6.1962.

⁹⁶ European Parliament Briefing (Article 50 TEU...), p. 6.

interpretation, more in line with the interests of the UK nationals working for Union institutions.

Now, if the practice seen in the specialised agencies had a general customary value, would it prevail over the EU Staff Regulation? There is no hierarchy among the various sources of international law. Therefore, the criterion that would determine the preferred application of one or other norm would be that of speciality. And there is no doubt that the regulation laying down the staff regulations of officials of the EU would be a *lex specialis* in relation to customary law, if that actually existed. That means that the UK negotiators could not allege the existence of a true subjective law on the matter in this case, either. However, the situation of British officials in the EU could be the object of special attention by the negotiators, with a view to preventing the sudden resignation of a large number of officials adversely affecting the work of the Union's institutions and bodies. Moreover, we cannot rule out the idea of **a special category of nationals of the withdrawing state emerging from the negotiations (those who have worked or are working for European Union institutions), which could be the object of an especially favourable treatment.**⁹⁷

⁹⁷ Ibid. p. 6.

6. DIRECT EFFECT OF THE EU TREATIES TO INDIVIDUALS AND THE LEGACY OF CITIZENS' RIGHTS

The withdrawal of the United Kingdom does not only mean that the Treaties “*shall cease to apply* [to it]” (Article 50.3 TEU). It also means that – any contrary provisions in the future Great Repeal Bill notwithstanding – the EU *acquis* will also cease to apply there at least with the supremacy EU law enjoys currently.⁹⁸ A good part of the *acquis* is made up of regulations and decisions which apply directly to individuals and which will be converted into UK law under the Great Repeal Bill.⁹⁹ That will presumably be the main cause of the effect on UK nationals in the EU and on nationals of other Member States living in the UK after the withdrawal agreement enters into force.

However, it is one thing to recognise the existence of certain rights that ‘*become part of the legal heritage [of individuals]*’, as did the CJEU in the *Van Gend & Loos* judgment (1963), and quite another to assume that **such legal heritage could outlast the termination of the instrument that created it**, the same way as a heritage (in another meaning of the same word) that can be preserved and passed on. This is simply wrong.¹⁰⁰

The meaning of that well-known *Van Gend & Loos* judgment, which was a landmark case regarding the direct application or direct effect of European Community law, is in fact different. The Dutch court requested a preliminary ruling on ‘*whether Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a state can, on the basis of the Article in question, lay claim to individual rights which the courts must protect*’. The CJEU replied:

*“Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them **rights which become part of their legal heritage**. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community”.*

If in international law rules are applicable to individuals only exceptionally, in EU law, by contrast, this is something that is habitual, since “*if the Common Market is to work, it is essential that individuals can be considered the direct targets of the rules that are adopted*.”¹⁰¹ That is why the term ‘*directly applicable*’ appears in Article 288 TFEU, describing a quality of the regulations: that of allowing the immediate application of their content to the subjects of the legal system ‘*in each Member State*’. In other words, we are talking about direct effectiveness “*without intervention from the national regulatory power*”.¹⁰² **However, that does not mean that the validity of such rights cannot be limited in time.**

⁹⁸ The treaties signed by the EU with third states and applying to individuals in UK territory warrant a special mention. They would raise the complex question of changing the physical scope of the application of a treaty signed by the Union with a third state. The ‘continuity of identity’ of the EU would not be affected by the loss of a Member State, but it would pose the problem of whether the individuals who were previously the beneficiaries of such a treaty in the territory of the UK could demand an equivalent benefit from the EU. It would be necessary to examine the matter in line with the circumstances of each case.

⁹⁹ Department for Exiting the European Union. *Legislating for the United Kingdom’s withdrawal from the European Union*. March 2017. <https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union>, pp. 13-14.

¹⁰⁰ Regarding the concept ‘*could outlast the instrument that created it*’, see: British Parliament report [cited above], p. 20, quoting Herbst, J., *German Law Journal* (6:2005), p. 1755.

¹⁰¹ Boulouis, J., and Chevalier, R. M., *Grands arrêts de la Cour de Justice des Communautés Européennes*, 3e éd. Paris: Dalloz, 1983, p. 161.

¹⁰² Louis, J. V., *L’Ordre juridique communautaire*, Brussels and Luxembourg, 5e éd. 1990, p. 82.

Subsequently, the judgment in the *Simmenthal* case stated that direct applicability “means that the rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force”, concluding that ‘these provisions are therefore a direct source of rights and duties for all those affected thereby, whether Member States or individuals’.¹⁰³

There is, then, a double meaning to the term, and also a time limit (**‘for so long as they continue in force’**). On the one hand, there is the fact that the regulation directed at the individual is applicable to individuals without further procedure, as it is complete, clear and assigned precisely to that end.¹⁰⁴ On the other, there is the possibility that someone targeted by the regulation will invoke it, demanding its direct effectiveness before the national administration or the ordinary domestic judge. That is how a regulation under EU law creates subjective rights for individuals that must be safeguarded by the competent authority¹⁰⁵. However, the CJCE in the *Van Gend & Loos* case was not referring to a heritage of rights, but to tariffs charged on the import of chemical products (urea-formaldehyde). **Once the period of validity of a European regulation for a state ends, the rights created by it must end.**¹⁰⁶

¹⁰³ CJEU, case 106/77 (*Simmenthal*), judgment of 9 March 1978, p. 643.

¹⁰⁴ Rodríguez Iglesias, G. C., ‘Los efectos internos del derecho comunitario’, *DA*, 1984, p. 55.

¹⁰⁵ CJEU, case 26/62, *Van Gend & Loos*, ruling of 5 February 1963, p. 1.

¹⁰⁶ In the same sense, see: Piris, J-C, ‘Should the UK withdraw from the EU: legal aspects and effects of possible options’, *Fondation Robert Schuman, European Issues*, No 355, 5 May 2015, p. 10.

PART II: ACQUIRED RIGHTS IN EUROPEAN UNION LAW

The concept of acquired rights, in the context of international law has been examined in the first part of this study. We concluded that, in the light of the precedents, best doctrine and the case law of the International Court of Justice, acquired rights do not exist. More exactly, according to international law, **rights of a public nature (or of a mixed, public/private nature) do not outlast a change of sovereignty or a succession of states or the termination of an international treaty**. We are referring to rights of public officials, rights of a political nature, constitutional rights, electoral rights or rights of an administrative nature, as pointed out by Barde.¹⁰⁷ Their not acquired nature appears to be clear under international law.

Following this analysis, the second part of the study examines whether European legislation could perhaps deliver such protection of the legal rights for UK nationals living in the EU-27 and EU-27 nationals living in the UK after the latter's withdrawal from the EU. This part discusses in particular citizenship rights under EU law, that is, rights that stem from being a citizen of the Union (notably free movement and residence) and tries to determine whether EU legislation can validate that the doctrine of acquired rights is able to protect the right to residence once the UK leaves the EU. It also examines whether citizens' rights can be protected by other means, most notably through the relevant provisions of European Convention on Human Rights and finally makes proposals on how to legally deal with rights of citizens in the context of the UK's withdrawal.

¹⁰⁷ Jacques Barde, *La notion de droits acquis en droit international public*, Paris: Les publications universitaires de Paris, 1981.

7. RIGHTS THAT STEM FROM THE EUROPEAN CITIZENSHIP

Citizenship of the Union is governed by Article 20(1) TFEU which states:

"Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship".

Citizenship of the Union as intended in the TFEU has a dimension of prohibition and one of recognition of rights. With regard to the former, Articles 18 and 19 prohibit "any discrimination on grounds of nationality" (Article 18), which is key to the European project, and ban any discrimination "based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" (Article 19).

As far as the positive elements in citizenship of the Union, Article 20 TFEU highlights the following rights, inter alia: "to move and reside freely within the territory of the [Union]"; active and passive suffrage in the elections to the European Parliament and the municipal elections of the Member State of residence; diplomatic and consular protection by any Member State; and the right to petition and present initiatives to the European institutions in any of the Treaty languages and to obtain a reply in the same language. Article 21(3) adds the possibility for the Council, acting unanimously, to adopt "measures concerning social security or social protection". Article 24 TFEU recognises the right to put forward, together with other citizens, a so-called 'citizens' initiative' calling for European legislation.

Moreover, the Treaties confer on citizens of any Member State other rights relating to employment, trade and economic activities as specified in Title IV of the TFEU, which is entitled 'Free movement of persons, services and capital'. These rights already formed part of the earlier texts of the then European Economic Community, since the EEC's goal was to establish a single market. With a view to this, it was necessary to ensure free movement of the factors of production: workers (Articles 45 and 46); self-employed professionals and companies (Articles 49 to 55); service providers (Articles 56 to 62) and capital (Articles 63 to 66). It should be noted that the concept of European citizenship, from which the free movement of 'persons' (not just 'workers') derives, did not appear until Maastricht. Later, the CJEU would assert the 'fundamental' nature of this right.

There is no doubt that those freedoms will be affected by the United Kingdom's departure from the European Union.

The content of citizenship is also reflected in a series of rights and duties laid down in the Charter of Fundamental Rights. It must be pointed out that the Charter does not contain the words 'of European citizens' in its title. It is a "Charter of Fundamental Rights of the European Union", having "the same legal value as the Treaties" (Article 6(1) TEU). It is not intended to form part of the status of European citizenship, but as an expression of the values of the Union as set out in Article 2 TEU ('respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities').

The provisions of the Charter apply, in general terms, to any person in the European Union. There is just one exception: Title V, entitled 'Citizens' Rights' (Articles 39, 40, 45 and 46), which expands on European citizens' rights already recognised in Article 20.2 TFEU (see above), notably the right to vote and to stand as candidate in elections to the European

Parliament and in municipal elections, freedom of movement and residence, and the right to diplomatic and consular protection.

The United Kingdom's withdrawal from the European Union will not affect the protection of the rights recognised in the Charter. This is for two reasons. Firstly, they are rights accorded not only to those persons who are considered as '*citizens of the Union*', but also to any '*person*' (except those rights exclusive to the former referred to in Article 20 TFEU and Articles 39, 40, 45 and 46 of the Charter). Secondly, the provisions of the Charter "*are addressed to the institutions, bodies, offices and agencies of the Union ... and to the Member States only when they are implementing Union law*" (Article 51 of the Charter). Thus, when the United Kingdom is outside the Union, the Charter will not apply to British citizens (except those who are in or reside in the EU), and the decisions of the EU institutions, as well as the decisions of the governments of other EU Member States when implementing Union law will not be binding on them.

Therefore, the rights which must be examined more carefully in order to assess whether they constitute possible acquired rights are those that specifically form part of European citizenship (free movement and residence, active and passive suffrage in elections to the European Parliament and municipal elections, the right to consular protection and the right to petition), as well as economic freedoms and other rights of a social nature. In this context, we must also take into account the abundant case law of the Court of Justice of the European Union, which gradually built new rights when the European Communities had not been sufficiently guaranteeing them, at a time when 'European citizenship' did not yet exist.

8. THE RIGHTS INVOLVED IN THE WITHDRAWAL NEGOTIATIONS - IN PARTICULAR, FREE MOVEMENT AND RESIDENCE

The right to reside and move freely in the territory of the Member States is undoubtedly the one that will give the parties negotiating Brexit most headaches. It is the core right of European citizenship. Approximately 14 million European citizens live in an EU Member State other than their own today. Out of them, around one million are British, while three million European citizens from other Member States live in the United Kingdom.

The legislation that governs this right most forcefully and with the widest scope is Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their families to move and reside freely within the territory of the Member States.

Quoting some paragraphs of the preamble to this directive will serve better than any commentary to give an idea of its transformative significance:

"Whereas

(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States [...]

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market [...]

(5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality [...]

(9) Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice [...]

(10) Persons exercising their right of residence should not, however, become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence [...]

(17) A right of permanent residence should [...] be laid down for all Union citizens [...] who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion order ...

(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty [...]

(24) Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State".

Thus, Directive 2004/38/EC codifies the rights of a European citizen and their family: to leave the territory of a Member State without the need for a visa; to reside up to three months in a Member State different from their own; to exceed that limit by complying with certain

conditions (employment, financial resources, studies); and even to obtain permanent residence if they have lived for a continuous period of five years in the host state. They only lose that right if there is a period of absence of two continuous years. Expulsion is only possible on grounds of 'public policy, public security or public health' (Article 27).

Thanks to the principle of equal treatment, a European citizen who resides in another EU Member State enjoys the same social rights as the host Member State guarantees for its nationals: access to education, social assistance, and healthcare and, of course, access to the labour market (Articles 23 and 24 of Directive 2004/38/EC). Regulations 883/2004 and 987/2009 of the European Parliament and of the Council govern the coordination of social security systems among Member States, aggregation of periods and transfer of benefits across the EU.

For all these rights, there has to be equal treatment with nationals.

Directive 2004/38/EC was incorporated into the domestic law of the United Kingdom through the Immigration (European Economic Area) Regulations 2006 (*'the EEA Regulations'*), which also introduced into British law other rights of European citizenship recognised by the case law of the CJEU. Thus, European citizens do not require a permit or visa to enter the United Kingdom, unlike citizens of many third countries. However, some control over them is maintained by the immigration services and they can be excluded from some social benefits.¹⁰⁸ The United Kingdom and Ireland are not in the Schengen area.

The right to residence can also be exercised in Iceland, Liechtenstein, Norway and, partially, in Switzerland. These countries and the majority of the EU Member States are also in the Schengen area.¹⁰⁹

8.1. The right of permanent residence as an acquired right?

As already stated, in its first part, this study concluded that, under international law, the doctrine of acquired rights cannot be used to protect the main rights that are involved in the UK withdrawal process, in particular rights linked to the single market freedoms.

However, the concept of acquired rights features in a broader field of study. Doctrine has always found it difficult to define what acquired rights are, among other reasons because

¹⁰⁸ Richard Gordon, QC and Rowena Moffatt, *Brexit: The Immediate Legal Consequences*, The Constitution Society, 2016.

¹⁰⁹ The EU has developed the right to residence, in its many facets, before and after approving Directive 2004/38. See the following: Schengen Borders Code regulation - Regulation 265/2006/EC (and associated implementation secondary legislation); Regulation 539/2001/EC listing the third countries whose nationals must be in possession of visas and those whose nationals are exempt from that requirement and Regulation 810/2009/EC establishing an EU code on visas (and associated implementation directives); Directive 2004/114/EC on the conditions of admission of Third Country National pupils for the purposes of studies, pupil exchange, unremunerated training, or voluntary service; Directive 2005/71/EC - specific procedure for admitting Third Country Nationals for the purposes of scientific research; Directive 2009/50/EC - 'Blue Card' (highly skilled migrants); Directive 2011/98/EU - 'Single permit' and common set of rights for workers; Directive 2014/36/EU - seasonal workers; Directive 2014/66/EU - intra-company transfers; Directive 2003/86/EC on the right to family reunification; Directive 2003/109/EC concerning the status of Third Country Nationals who are long-term residents; Directive 2001/51/EC - carriers sanctions; Directive 2004/82/EC - obligation to communicate advance passenger data; Council Directive 2002/90/EC defining facilitation of authorized entry, transit and residence; Directive 2009/52 - sanctions against employers of illegally staying Third Country Nationals; Directive 2004/81/EC - residence permit issued to Third Country Nationals who are victims of trafficking in human beings; and Directive 2011/36/EC on preventing and combating trafficking in human beings. Cited in Gordon and Moffatt, op. cit., p. 54, notes 64, 65 and 66.

judges have been defining them over time. The French *Conseil d'État* has rightly spoken of an 'act creative of rights', or an 'act definitively acquired'.¹¹⁰

Constantin Yannakopoulos explains that doctrine has disregarded any conceptual definition in order to seek a purely functional definition, according to which an acquired right is a 'right to the maintenance of the act considered as creative of rights', or to maintain an acquired legal situation.¹¹¹

In any case, the concept of acquired rights has to be examined from a dynamic perspective, one of 'in real time' law or 'law in movement' - the legal process by which law is created and applied', as Hans Kelsen has defined it, in opposition to the 'static theory of law'.¹¹²

The concept of acquired rights, whatever its origin or formation over time, is linked to the notion of the **irreversible and binding nature of those rights** in the face of new laws and new political and administrative powers. That is what we understand by '*derechos adquiridos*', '*droits acquis*' or '*vollerworbene Rechte*' - a concept that is used in various countries and legal cultures to define rights that protect settled and consolidated situations or interests that warrant legal protection. They are of a stronger nature than the so-called '*legitimate expectations*' (a concept used by the Court of Justice of the European Union), or '*expectations of rights*' a concept very often used in civil law. By virtue of its strength, the concept of acquired right claims the non-retroactivity of legislation subsequent to the supposed consolidated acquisition of the right concerned or, where appropriate, reparation or compensation (responsibility of the state) for the injury suffered to the hypothetically acquired rights in question.

Acquired rights, then, are rights protected against changes in the law. One might go on to ask whether the rights of European citizens who reside permanently in a Member State of which they are not nationals – for instance, British citizens living in another Member State and EU-27 citizens living in the UK – and have been established by virtue of EU law really are 'acquired' and, therefore, unassailable by the United Kingdom's withdrawal from the European Union. This is a position supported by some experts who argue that the UK cannot strip its citizens (who are European citizens) "of the rights they have acquired under that very status."¹¹³ They also claim that the CJEU's rulings in *Rottmann* and *Ruiz Zambrano* cases lead to the conclusion that "Member States are no longer free to do with their citizens as they please"¹¹⁴ and that, as the CJEU stated in the *Ruiz Zambrano* case "Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union".¹¹⁵

¹¹⁰ EC, 5 May 1950, *Sieur Richard*, Rec., p. 264.

¹¹¹ Constantin Yannakopoulos, *La Notion de Droits Acquis en Droit Administratif Français*, Librairie Générale de Droit et de Jurisprudence, Paris, 1997, p. 7. See also p. 3, *ibid.*, for the old idea of 'acquired rights' (*jus quaesitum*) as opposed to the idea of innate right (*jura connata*): an innate right, resulting from the nature of the human being, is original, universal and absolute; an acquired right is a right that springs from a particular human action and can be modified or renounced.

¹¹² H. Kelsen, *Théorie pure du droit*, Paris, 1962, pp. 96 and 115.

¹¹³ Dawson, Mark - Augenstein, Daniel "After Brexit: Time for a further Decoupling of European and National Citizenship?" in *Verfassungsblog*. <http://verfassungsblog.de/brexit-decoupling-european-national-citizenship/> DOI: <http://dx.doi.org/10.17176/20160714-114950>. 14 July 2016.

¹¹⁴ Phoebus L. Athanassiou and Stéphanie Lahlou Shaelou "EU Citizenship and its Relevance for EU Exit and Secession" in Dimitry Kochenov (ed.) 'EU citizenship and federalism The Role of Rights' Cambridge University Press. 2017.

¹¹⁵ . Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* (Reference for a preliminary ruling from the tribunal du travail de Bruxelles) ECLI:EU:C:2011:124.

The right to residence, especially to permanent residence, is probably the most important fundamental right of all those that constitute the status of European citizen, because from that right stem all other rights that a person can enjoy in a Member State other than their own. That right is enjoyed on equal terms with the nationals of the host Member State – for example, the UK. The loss of that condition by a European citizen residing outside their Member State of origin is truly important and qualitatively greater than the loss of other rights. Hence the significance of clarifying whether the right to residence is an *acquired* right which could be consolidated and shielded against a decision such as that made by the UK, both for the citizens of that country who reside in another EU Member State and for other European citizens residing in the UK.

Accordingly, we selected for a more detailed analysis the right to permanent residence because, for the purpose of this study (which is to clarify whether Union citizens can enjoy acquired rights), **the right to permanent residence after five continuous years, as provided for in Directive 2004/38, is the most powerful and advantageous right of a public nature for European citizens.** In other words, it is the one whose loss would cause most injury to the citizens affected by Brexit. So if we came to the conclusion that permanent residence in another Member State does not constitute an acquired right that can continue beyond the termination of the force of the Treaties and EU law in the UK, then there would be no reason to continue analysing the remaining rights that form part of European citizenship or other rights created by the law of the Union. **If the consolidated right of a citizen of another EU Member State to reside in the UK, or of a British citizen to reside in another EU Member State, is not an acquired right that will remain unaffected by the UK's departure from the Union, then no other right created by the Union as inherent in European citizenship has the nature of an acquired right.**

In the light of European law and, in particular, of Article 50 TEU, our conclusions are as follows:

The EU Treaties and secondary legislation (e.g. Directive 2004/38/EC) will remain fully in effect until the conclusion of the withdrawal of the UK from the EU or, in any case, until two years after notification by the UK of its decision to withdraw. In this respect, Article 50.3 stipulates:

"The Treaties will cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period".

Until the EU Treaties cease to apply in the UK, Article 50 TEU does not provide for any transitional situation for the rights of EU citizens residing in the UK or of UK nationals residing in other EU Member States. We must understand, therefore, that until that precise moment, the right to residence laid down in Article 21 TFEU and in Directive 2004/38/EC – and the rest of the political, social or economic rights stemming from the EU legal system – cannot be revoked or cancelled by the UK or any other Member State of the Union.

A different issue is the possibility that the withdrawal agreement between the UK and the EU may establish a transitional phase for the rights of citizens during the legal 'disconnection' between the two parties. In any case, if this eventuality arises, it will happen as of the moment laid down in Article 50.3 TEU, not before – and it will be the product of a political negotiation.

The political negotiation provided for in Article 50 TEU cannot be conditioned by a supposedly unalterable right of European citizens with permanent residence in the UK or UK nationals within Union territory always to retain that situation as a case of supposedly 'acquired' rights.¹¹⁶ The reason is that the status of European citizen with the right to free movement and residence in any EU Member State emanates from the EU legal order rather than from national law. If the Treaties cease to apply in the UK (Article 50.3 TEU), rights such as that of residence which exist today under the protection of these Treaties for European citizens in the UK and for British citizens in every Member State will disappear. The legal grounds for such a right to residence shall cease to be valid at the moment the UK ceases to be a member of the Union.

The above argument is confirmed by the fact that one of the avowed goals of the current UK government in leaving the EU, as it also appears in the speech by Theresa May on 17 January 2017, is precisely to control migratory flows into the country and to cease being obliged to accept freedom of movement and residence for EU citizens guaranteed by the Treaties, EU legislation and the CJEU.

Therefore, in compliance with the provisions of Article 50 TEU, the right to residence and other rights, as well as the important principle of equal treatment and non-discrimination on grounds of nationality, will cease to be guaranteed – as European rights – in the UK and for British nationals outside their country.

The fate of these rights created by the EU, as far as the United Kingdom is concerned, **will depend on UK's domestic legal order and British judges**, within the framework of the foreseeable (and desirable) agreement between the EU and the UK, because the latter will no longer be a member of the EU but a third country.

Case law from the highest-ranking courts in the United Kingdom corroborates this approach. The High Court judgment of 3 November 2016¹¹⁷ – which ruled that triggering Article 50 required the approval of Parliament – did not address the issue of acquired rights directly. However, it did state that the rights arising from the legal system of the EU will be undone as soon as the Treaties cease to be in effect in the UK. Paragraph 66 of the judgment in fact states that:

"The reality is that Parliament knew and intended that enactment of the ECA 1972 would provide the foundation for the acquisition by British citizens of rights under EU law which they could enforce in the courts of other Member States. We therefore consider that [...] withdrawal from the European Union pursuant to Article 50 would undo the category (ii) rights which Parliament intended to bring into effect, and did in fact bring into effect, by enacting the ECA 1972. Although these are not rights enforceable in the national courts of the United Kingdom, they are nonetheless rights of major importance created by Parliament. Accordingly, the claimants are entitled to say that it would be surprising if they

¹¹⁶ According to Tim Eicke, the only exception could be for individuals who have lived in the UK long enough to possess a 'residence permit or residence document endorsed to show permission to remain in the United Kingdom indefinitely', granted under the old paragraph 255 of the UK Immigration Rules (no longer in force as of 30 April 2006). Eicke argues that the reason is that 'indefinite leave to remain' was not a creation of European law but of British law (Immigration Rules). See Eicke, 'Could EU citizens living in the UK claim acquired rights if there is a full Brexit?', Lexis PSL, 11 April 2016.

¹¹⁷ Case No: CO/3809/2016 and CO/3281/2016. Gina Miller & others against The Secretary of State for Exiting the European Union.

could be removed simply through action by the Crown under its prerogative powers.”

The same will apply to British nationals in any EU Member State.

Where a directive refers to acquired rights, this does not mean that the provisions concerned are immune to the United Kingdom's departure from the Union. For example, Council Directive 2001/86 of 8 October 2001 completing the Statute for a European Company stipulates in recital 18: *“It is a fundamental principle and stated aim of this Directive to secure employees' acquired rights as regards involvement in company decisions”*. This means that a regression in those rights is not possible (the 'before and after' principle)¹¹⁸.

Does this mean that these so-called acquired rights stemming from that directive are inviolable? Does it mean that those rights would prevail over the withdrawal of the UK from the European Union? Clearly not, in our view. As that directive forms part of domestic British law, it may be modified at the will of the British Parliament after the UK ceases to be part of the Union. The recognition of the acquired rights of workers operates within the EU legal order, but it does not have any effect outside the Union and it does not bind a state that is no longer a member of the Union.

In short, **European citizenship**, as a status that affords a series of rights, starting with free movement and permanent residence in any state of the EU, **is inevitably tied to that state's membership of the Union**. If, as there is every indication, the UK withdraws from the Union, the rights that come with EU citizenship, starting with the most powerful – permanent residence – will cease to exist in law, in the sense that they would cease to be binding under UK law. In the UK, EU citizens would be considered, from a legal point of view, in the same manner as those of any other third country. The same would apply to British nationals living in the Union.

This does not mean that European citizens in the UK (or British citizens as ex-European citizens) are going to be immediately dispossessed of the rights of today's European citizenship, but that will depend on the following:

- Firstly, on the agreement reached by the UK and the EU-27 under Article 50 and on the agreement regarding the framework for their future relationship; and
- Secondly, on the subsequent reforms to legislation in both the UK and the EU and the interpretations of the courts in both legal orders.

Accordingly, at least theoretically, the situation of EU-27 citizens in the UK and of UK citizens in the EU may be different once Brexit is complete. The former may be subject to stricter immigration rules than the latter.

As Gordon and Moffatt point out, **European citizens in the UK would have to defend their current status once the British withdrawal is complete, using only British domestic law** and nothing else¹¹⁹. However, British citizens in the EU, even if they are no longer European citizens, would benefit from the EU legislation on immigration, which is partly harmonised at EU level, and could invoke its general principles as nationals of a third

¹¹⁸ See Fernando Elorza Guerrero, 'La protección de los derechos adquiridos en la implicación de los trabajadores en una Sociedad Anónima Europea', in Gobierno de la empresa y participación de los trabajadores: Viejas y nuevas formas institucionales. Salamanca, 18 and 19 May 2006. XVII Congreso Nacional de Derecho del Trabajo y de la Seguridad Social.

¹¹⁹ *Brexit: The Immediate Legal Consequences*, op. cit., p. 67.

country; they could also invoke the very favourable provisions of the Charter of Fundamental Rights of the EU – something an EU citizen in the United Kingdom could not do when the UK leaves the Union.

For example, British law does not recognise the index-linking of pensions and social subsidies, whereas EU law does. Would it be necessary to amend the EU legislation so that it excludes index-linking for British nationals?

Another example of possible imbalance are the directives for highly specialised workers (Blue Card Directive), seasonal workers and other nationals of third countries with long-term residence.

Hence the importance for European citizens of the agreement on withdrawal and the framework for the United Kingdom's future relationship with the Union (Article 50.2 TEU).

9. RIGHTS OF CITIZENS AND THE 1950 EUROPEAN CONVENTION ON HUMAN RIGHTS

A hypothetical loss of the right to residence and other rights of European citizenship because of Brexit – in the event that these rights will not be replaced by an agreement pursuant to Article 50 between the United Kingdom and the EU – would not mean a total lack of legal protection for British nationals residing outside their country and EU citizens living in the UK. It would not mean, more precisely, the total renunciation of the right to move, reside and work as they do at present, for two reasons primarily.

Firstly, because **the respective national legislation on migration would immediately apply** and these persons would be assimilated to citizens of other third countries. It is true that the level of protection of rights in qualitative terms would decline substantially, but there would not be a total disappearance of rights. The level of these rights would depend on the legislation of the country of residence.

More importantly, **all European citizens live in states that are parties to the European Convention on Human Rights** (ECHR), which in the last instance is interpreted and implemented by the European Court of Human Rights (ECtHR) in Strasbourg.¹²⁰ The Convention is important in particular to the rights that are especially relevant for the purposes of this study: **the right to respect for private and family life and one's home** (Article 8 ECHR) and **the right to property** (Article 1 of Additional Protocol 1 to the ECHR).

It seems quite reasonable to consider that those European citizens living in the United Kingdom who have not found protection in British law to continue living in the UK may use, with foreseeable success, the channel of Article 8 of the ECHR before the British courts, or, failing that, appeal to the ECtHR in Strasbourg.¹²¹ Naturally, the chances of being able to reside in the UK (or conversely in another country of the Union) after Brexit will increase in proportion to the length of residence and the family and professional ties of the person affected by the British departure from the Union.

In Douglas Scott's view, Article 8 of the ECHR would make it possible to stop deportations of European nationals from the UK, or of British nationals from EU Member States, who no longer enjoy the right to residence because of Brexit.¹²² Nevertheless, the case law of the ECtHR is flexible according to each case. It accepts that states control immigration and will only condemn a state if the case requires it and according to the circumstances of the state itself.

In any case, the ECtHR cannot be called upon to preserve European citizenship for British citizens once the United Kingdom no longer belongs to the Union.

¹²⁰ The United Kingdom incorporated the ECHR into its domestic law through the Human Rights Act 1988. On the other hand, the UK signed in 1963, but never ratified, Protocol n° 4 to the Convention. This Protocol protects **directly**, in its article 2, **freedom of movement, including residence. Art. 2.1 provides that "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."** In addition, Article 4 thereof prohibits the **collective expulsion of aliens, stating simply, that "collective expulsion of aliens is prohibited."** In fact, the United Kingdom is not directly obliged to comply with the content of this Protocol with respect to persons under its jurisdiction.

¹²¹ Eicke, 'Could EU citizens living in the UK claim acquired rights if there is a full Brexit?', p. 3.

¹²² Cited in: House of Lords, European Union Committee, 10th Report of Session 2016-17, 'Brexit: acquired rights', 14 December 2016, pp. 30 ff.

With regard to Article 1 of the additional Protocol to the ECHR, the expansive case law of the ECtHR allows one to think that the concept of the '*right to respect of one's possessions*' or '*property*' used by Article 1 of the Protocol will be applied flexibly and broadly.

Professor Lowe's evidence before the House of Lords EU Select Committee for its report on acquired rights considers that the ECtHR has established a very broad interpretation of the concepts of '*possessions*' and '*property*' from the Additional Protocol to include pensions or other related matters. Therefore, the Convention protects economic rights beyond what we understand by the term '*assets*'. The ECtHR broadens the concept to movable and immovable things, including intangible assets such as intellectual property, contracts, judgments, licences and public benefits. Lowe extends it to '*legitimate expectations*'.¹²³ As we can see, it would be possible to include a part of the economic rights that the Treaties afford to European citizens in Article 1 of the additional Protocol.

Naturally, the protection of rights will vary according to the circumstances of the case, which introduces an element of uncertainty – an uncertainty which today does not exist, thanks to the clarity and strength of the guarantees of the Treaties and European law. In fact, the ECtHR in Strasbourg has accepted that the EU legal order makes it admissible that, under the ECHR, European citizens should be treated more favourably than other '*foreigners*' from third countries. Once the United Kingdom has withdrawn from the EU, in view of Article 14 of the ECHR (prohibition of discrimination in the enjoyment of the rights and freedoms set forth in the Convention), it will be more difficult to justify treating a certain category of foreigners (for example, citizens of the EU) differently from others.¹²⁴ This is another reason to champion the advisability of a negotiated agreement on the withdrawal of the UK from the EU that guarantees the rights that disappear with withdrawal. We must take into account that the equality ('*prohibition of discrimination*') referred to in Article 14 of the ECHR is not guaranteed in absolute and general term, but always associated with the '*enjoyment of the rights and freedoms set forth in this Convention*'.

In conclusion, once the United Kingdom's departure from the European Union is complete, we agree with the Report of the House of Lords of 14 December 2016 that, in the absence of an agreement established between the two parties (Article 50 TEU), the European Convention on Human Rights provides an indirect means of defending the right to residence and other rights inherent in European citizenship. It could be more effective than international law or the (ambiguous and fragile) doctrine of acquired rights. A number – though by no means most – of the rights created by the EU match the rights and freedoms of the ECHR, which forms part of the United Kingdom's domestic law by virtue of the Human Rights Act 1998.¹²⁵

The most significant rights for that purpose are, as we have said, those laid down in Article 8 (the right to private and family life) and Article 1 of the first Protocol (additional Protocol) to the Convention, which recognises the right to the peaceful enjoyment of possessions.

However, that protection from the ECHR, as interpreted by the Court in Strasbourg, cannot replace the rights derived from the Treaties and the EU's legal system or, to be precise, those inherent in European citizenship. This will disappear with Brexit. The ECtHR will interpret and apply the ECHR to persons as nationals of a country as such, not as European citizens.

¹²³ House of Lords, op. cit., pp. 20.

¹²⁴ See Eicke, op. cit.

¹²⁵ House of Lords, op. cit., p. 33 (paragraph 88). See also Aleksandar Jaksic, 'The execution of final judgments and vested rights', *Russian Law Journal*, Volume II (2014), Issue 3, pp. 64 and 77.

Moreover, the **ECHR does not include certain rights that are highly important in a person's everyday life** and which are abundantly covered by EU legislation: the rights to work, to study, to a pension, to access to health services, to social assistance and to equal treatment.

On the other hand, it is important to underline that the protection mechanism established by the Convention is subsidiary to national legislation, given that access to the ECtHR requires the previous exhaustion of domestic remedies provided by the legislation of the State under whose jurisdiction lies the person who claims violation of his or her rights. Furthermore, we must also bear in mind the inherent lengthy and slow character of this mechanism, which is, in addition, overburdened by thousands of pending cases. According to the Court's annual report for 2016 the number of pending cases reached 79.950.¹²⁶

It follows that the support of the ECHR in a post-Brexit scenario will be very valuable, for the reasons set out above, but that it is not comparable with European citizenship – which will disappear in the UK for Europeans and in the EU for British nationals, and whose content in terms of rights is extraordinarily important for the lives of 14 million people in Europe today.

¹²⁶ http://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf, page 193.

10. LEGAL TREATMENT OF THE RIGHTS OF EUROPEAN CITIZENS IN VIEW OF THE UNITED KINGDOM'S WITHDRAWAL FROM THE UNION

As analysed in the previous section the United Kingdom's withdrawal from the Union will have severe negative effects on the rights of European citizens, whatever their situation. Losing the status of European citizen is undoubtedly set to inflict severe damage on the rights of those who have enjoyed the benefits derived from that status until now.

British nationals in the Union will no longer enjoy the right to free movement, the right of residence, the right to work or other rights derived from the status of European citizenship. The same will happen to non-British citizens in the territory of the United Kingdom.

It is difficult to know who will come off worse, the British or the non-British. The truth is that, as far as the latter are concerned, the loss of rights that are so vital and so essential to their lives will take place in one country alone, the United Kingdom. On the other hand, British nationals will lose their (European) right to residence, permanent or not, in all 27 Member States of the European Union.

The citizens currently affected – obviously we cannot talk about future hypotheses – are, according to British Government figures from 2011, 2.8 million EU nationals living in the UK (the largest group, 900 000, being from Poland) and 1 million British nationals who are long-term residents of Member States, most of them being in Spain (over 300 000), in France (over 50 000) and in Germany (almost 100 000).¹²⁷

It is quite plausible that many of these citizens, and others with expectations of rights, are not simply going to settle for the sudden loss of the status of European citizen and, consequently, of the rights to move, reside, work with rights, set up companies, provide services, have access to health and social services, etc. In the absence of a reasonable agreement between the United Kingdom and the Union, we can expect the level of litigation to be high.

For those reasons, there can be no doubt that the best recommendation we can make to facilitate a suitable transition to the situation governed by Article 50 TEU – in this case, the withdrawal from the Union by the United Kingdom – is to reach a good agreement between the parties, an agreement, as Article 50.2 says, on *'the arrangements for [the UK's] withdrawal, taking account of the framework for its future relationship with the Union'*, to be negotiated in accordance with Article 218(3) TFEU. This is the procedure for negotiating and signing agreements between the EU and third countries, only in this case the United Kingdom will not be a third country yet. That is why it should be made clear that in this study we always speak about the agreement stipulated in Article 50 TEU, which is the United Kingdom's withdrawal agreement, not about the agreement between the Union and the United Kingdom once the country is a third country, which will establish the 'future relationship' of the two parties. We have to make a distinction, then, between two agreements whose goals and content are not identical, though they are not contradictory either:

- First, the agreement under Article 50 TEU, This agreement may be concluded or not. In the latter case, the UK will leave the Union two years after the notification of

¹²⁷ The United Kingdom's exit from and new partnership with the European Union. Presented to Parliament by the Prime Minister by Command of Her Majesty, February 2107, p. 29.

withdrawal, barring a decision by the European Council to extend the period. This agreement does not require ratification by every Member State. According to Article 50.2 TEU, the Council will conclude the agreement on behalf of the Union, acting by a qualified majority 'after obtaining the consent of the European Parliament'.

- Second, the agreement (or agreements) on the 'future relationship' between the EU and the UK, which will probably be negotiated when the country no longer forms part of the Union and under the procedure of Articles 216 to 218 and Article 207 TFEU. This agreement does need to be ratified by all the Member States (as a 'mixed' agreement).

Between the two agreements, a provisional situation could be brokered to avoid a sudden break in relations and a disorderly and chaotic process of uncoupling, politically and legally speaking.

The European Parliament made it clear in its resolution of 28 June 2016 that *"any new relationship between the United Kingdom and the European Union may not be agreed before the conclusion of the withdrawal agreement"* and repeated this in its resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union while stressing also that *"should substantial progress be made towards a withdrawal agreement then talks could start on possible transitional arrangements on the basis of the intended framework for the United Kingdom's future relationship with the European Union"*.

The fact that the United Kingdom will end up out of the Union does not require the citizens affected to be treated as if they belonged to a third country from the outset. The negotiation of the first agreement will be governed, in its broad outlines, by the 'criteria' mentioned in the declaration of 15 December 2016 approved by the 27 Heads of State and Government and by the presidents of the European Council and the Commission and the "draft guidelines following the United Kingdom's notification under Article 50 TEU" prepared, on 31 March 2017, by the European Council Secretariat in view of the European Council of 29 April 2017.

That declaration of 15 December 2016 states that *"the first step following the notification by the United Kingdom will be the adoption by the European Council of guidelines that will define the framework for negotiations under Article 50 TEU and set out the overall positions and principles that the EU will pursue throughout the negotiation"*. Those European Council guidelines can be completed by recommendations from the Commission to the Council, which is the body that authorises the opening of negotiations (Article 218.3), and, if required, by European Parliament resolutions.

In our view:

Those political guidelines should be as close as possible to an agreement by which the EU and the UK maintain over an extensive period the enjoyment of the rights that European citizens have possessed until now. Therefore, **the safeguarding of these rights should form part of the UK's withdrawal agreement, without prejudice to their being repeated in the agreement on the framework for the future relationship** between the EU and the UK, once the British withdrawal from the EU has taken place.

To give the agreement on the rights of citizens the maximum legal substance, **it should be subsequently written into an international treaty between the EU and the UK**, once it is formally a third country. The treaty in question will have to be incorporated into the legal framework of the UK and the 27 other countries that make up the Union today.

Only this procedure would give all European citizens the level of confidence and legal certainty befitting a democracy (which they are already demanding) and the social and economic stability that the EU needs. That also goes for the UK, in such important fields as the British labour market, so in need of foreign workers in highly specialised sectors (e.g. health and finance) or seasonal workers.

The agreement should be founded on the **principle of reciprocity** in the guarantee of rights. It is the only way of protecting the status of the British citizens living in the Union, as appears to be the UK Government's aim.

However, so far, the British Government has set out in its White Paper '*The process of withdrawing from the European Union*' a series of rights that would have to be ensured for British citizens, with no word about reciprocity. They are rights such as: living, working, owning property, retiring to another EU country, receiving healthcare (using the European Health Insurance Card), voting in local elections in other EU countries, mutual recognition of decisions on the custody of children across the EU, use of the European Small Claims Procedure to claim sums of up to EUR 2 000 from citizens of other EU states, access to public services in other countries of the Union, etc.

In addition, we must add that the free movement of capital and non-restriction of payments are declared in Article 63 TFEU to apply to relations between EU Member States and 'third countries', so the UK will not be affected in this field by leaving the EU.

It is clear that the demand for these rights for British citizens in EU countries will trigger an equivalent reciprocal demand for a guarantee of the same rights for nationals of countries of the Union.

The core of the rights whose permanence is agreed for current British and Union citizens should be free movement and residence, the so-called four freedoms, and equal access to public services and social protection, and the right to vote in municipal elections in the country of permanent residence.

The House of Lords Report of 14 December 2016 contains an interesting and lucid reflection:

*"In our view EU citizenship rights are indivisible. Taken as a whole they make it possible for an EU citizen to live, work, study and have a family in another EU Member State. Remove one, and the operation of others is affected. It is our strong recommendation, therefore, that the full scope of EU citizenship rights be fully safeguarded in the withdrawal agreement".*¹²⁸

We agree with that recommendation, which implies **accepting the status quo at the time of the UK's formal withdrawal with regard to the citizens who enjoy today, and will enjoy up to the date of the UK's withdrawal, European citizenship rights in the UK and in the EU** (the British). In other words, as if they were 'acquired rights', even if they are not.

As we know, this proposal does not coincide with the British Government's current position of abolishing freedom of movement and residence for EU citizens, but accepting access for the UK to the internal market in goods, services and capital.

¹²⁸ House of Lords, op. cit., p. 40 (paragraph 121).

However, it is not easy to find an alternative other than the absence of any agreement whatever in two years' time, in other words the worst-case scenario.

- It is not appropriate that the negotiations on citizens' rights should be hived off as a matter separate from the first agreement as a whole. The House of Lords Report appears to take that approach so as to avoid having to wait until the end of the negotiations.¹²⁹ However, that is not the sense of Article 50 TEU. The article speaks of '*an agreement*': in other words, the negotiations form a whole, and until they conclude with a single, global agreement, there is no agreement at all.¹³⁰ The second agreement will come later, when the UK is out of the Union.
- This second agreement between the EU and the UK (when it is a third country) should be a mixed agreement, which will require ratification by all the Member States of the Union.
- It is important that the EU-UK agreement on the UK's withdrawal from the Union should be broad, detailed and binding enough not to leave room for bilateral negotiation by the UK with each member of the EU. That could be the UK's intention, though it would have little chance of success on migratory issues, given the EU's powers over external borders in the matter.

¹²⁹ Ibid., p. 47 (paragraph 148) and p. 52 (paragraph 31).

¹³⁰ Cf. 'Brexit and the European Union: General Institutional and Legal Considerations', Committee on Constitutional Affairs, p. 23.

11. CONCLUSIONS

1. How to describe acquired rights

Acquired rights are subjective rights of individuals that originated in a certain legal system and seek to extend their effectiveness in a different legal system from the original one. A fundamental change in the norms in force may occur because of a succession of states over a territory or a revolutionary change of government within the same state. In the past, acquired rights were invoked to oppose expropriations following a state succession with a view to obtaining compensation. In July and December 2016, two reports by, respectively, the UK House of Commons and House of Lords, considered whether it would be possible to invoke acquired rights in order to protect the rights of UK nationals in the rest of the Member States of the European Union in the context of the British withdrawal from the Union. This raises the question of whether it would be possible to cite acquired rights in defence of rights other than the right to property, such as economic freedoms or the rights inherent in the European citizenship status.

2. Acquired rights do not apply to economic freedoms

With regard to the right to private property, there is at least one precedent, dating from 1926, when the Permanent Court of International Justice (PCIJ) mentioned the existence of a general principle on the recognition of individuals' acquired rights. However, the principle already had exceptions formulated through a specific treaty (Geneva Convention of 1922); thus, it appeared to be of a dispositive nature. In any case, the principle has proven incapable of withstanding the onslaught of trends contrary to it in the evolution of law, and it is reasonable to assume that it has lost all legal value today.

With regard to freedom to trade, freedom of establishment and freedoms related to customs or fiscal advantages, the precedents found in the case law of the PCIJ (Oscar Chinn, 1934) and the International Court of Justice (ICJ) (United States nationals in Morocco, 1952), as well as in the reports by Special Rapporteur F.V. García Amador to the International Law Commission (ILC) (1956 to 1961) and in the works of doctrine, reveal that these freedoms have always remained beyond the idea of acquired rights. They do not exist autonomously and independently of the treaties that grant them to their beneficiaries and they are not maintained in the future once the treaties that give rise to them are terminated. To put it in another way, **the precedents on business freedoms in the case law of the PCIJ and ICJ are negative regarding the existence of acquired rights or the maintenance of other similar subjective rights of individuals with an existence that is permanent and independent from the treaty that created them.**

3. The European Union bears no international responsibility for the violation of subjective rights of UK nationals

In the event of litigation arising which cites the possible responsibility of the European Union for the violation of hypothetical 'acquired rights', it must be recalled that, unlike in the traditional approaches, the current premise of international responsibility is the existence of a wrongful act. This premise does not arise in the case of the UK's withdrawal, as the UK is not, in any way, committing a wrongful act by withdrawing from the Union. Nor is the EU by terminating the application of the Treaties and the Union *acquis* in the UK. Therefore, in the event of the termination of individuals' subjective rights linked to their national state's membership of the Union – even if withdrawal resulted in injury to them – there would be no

reason for compensation, as there has been no wrongful act, but, rather, a voluntary action by the state that withdraws in accordance with international law.

4. There cannot be international responsibility for injury to economic interests that do not constitute subjective rights

Therefore, **there are no acquired rights or other subjective rights of the individuals which will suffer injury by the UK's withdrawal.** There will only be economic interests which might suffer injury, but the UK should have assessed them before triggering the withdrawal process. The case law of the ICJ on this subject is constant (both in the *Barcelona Traction* case of 1970 and in the *Sadio Diallo* case 40 years later) in its affirmation that the mere harming of economic interests does not constitute damage that qualifies for compensation.

In this latter case, all the judges from Western states voted with the majority. Insofar as their vote may reflect the *opinio juris* of their respective states, that means that – despite the many bilateral treaties promoting and protecting investment that have been agreed in order to allow special rules to apply – general international law has not varied on the subject in the last 50 years.

5. The right to private property is not impaired by the UK's withdrawal

The greatest concern expressed by the British institutions about the consequences of withdrawal refers to the right of free movement of persons and workers, the right of residence, freedom of establishment and the freedom to provide services. There is much less concern over possible consequences on the right to private property, which does not usually pertain to European Union law, but is rather regulated by the legislation of each Member State, although it could be affected by some action of the EU institutions. As this is a right of property, it is not possible to transpose its regulation to other rights and economic freedoms of a personal nature derived from a treaty. The precedents concerning 'acquired rights' do not refer to economic freedoms but to foreigners' rights to own property. There is no identity, nor even similarity, between these rights and those whose impairment as a result of withdrawal are the main concern of the UK and of the EU.

According to Article 70.1(b) of the VCLT, the withdrawal of a State party to a treaty will not affect the rights, obligations or legal situation created by the treaty prior to its termination. However, after examination of the preparatory work of the precept, including the (interpretative) comment of the ILC on the article at the time it was voted on, **the rights it refers to are rights of States, not of individuals, since it 'is not in any way concerned with the question of the "vested interests" of individuals'.** The precept was approved by 101 votes to zero. The ILC's Special Rapporteur was Sir Humphrey Waldock, a United Kingdom national.

6. The case of Greenland is not comparable to the withdrawal of the UK from the EU

There is a fundamental difference in the case of Greenland's withdrawal, insofar as Greenland was only a part of a Member State (Denmark), which remained in the then EEC. Its withdrawal simply meant that that specific part of the territory of Denmark went outside the scope of Community law. Therefore, all that occurred was a change of the territorial scope of the EEC Treaties, which, as the Commission stated in its opinion (COM 83/0006), 'affected an extremely small number of persons.' The chief problem to be solved was recognition of

the payments made by companies for their employees, who were nationals of other Member States and had worked in Greenland, in view of the future consolidation of those employees' pension rights. For all these reasons, the case of Greenland is not a 'comparable situation' to the present one, although the fact that the institutions paid special attention to solving the 'transitional problems' of those affected, through the Amendment Agreement and the subsequent provisions adopted by the Council, certainly can serve as a precedent.

7. Withdrawal from UNESCO is not a '*comparable situation*'

The withdrawal of two member states (United States of America and the United Kingdom) from UNESCO is not a comparable situation with the situation of the UK withdrawal from the EU. There were no acquired rights, for citizens at large, involved in the process of these withdrawals. The only form of acquired rights in this context involved the efforts undertaken to safeguard the interests of officials working for the organisation who were nationals of these two states. Even if this is an objective appearing to warrant flexible and generous consideration, to transpose that situation to the UK's withdrawal from the EU would require a detailed analysis of the diverse statuses existing inside the EU civil service, which would go beyond the scope of the present study.

8. EU law shall apply fully on citizens' rights till the moment UK withdrawal becomes effective

The EU Treaties and secondary Union legislation (such as Directive 2004/38/EC) will be in full effect until the negotiations for the withdrawal of the United Kingdom from the Union are completed, or else for two years after the UK has notified its decision to withdraw. Until the EU Treaties cease to have effect in the UK, Article 50 TEU does not provide for any transitional situation.

9. Subjective rights granted by EU law, though incorporated into the legal heritage of individuals, shall end after withdrawal

The direct application to individuals of the content of treaties is rare in the field of international law, while, on the other hand, it is the basis of the functioning of EU law. While the CJEU has said that this legislation creates 'rights that become part of the legal heritage of individuals' (Van Gend and Loos, 1963), thus describing the direct effect of EU law, such statement only indicates that individuals are the direct targets of European legislation, which is fully and uniformly applied. However, it does not apply forever, but only for so long as it continues in force (Simmenthal, 1978). **That period will end for the UK the moment the withdrawal agreement takes effect.**

Thus, a supposedly unchangeable right of European citizens having permanent residence in the UK or British nationals within Union territory, to always retain that situation on the basis of supposedly 'acquired' rights cannot condition the political negotiations provided for in Article 50 TEU. **There are no acquired rights to free circulation and residence for the European citizens if the United Kingdom retires from the Union.** The reason is that the status of European citizen with the right to free movement and residence in any state of the EU emanates from the legal order of the EU, not national law. If the Treaties cease to apply in the UK (Article 50.3 TEU), then rights such as that of residence, which exist today under the protection of the Treaties for European citizens in the UK and for British citizens in every EU Member State, disappear.

10. Rights and freedoms granted by EU law can be safeguarded in the withdrawal agreement, during a transitional period or even beyond

The United Kingdom's withdrawal from the Union will have a severe negative impact on the rights of European citizens, whatever their situation. It is quite understandable that many of these citizens, and others with expectations of rights, are not simply going to settle for the sudden loss of their status of European citizen and, consequently, of the rights to move, reside, work with rights, set up companies, provide services, enjoy access to health and social services, etc. In the absence of a reasonable agreement between the UK and the Union, we can expect the level of relevant litigation to increase substantially.

As explained, general international law does not provide protection of the subjective rights and freedoms that may survive withdrawal from the treaty that created them by the state of which the holders of such rights and freedoms are nationals. **Therefore, there are no acquired rights. Rights for individuals will not endure if there is no withdrawal agreement.** However, the conventional international law agreed between the EU and the UK in the moment of withdrawal (in other words the withdrawal agreement under article 50 TEU) may protect the rights and freedoms created so far for UK nationals in the remaining Member States and vice versa, as if the law of the Union extended its effects over the individuals concerned and their rights. **However, those subjective rights would stem from the withdrawal agreement rather than the general EU law.**

For these reasons, there can be no doubt that the best means to facilitate a suitable transition to the situation governed by Article 50 TEU – in this case, the United Kingdom's withdrawal from the Union – is to reach a good agreement between the parties following the negotiations that will begin after the UK Government's notification under article 50 TEU on March 29, 2017. **This agreement should be founded on the principles of reciprocity and non-discrimination on the grounds of nationality and should aim to achieve as close as possible enjoyment by which the EU and the UK nationals, over an extensive period, of the rights that European citizens have possessed until now.** This is the only way of protecting the status of the UK citizens living in the EU and conversely of EU citizens living in the UK and is in line with what appears to be the UK Government's aim.

11. Content of the citizens' rights to be preserved in the withdrawal agreement

The core of the rights whose permanence is agreed for current British and Union citizens should be freedom of movement and residence, the so-called four freedoms, and equal access to public services and social protection, as well as the right to vote in municipal elections in the country of permanent residence.

We do not think it appropriate that the negotiations on citizens' rights should be hived off as a matter separate from the agreement as a whole. The House of Lords' report appears to take that approach to avoid having to wait until the end of the negotiations. However, that is not the sense of Article 50 TEU. It speaks of 'an agreement', in other words, the negotiations form a whole and until they conclude in a single, and global agreement, there will be no agreement at all. The Union *acquis* is indeed indivisible.

It is important that the EU-UK agreement on the UK's withdrawal from the Union should be broad, detailed, and binding enough not to leave room for bilateral negotiation by the UK with each member of the EU.

12. Protection of citizens' rights under the European Convention on Human Rights

Once the United Kingdom's departure from the European Union is completed and in the event of the absence of an agreement between the two parties during the article 50 negotiations, the European Convention on Human Rights may offer an indirect means of defending the right to residence and other rights inherent in European citizenship. A number of – but not all – the rights created by the EU have a counterpart in the rights and freedoms provided for under the ECHR, which forms part of UK domestic law by virtue of the Human Rights Act 1998. The considerations we offer in this study are naturally subject to the ECHR continuing to form part of British law. This is, however, not assured, given certain political statements that have been made in the United Kingdom.

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