Progress Through Preservation of the Legal *Status Quo*: Paradox or Prerequisite?

Janina Barkholdt*
International Court of Justice, The Hague, Netherlands
j.barkholdt@gmail.com

Abstract 926
Keywords 926
I. Introduction: *Quieta Non Movere* as an Outdated Principle? 926
II. Progress and International Law 929
III. Progress Through the Interplay of Transformative and Preservative Rules 931
1. Transformative Rules: Changing the Law as a Prerequisite of Progress? 932
2. Preservative Rules: Progress Despite International Law? 933
IV. The Case Law of Courts and Tribunals: Progress Despite or Through Preservation? 935
1. Preservation of the Stability of Boundaries: *Uti Possidetis* 936
a) *Uti possidetis:* Mission Creep of a Roman Concept? 936
b) Progress and *Uti Possidetis*: the Right to Self-Determination 938
c) Progress After Preservation: Limits to *Uti Possidetis* 941
2. Protection of Transboundary Rights of Non-State Actors 943
a) Transboundary Rights of Non-State Actors: Between Private Rights and Rights of the State? 943
b) Progress and the Protection of Rights of Non-State Actors: the EEZ 945
c) Progress Alongside Preservation: Risks of Fragmentation and Circumvention 947
3. Entrenchment of the Legal *Acquis* Through Unwritten International Law 948
a) Unwritten International Law: Irreconcilability of 'Generality' and 'Trailblazing'? 949
b) Entrenchment of Progress Through Unwritten International Law: Treaty Withdrawal 950
c) Progress Despite Preservation: Outlasting State Consent? 953
V. Conclusion: Progress Through an Equilibrium of Transformative and Preservative Rules 954

* Associate Legal Officer at the International Court of Justice (ICJ) until December 2024. PhD Humboldt University Berlin (2022). This article is based on a presentation given at the conference 'Progress and International Law: A Cursed Relationship,' hosted by the Arbeitskreis junge VölkerrechtswissenschaftlerInnen (AjV) and the Deutsche Gesellschaft für Internationales Recht (DGIR) at the University of Cologne (22-23 September 2023). The author would like to thank Yateesh Begoore, Thomas Kleinlein, Júlia Miklasová, Valentin Schatz, Robert Stendel, Christian Tams, Sara Wissmann, the anonymous reviewers, and the conference participants for their comments on earlier drafts. Any remaining inaccuracies and errors are the author's sole responsibility. The views expressed in this article are personal to the author and do not reflect those of the ICJ.

DOI 10.17104/0044-2348-2024-4-925 ZaöRV 84 (2024), 925-954

Abstract

In 1909, an arbitral tribunal famously stated in the *Grisbådarna* case that 'it is a well established principle of the law of nations that the state of things that actually exists and has existed for a long time should be changed as little as possible'. What was considered 'well established' in 1909 seems to be irreconcilable with the idea of progress today. However, dismissing this 'principle' as outdated risks missing an important element for understanding the role of – and for – progress in international law. Rather, the conditions under which progress can be achieved in and through international law can only be understood if we take a closer look at those rules which ostensibly aim to achieve the exact opposite of progress, that is the preservation of the legal *status quo*.

To this end, this contribution analyses three examples of 'preservative' rules in international law. First, it examines the principle of *uti possidetis*, which mediates between change and stability in light of phenomena such as decolonisation and the dissolution of States. The second example concerns 'unwritten' rules arising from a long-standing practice of non-State actors which have been considered by judicial bodies as limiting the application of the United Nations Convention on the Law of the Sea (UNCLOS). Thirdly, it discusses the extent to which the withdrawal from human rights treaties leaves intact rules and obligations enshrined therein that reflect or have evolved into 'unwritten' international law.

The contribution concludes that the equilibrium between preservative and transformative rules ensures a constructive relationship between progress and international law.

Keywords

legal certainty – change in international law – stability of boundaries – UNCLOS – unwritten regional international law – human rights treaties

I. Introduction: *Quieta Non Movere* as an Outdated Principle?

In 1909, the arbitral tribunal in the *Grisbådarna* case famously stated that 'it is a well established principle of the law of nations that the state of things

that actually exists and has existed for a long time should be changed as little as possible'.[1] Despite being allegedly 'well established' at the time, this principle, usually associated with the maxim *quieta non movere* ('Do not move settled things.'),[2] has never been explicitly endorsed by the Permanent Court of International Justice (PCIJ) or its successor, the International Court of Justice (ICJ).[3] It is thus tempting to discard it as a relic of bygone times.

However, the idea of *quieta non movere* continues to permeate international law reasoning. Parties in boundary disputes still invoke *quieta non movere* before international courts and tribunals.[4] Judges writing separately have repeatedly suggested that *quieta non movere* informed the decisions of the Court.[5] In 2023, the Institut de Droit International (IDI) even declared it to be a 'principe très général de droit' applicable beyond the context of boundary disputes.[6]

This persistence of *quieta non movere* may well be understood as a reflection – maybe even as a renaissance – of international law's '*status quo* bias' and, as such, as an obstacle to its adaptation to new challenges.[7] Indeed, the very idea of 'not moving settled things' seems to be irreconcilable with the idea of progress in international law.

However, dismissing the idea behind *quieta non movere* as outdated risks missing an important element for understanding the role of international law in the pursuit of progress. This article argues that the conditions under which progress can be achieved in and through international law can only be understood if we take a closer look at rules which ostensibly aim to achieve the

---

1 PCA, *The Grisbådarna Case* (Norway v. Sweden), Award, 23 October 1909, PCA Case No. 1908-01, 161.

2 See e. g. Institut de Droit International, 'Jurisprudence et précédents en droit international' (Rapporteurs: Mohamend Bennouna and Alain Pellet), *Rapport de la 2 e Commission* (Editions A. Pedone 2023), 69; Separate Opinion of Judge Ammoun, *North Sea Continental Shelf,* judgment of 20 February 1969, ICJ Reports 1969, 3 (para. 12, footnote 4).

3 See Dissenting Opinion of Judge Torres-Bernádez, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrein), merits, judgment of 16 March 2001, ICJ Reports 2001, 40 (269, para. 19).

4 See e. g. Slovenia in PCA, *Arbitration Between the Republic of Croatia and the Republic of Slovenia,* PCA Case No. 2012-04, final Award of 29 June 2017, para. 816; Nigeria in ICJ, *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening), judgment of 10 October 2002, ICJ Reports 2002, 303 (para. 65).

5 See e. g. Judge Torres-Bernádez (n. 3), paras 13-21; Judge Ammoun (n. 2), para. 12.

6 See Institut de Droit International (n. 2), 69.

7 See for a criticism of the '*status quo* bias' in international law: Michal Saliternik and Sivan Shlomo Agon, 'Proactive International Law', UC Law Journal 75 (2024), 661-712 (682-683).

exact opposite of progress, that is the preservation, protection, and entrenchment of the *status quo* (which I will call 'preservative rules'). The central claim of this article is that these preservative rules play an essential role in creating and cultivating the necessary trust that enables the 'leap of faith' required for any progress. It is hoped that the analysis underlying this claim will encourage a more nuanced understanding of the ways in which international institutions contribute to the pursuit of progress through law. This article seeks to show that what may seem reactionary at first glance – the protection of 'the edifice of law carefully constructed by mankind' through such preservative rules – may in fact be vital to ensure 'ordered progress' in the relations between States.[8]

Such an analysis of these preservative rules and their role as an integral element of progress in international law fills a *lacuna* in scholarship. Doctrinal scholarship has so far mainly focused on the rules and institutions that allow the existing legal framework to be changed and thus to be adapted to novel challenges and societal needs, rather than preserved.[9] Meanwhile, preservative rules have been looked at from specific angles, that is either from a procedural perspective, in particular the role of 'precedent' or estoppel in international adjudication,[10] in specific fields of international law, notably in boundary disputes,[11] or by focusing on the way in which they generally contribute to stability and legal certainty in international law.[12] Their integral role for ensuring progress in international law has thus not been analysed to date, which this article aims to do in three steps.

After briefly situating the present article within the current scholarship on progress in international law and developing a definition of the notion of 'progress' (II.), the following section juxtaposes transformative rules and preservative rules and their respective characteristics, function, and role for progress in international law (III.). It shows that doctrinal scholarship has focused on how international law achieves progress by overcoming seem-

8 ICJ, *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), judgment of 24 May 1980, ICJ Reports 1980, 3, para. 92.

9 See e. g. Nico Krisch and Ezgi Yildiz, *The Many Paths of Change in International Law* (Oxford University Press 2023); Georges Abi-Saab, Kenneth Keith, Gabrielle Marceau and Clément Marquet (eds), *Evolutionary Interpretation and International Law* (Hart 2019).

10 See Institut de Droit International (note 2); James G. Devaney, 'The Role of Precedent in the Jurisprudence of the International Court of Justice: A Constructive Interpretation', LJIL 34 (2022), 641-659.

11 See e. g. Yehuda Zvi Blum, *Historic Titles in International Law* (Martinus Nijhoff 1965).

12 See e. g. Jörg Müller, *Vertrauensschutz im Völkerrecht* (Carl Heymanns 1971); Daniel Costelloe, 'Compatibility in the Law of Treaties and Stability in International Law', BYIL (2022).

ingly outdated social structures, on the 'Grotian moments'.[13] Yet, less attention has been devoted to preservative rules that serve to maintain, protect, and entrench the *status quo*. This neglect is even more remarkable because preservative rules often appear in the jurisprudence of international courts and tribunals. The article takes a closer look at three examples of preservative rules in the case law of international courts and tribunals (IV.). First, it examines the principle of *uti possidetis*, which mediates between change and stability in the face of phenomena such as decolonisation and the dissolution of States. The second example concerns rules arising from long-standing practices of non-State actors, in particular indigenous people, which have been considered by judicial bodies as limiting the application of the United Nations Convention on the Law of the Sea (UNCLOS). Thirdly, it discusses the extent to which the withdrawal from human rights treaties leaves intact those rules and obligations enshrined therein that reflect or have evolved into 'unwritten' international law. The article concludes that a careful maintaining of an equilibrium between preservative and transformative rules is indispensable for ensuring progress in international law (V.).

II. Progress and International Law

The relationship between progress and international law has traditionally been examined from four perspectives. From a normative perspective, some scholars have argued that international law as such represents a form of progress.[14] Others have taken an analytical perspective examining to what extent we find progress in certain fields or in international law generally.[15] More recently, critical scholars have pointed to the discursive power of progress narratives and the indeterminacy of the term.[16] A fourth group focuses on the role that the methods and institutions provided by interna-

13 See on the trajectory of this concept which was prominently coined by Richard Falk in 1985 and further developed by Michael Scharf: Contributions in the Special Issue: Dossier on Grotian Moments, by Tom Sparks and Mark Somos, Grotiana 42 (2021), 179-372.

14 See e. g., Daniel Thürer, *Völkerrecht als Fortschritt und Chance* (Nomos 2009).

15 See e. g., Manley O. Hudson, *Progress in International Organisation* (Stanford University Press 1932); Bruno Simma, 'From Bilateralism to Community Interests' RdC 250 (1994), 221-384.

16 See e. g., Thomas Skouteris, 'The Idea of Progress' in: Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), 941; see also Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' EJIL 25 (2014), 425-444 for further references regarding critical approaches to the concept of 'progress'.

tional law play in achieving progress.[17] The present, primarily doctrinal article forms part of this fourth group.

And yet, no contribution on the topic – not even one that seeks to approach the topic from a positivist angle – can avoid a brief account of its own understanding of 'progress'.

Progress is mostly defined as a 'change for the better'.[18] But who defines what constitutes a 'betterment' in international law? It is not difficult to imagine that these questions lead to different answers depending on the addressee. In the inter-war period, Kunz, for example, argued that 'the only 'common international good' already sufficiently felt is the preservation of peace'.[19] A point of departure for what is commonly understood as 'betterment' in the post-World War II international legal system can be found in the Preamble and Article 1 of the United Nations Charter (UNCH).[20] Article 1 refers to the 'purposes' of the United Nations which largely correspond to the aspirations listed in the Preamble.[21] These purposes and preambular objectives include the maintenance of international peace and security, sovereign equality of States, the self-determination of peoples, and respect for human rights.[22]

17 See e. g., Josef L. Kunz, 'Problem of Revision in International Law-Peaceful Change', AJIL 33 (1939), 33-55; Charles de Visscher and Percy Ellwood Corbett (tr), *Theory and Reality in Public International Law* (Princeton University Press 1968), 333-349; Hisashi Owada, 'Peaceful Change' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2007); Arnold N. Pronto, 'Change in International Law' in: Vesselin Popovski and Ankit Malhotra (eds), *Reimagining the International Legal Order* (Routledge 2023), 42-52, (49); see also on the role of progressive development by the International Law Commission: Arthur Watts, Michael Wood and Omri Sender, 'Codification and Progressive Development of International Law' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2021), paras 19-24.

18 See e. g., the Cambridge English Dictionary: 'movement to an improved or more developed state'; Oxford English Dictionary: 'To go or move forward or onward in space; to proceed, advance'. See also for a very similar understanding of the term 'reform': Thilo Rensmann, 'Reform' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds), *The Charter of the United Nations: A Commentary, Volume I* (4th edn, Oxford University Press 2024), 43, para. 1.

19 Kunz 'Problem of Revision' (n. 17), 54.

20 Daniel-Erasmus Khan, 'Preamble' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus (eds), *The Charter of the United Nations: A Commentary, Volume I* (4th edn, Oxford University Press 2024), 160, para. 29: 'what is announced here is nothing less than the bedrock of the ideological basis on which the post-World War II reorganization of the international community is built.'

21 See on the close interrelationship between preamble, purpose and principles: Thomas Kleinlein, 'Article 1' in: Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus (eds), *The Charter of the United Nations: A Commentary, Volume I* (4th edn, Oxford University Press 2024), 169, para. 9.

22 See on Article 1 as setting out the 'goals' of the UN: ICJ, *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, 151, (167-168).

 DOI 10.17104/0044-2348-2024-4-925

With respect to these preambular objectives and purposes, Article 1 adopts a 'future-oriented perspective'.[23] In particular, Article 1(4) of the UNCH, which speaks about the 'attainment of these common ends', clarifies that these preambular objectives and purposes are intended to guide the conduct of member States in achieving 'betterment' in their international relations. This article therefore proposes that their attainment represents the common denominator of what constitutes progress in the relations between member States.[24]

Alongside domestic law, political initiatives, and diplomatic means, international law plays a modest but important role in promoting progress in international relations as defined in this sense. For example, States and international organisations have been creating new rules and mechanisms of international law to specify these 'common ends', including by prioritising between the objectives set out in the Preamble and in Article 1. Such progress through new law is illustrated by the substantive and institutional rules following the Preamble and Article 1 in the UNCH. However, international law also provides legal techniques to advance and, importantly, to protect the 'betterment' as defined in the Preamble and Article 1 of the UNCH when interpreting and applying the existing legal framework over time. The way in which progress is furthered in international relations through these legal techniques, in a more subtle manner than the 'Grotian moments', is the focus of the next sections.

III. Progress Through the Interplay of Transformative and Preservative Rules

Given that progress is traditionally associated with 'change',[25] it is unsurprising that much scholarly attention has been devoted to those legal rules that change the existing legal framework ('transformative' rules) towards common goals (1.). Legal rules which aim to preserve the legal *status quo*

23 Kleinlein (n. 21), 166, para. 3.

24 See also the recent reaffirmation of the UNCH as a basis for 'a better future for people and planet': 'The Pact for the Future', UNGA Res 79/1 of 22 September 2024, A/RES/79/1, paras 8, 12, 32, 82.

25 See e. g. Kunz 'Problem of Revision' (n. 17), 45: '"Change" is Often Identified with "Progress"'; Visscher and Corbett (n. 17), 333: 'the future of peaceful change is indissolubly linked with the progress of international organization'; Pronto (n. 17), 49: 'the progress made over the last century in the human condition […] has led to much change to international law, sometimes precisely because such changes were effected through international law'.

('preservative' rules) are often seen as an antipode to progress.[26] Whether this is an exhaustive or even accurate description of their function is, however, doubtful (2.).

1. Transformative Rules: Changing the Law as a Prerequisite of Progress?

The imperative need for international courts to account for changes in international law has been emphasised by the ICJ in its 1971 *Namibia* Advisory Opinion. Formulating the ostensible antithesis to *quieta non movere*, the Court stated that it 'must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law'.[27]

Yet, the question of how to take these changes into account in the absence of a universal legislator has puzzled generations of international lawyers.[28] Thus, it does not come as a surprise that much scholarly attention has been devoted to identifying those rules of international law that allow for adapting the existing legal framework.[29] These are often found in the international law equivalents of what H. L. A. Hart has termed 'secondary rules' of law,[30] notably including the rules of treaty interpretation, e. g., recourse to rules allowing for 'evolutionary interpretation',[31] and the doctrine of sources of international law, e. g., by lowering the criteria for identifying customary international law ('modern custom')[32] and by expanding the catalogue of sources enumerated in Article 38(1) of the ICJ Statute.[33]

---

26 See Saliternik and Agon (n. 7), 682-683.

27 ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, ICJ Reports 1971, 16, para. 53.

28 See notably Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933, reprinted in Oxford University Press 2011), 256-267.

29 See notably Sotirios-Ioannis Lekkas and Panos Merkouris, 'Change in International Law: Rules of Change or Changing Rules', ESIL Reflections 13 (15 April 2024), available at: <https://esil-sedi.eu/esil-reflection-change-in-international-law-rules-of-change-or-changing-rules-series-concluding-note/>, last access 10 December 2024, with further references to contributions on the topic of change in international law.

30 Herbert L. A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012), 81.

31 See on this: Abi-Saab, Keith, Marceau and Marquet (n. 9).

32 See e. g., Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' AJIL 95 (2001), 757-791.

33 Christine M Chinkin 'The Challenge of Soft Law: Development and Change in International Law', ICLQ 28 (1989), 850-866.

While this may appear to be a random collection of examples, they have three characteristics in common. First, they have the methodological potential to change the legal rule, as it is understood at a certain moment, by lowering the threshold for such change or by either widening or narrowing the scope of application of an existing rule. Second, this methodological approach is justified by equating progressive aims and the common interest. Third, these rules are 'forward-looking' in the sense that they distance themselves from, and sometimes even condemn, the past. Based on these three characteristics, transformative rules have a distinct potential in generating progress as they channel political momentum and translate it into the legal framework. In other words, these rules enable the 'leap of faith' that progress needs for breaking with, overcoming, and moving beyond the existing legal and social structures.

Two important clarifications should be made regarding these transformative rules. Firstly, transformative rules are different from those 'revolutionary' substantive legal rules that prescribe change in the conduct of States, for example, the prohibition of the threat or use of force, the principle of self-determination, or international human rights obligations, which are often cited as examples for progress *in* international law. Transformative rules allow for structural change within the legal system itself and thus for progress *through* international law. Secondly, transformative rules are not inherently 'progressive' rules. Rather, they may also be used to change the existing legal framework in a way that many commentators would consider to be 'regressive', e. g., by withdrawing from international institutions which serve the maintenance of peace and security, or by lowering the standard of human rights protection. Bearing these two considerations in mind, the way in which progress is ensured in international law depends on a balance between transformative rules on the one hand, and another, often neglected category of rules, which may be termed 'preservative rules'.

2. Preservative Rules: Progress Despite International Law?

It often seems that the vast majority of rules in international law do not enable, but rather inhibit change. Indeed, in its decision in the *Grisbådarna* case, the arbitral tribunal even implied – as the IDI recently affirmed[34] – the existence of a general principle of *quieta non movere*. Despite this sweeping statement, the arbitral tribunal neither substantiated this *dictum* any further nor did the alleged principle gain much traction in later decisions by interna-

34 See Institut de Droit International (n. 2).

tional courts and tribunals despite being occasionally relied upon by parties in territorial or maritime boundary disputes.[35]

Indeed, the extent to which the preservation of the *status quo* translates into one or more binding rules of international law is unclear. Twenty-five years after the *Grisbådarna* case, Kunz observed that '[t]here have been attempts to base this preservation of the *status quo* upon principles; but these principles were never more than maxims for political action; they were never rules of international law'.[36] Similarly, while attesting international law a '*status quo* orientation',[37] Wasum-Rainer and Wasielewski argue that the preservation of the *status quo* 'embodies neither a general principle of law […], nor an autonomous rule or principle of international law for the government of international relations […]'.[38] Indeed, on a literal reading of the *Grisbådarna* award, *quieta non movere* has often been understood – and criticised – as conferring legal protection to any *status quo* 'that actually exists and has existed for a long time', not limited to the *status quo* arising from legal facts ('legal *status quo*'). However, even critics of the maxim have pointed to a narrower understanding arguing that '*Quieta* implies the existence of a peaceful and generally accepted situation created without real or possible infringements of the international legal order contemporaneous with its establishment'.[39] One may add, as an additional requirement, that the 'generally accepted situation' must have been capable of instilling a belief or expectation that the existence of the *status quo* arises from an existing right or obligation (as was the case in the *Grisbådarna* case, where Sweden had performed various acts in the Grisbådarna region, especially of late, owing to her conviction that these regions were Swedish without meeting any protest of Norway).

Understood in this narrower sense, the idea of *quieta non movere* underlies or is closely related to various rules in international law, such as the important quasi-precedential role of judicial decisions in the identification of international law,[40] the power of international courts and tribunals to indicate

35 See also Dissenting Opinion of Judge Torres Bernádez (n. 3), para. 19.

36 Josef L Kunz, 'The Law of Nations, Static and Dynamic', AJIL 27 (1933), 628-650 (631).

37 Susanne Wasum-Rainer and Lukas Wasielewski, 'Status quo' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2021), para. 4.

38 Wasum-Rainer and Wasielewski (n. 37), para. 1.

39 See Judge Torres Bernádez (n. 3), para. 21.

40 See also Institut de Droit International (n. 2), 69; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), preliminary objections, judgment of 18 November 2008, ICJ Reports 2008, 412, para. 53: 'To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.'

provisional measures to preserve the *status quo pendente lite* of the rights of the Parties before the rendering of the final decision, the principles of *res judicata* and *estoppel*, and the concept of acquiescence. Mirroring the three characteristics of transformative rules, these preservative rules share three features. First, they have the methodological potential or claim to identify, protect, or entrench the legal *status quo*. Second, they justify any such claim or effect based on the important role of predictability and legal certainty. Third, these rules do not distance themselves from the past, but rather associate themselves with and build on it.

In contrast to transformative rules, the rules that aim at preserving the legal *status quo* do not fit squarely with the definition of progress as 'change for the better'. Rather, they appear to be progress' natural archenemy. This may be an important reason why this type of rules has so far received only little attention in scholarship on progress in international law. However, given their function of maintaining legal certainty and predictability in the international legal order, they play an essential role in creating the necessary trust inherent in the 'leap of faith' required for any progress.

It is thus through the interaction of transformative and preservative rules that international law allows for changes in the legal framework towards the 'common ends' set out in Article 1 and the Preamble of the UNCH without losing the regulatory function of the law (which would usually be the case in situations of a revolution).[41] The precise nature of this interaction and, in particular, the role of the still largely underexplored preservative rules therefore deserves special attention. This will be analysed using three examples from the case law of international courts and tribunals.

IV. The Case Law of Courts and Tribunals: Progress Despite or Through Preservation?

Rules that identify, protect, and entrench the legal *status quo* play a central role in the jurisprudence of international courts and tribunals. To ensure a high degree of representativeness, the following three case studies have been carefully selected so as to cover different types of preservative rules in a wide range of subject-matters (boundary disputes, conflicts about the equal distribution of natural resources, and international human rights law), different

41 See also Kunz 'The Law of Nations' (n. 36), 631: 'The change here will not be the outcome of a revolution, but of an evolution, brought about in [sic!] virtue of the juridical order itself.'

geographic regions, and against the background of different historical contexts. The three examples illustrate that, at closer inspection, it is not easy to tell whether such preservative rules inhibit or rather enable progress, i. e., a 'change for the better'.

1. Preservation of the Stability of Boundaries: *Uti Possidetis*

The first example concerns the concept of '*uti possidetis juris*' which has been described as '[t]he most visible and explicit emanation of *status quo*' in international law.[42] It is resorted to in order to preserve the stability of existing territorial and maritime boundaries facing pressure for change arising from decolonisation, from the dissolution of States, secession, and, more recently, from sea-level rise. After setting out the normative content and development of *uti possidetis* that justify its qualification as a preservative rule (a), this section explains how *uti possidetis* contributes to progress in the context of decolonisation (b) and addresses the limits of *uti possidetis*'s progressive potential (c).

a) *Uti Possidetis*: Mission Creep of a Roman Concept?

The concept of *uti possidetis* originates in Roman property law (*uti possidetis, ita possideatis*: 'as you possess, so shall you possess').[43] As broad as this maxim may sound, its original use in Roman law was much more limited than what the development of *uti possidetis* in international law suggests.[44]

In international law, the concept of *uti possidetis* 'provides that states emerging from the dissolution of a larger entity inherit as their borders those administrative boundaries which were in place at the time of their independence'.[45] In other words, *uti possidetis* preserves pre-existing boundaries. It does so, as the ICJ Chamber vividly pointed out in its 1986 judgment in the

42 Wasum-Rainer and Wasielewski (n. 37), para. 5.

43 Giuseppe Nesi, 'Uti Possidetis Doctrine' in: Anne Peters and Rüdiger Wolfrum (eds), *MPEPIL* (online edn, Oxford University Press 2018), para. 1.

44 In Roman law, *uti possidetis* did not denote a definitive status, but rather provided for a procedural and provisional shift of the burden of proof or a mechanism of standing in property disputes (see Anne Peters, 'The Principle of *Uti Possidetis Juris*: How Relevant is it for Issues of Secession?' in: Christian Walter and Antje von Ungern-Sternberg (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014), 95-137 (97 et seq.).

45 James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019), 224.

Frontier Dispute case (Burkina Faso/Mali), by 'freez[ing] the territorial title; it stops the clock […]' upon their independence.[46] Such 'freezing' of the territorial title serves to preserve 'the territorial heritage of new States at the moment of independence'.[47] In this sense, '*uti possidetis juris* is essentially a retrospective principle'.[48]

Over the past decades, the scope of *uti possidetis* has undergone a significant expansion. In a first expansion of its territorial scope, the ICJ declared the applicability of *uti possidetis*, which until then had been associated with territorial disputes arising from decolonisation in Latin America in the 19th century, to the African continent in its 1986 Judgment in the *Frontier Dispute (Burkina Faso/Mali)* case. The Court justified the transposition of that principle by its nature as 'a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs'.[49]

The transposition of the concept from Latin America to Africa was followed by several expansions of its original scope *ratione materiae*. For one, it was eventually considered to be relevant in the context of maritime disputes between former colonies.[50] Moreover, the concept of *uti possidetis* was resorted to outside the context of decolonisation in the European region, notably with respect to dissolutions and secessions of States following the fall of the Iron Curtain.[51] The substantial expansion has been recently confirmed by the ILC Study Group on Sea-level rise, where the principle of the intangibility of boundaries is 'derived' from and 'developed' by the 'well-established principle' of *uti possidetis*[52] and used in support of preserving the baselines of States whose territory recedes due to sea-level rise.[53]

---

46 ICJ, *Frontier Dispute* (Burkina Faso/Mali), judgment of 22 December 1986, ICJ Reports 1986, 554, para. 30. See also ICJ, *Frontier Dispute* (Benin/Niger), judgment of 12 July 2005, ICJ Reports 2005, 90, para. 25.

47 Malcolm N. Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', BYIL 67 (1996), 75-154 (75 et seq).

48 ICJ, *Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras: Nicaragua intervening), judgement of 11 September 1992, ICJ Reports 1992, 351, para. 43.

49 ICJ, *Land, Island and Maritime Frontier Dispute* (n. 48).

50 ICJ, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean* Sea (Nicaragua v. Honduras), judgment of 8 October 2007, ICJ Reports 2007, 659, paras 232 and 234.

51 Badinter Commission Opinion No. 3 (11 January 1992), para. 3, third principle, ILM 31 (1992), 1488-1526 (1500); PCA, *Croatia* v. *Slovenia*, final Award of 29 July 2017, case no. 2012-04, para. 256.

52 ILC, 'Sea Level Rise in Relation to International Law Additional Paper to the First Issues Paper (2020)', Bogdan Aurescu and Nilüfer Oral (2023), A/CN.4/761, para. 101.

53 ILC, 'Sea Level Rise (n. 52), para. 111.

b) Progress and *Uti Possidetis*: the Right to Self-Determination

Paradoxically, *uti possidetis*' effect of 'stop[ping] the clock' can be understood as contributing to progress in international law. Taking the origin of *uti possidetis* in Latin America, for example, recourse to *uti possidetis* served to overcome the *terra nullius* doctrine and to protect the sovereignty and territorial integrity of the new republics from territorial claims by European colonial powers.[54] Outside the context of decolonisation, *uti possidetis* contributes to protecting newly established States from territorial claims based on abusive invocations of the principle of self-determination by powerful neighbours.[55] Moreover, the way in which *uti possidetis* has been used to support novel legal approaches, notably in response to sea-level rise could be seen as enabling progress in international law.[56]

This is not to deny the tension between conserving and progressive potential inherent in *uti possidetis*. What is being preserved here is, after all, the legal *status quo* as derived from 'colonial-era legal instruments'.[57] That *uti possidetis* may represent an obstacle to 'progress' in international law has been recognised by the ICJ in its judgment in the *Burkina Faso/Mali* case, in which the Court

> 'wondered how the time-hallowed principle [of *uti possidetis*] has been able to withstand the new approaches to international law as expressed in Africa, where the successive attainment of independence and the emergence of new States have been accompanied by a certain questioning of traditional international law. At first sight this principle conflicts outright with another one, the right of peoples to self-determination.'[58]

In order to avoid a conflict between these two principles, the Court rather interpreted the principle of self-determination in harmony with – i. e., as not deviating from – the principle of *uti possidetis*:

---

54 *Affaire des frontières Colombo-vénézuéliennes* (Colombie c. Vénézuela), Award of 24 March 1922, RIAA, vol. I, 223-298, (228).

55 Júlia Miklasová, 'Dissolution of the Soviet Union Thirty Years On: Re-Appraisal of the Relevance of the Principle of Uti Possidetis Iuris' in: Jorge E. Viñuales, Andrew Clapham, Laurence Boisson de Chazournes and Mamadou Hébié (eds), *The International Legal Order in the XXIst Century: Essays in Honour of Professor Marcelo Gustavo Kohen* (Brill 2023), 105-124 (124); Giuseppe Nesi, 'A Few Reflections About uti possidetis iuris and Self-Determination Between the Twentieth and the Twenty-First Centuries' in: Jorge E. Viñuales, Andrew Clapham, Laurence Boisson de Chazournes and Mamadou Hébié (eds), *The International Legal Order in the XXIst Century: Essays in Honour of Professor Marcelo Gustavo Kohen* (Brill 2023), 197-209 (209).

56 See on this Frances Anggadi, 'What States Say and Do About Legal Stability and Maritime Zones, and Why It Matters', ICLQ 71 (2022), 767-798 (771-772).

57 David Hongler, 'The International Court of Justice and Territorial Disputes: an Updated Systematization', Max Planck UNYB 26 (2023), 250-281 (265).

58 ICJ, *Frontier Dispute* (Burkina Faso/Mali) (n. 46), para. 25.

 DOI 10.17104/0044-2348-2024-4-925

> 'The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples. Thus the principle of *uti possidetis* has kept its place among the most important legal principles, despite the apparent contradiction which explained its coexistence alongside the new norms implied.'

According to the Court's understanding, a conflict between these two legal principles simply does not arise. Instead, the Court basically understood the right to self-determination, the 'new norm' and the preservative rule of *uti possidetis*, as two sides of the same coin for achieving progress in the form of independence from colonial rule. In other words, *uti possidetis* has been seen as a prerequisite for progress; as a rule, that enables rather than hinders progress.

However, the relationship between *uti possidetis* and other rules under international law remains controversial. At the core of these controversies lies the question whether its substantive and territorial expansion has led to a symbiotic or antagonistic relationship of *uti possidetis* and the right to self-determination. Commenting on the Court's approach in the 1986 *Frontier Dispute* case, Tomuschat concluded that '*[u]ti possidetis* has thus become the leading maxim for the territorial delimitation of Africa, relegating self-determination in that respect to an insignificant, inferior place'.[59] While this assessment seems to be somewhat harsh with respect to the harmonious interpretation of the two principles by the Court in 1986, Tomuschat's remark is more understandable when considering the hierarchical approach taken by the Badinter Commission.[60] Stating that 'whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise',[61] the statement raises the question to what extent the principle of *uti possidetis* affects the legality of State-creation. While the Badinter Commission's approach seems to suggest that *uti possidetis* prohibits non-consensual State creation, the Court's 1986 Judgment rather indicates that *uti possidetis* simply does not regulate the legality of State creation. As succinctly put by Kohen, '[s]elf-determination addresses the right to create a State (or to freely choose a specific connection with an

59 Christian Tomuschat, 'Secession and Self-Determination' in: Marcelo G. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge University Press 2006), 23-45 (27).

60 Peters (n. 44), 126.

61 Badinter Commission, Opinion No. 2 of the Arbitration Commission of the Peace Conference on Yugoslavia, ILR 92 (1993), 167-169 (168).

existing one), while *uti possidetis juris* defines the territorial extension of the new entity'.[62]

However, uncertainties about the scope and effect of *uti possidetis* and its relationship with the principle of self-determination persist. They became apparent in the proceedings leading to the ICJ's *Chagos* Advisory Opinion of 2019, in which several States invoked the principle of *uti possidetis* in support of either the legality of the detachment of the Chagos Archipelago from Mauritius[63] or its illegality.[64] The Court did not make any explicit reference to *uti possidetis*. However, it stated that 'the right to self-determination of the people concerned is defined by reference to the entirety of a non-self-governing territory' and that 'any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination'.[65] According to Nesi, the Court's statements imply that '*uti possidetis* creates a link between the right to self-determination of people under colonial domination and the respect for territorial integrity of a State arising out of decolonization'.[66] Hilpold even interprets the Court's approach as the application of a 'special, qualified *uti possidetis* principle'.[67]

However, it seems that this understanding comes close to conflating two related, but distinct legal principles. The difference between the two has been made clear by Judge Sebutinde in her separate opinion distinguishing '*uti possidetis* […] as one means of identifying the self-determination unit in the context of decolonization […] from the territorial integrity component of self-determination'.[68] *Uti possidetis* thus neither limits nor strengthens any territorial claims arising from the right of self-determination, but rather

62 See also Marcelo G. Kohen, 'Self-Determination' in: Jorge E. Viñuales (ed.), *The UN Friendly Relations Declaration at 50 An Assessment of the Fundamental Principles of International Law* (Cambridge University Press 2020), 133-165 (155).

63 ICJ, *Legal Consequences of the Seperation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, 95: Written Statement of the UK, 15 February 2018, paras 8.29 and 8.30. See also the statement made by the UK during the oral proceedings: Verbatim Record CR 2018/21, 42-43, para. 7, 47, para. 20, 52, para. 32 (Webb).

64 ICJ, *Legal Consequences of the Seperation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Mauritius, 1 March 2018, para. 6.58, 699; statement during oral proceedings by Nigeria CR 2018/25, 54-55, paras 17-19 (Apata); Statement of South Africa, StZA, paras 70-75; statement during oral proceedings by South Africa CR 2018/22, 14, para. 23.3. (de Wet).

65 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* Advisory Opinion of 25 February 2019, ICJ Reports 2019, 95, para. 160.

66 Nesi (n. 55), 202-203.

67 Peter Hilpold, '"Humanizing" the Law of Self-Determination – the Chagos Island Case', Nord. J. Int'l L. 91 (2022), 189-215 (202).

68 Separate Opinion of Judge Sebutinde, ICJ, *Chagos Advisory Opinion* (n. 65), para. 36.

provides a method for the identification of their scope. In some cases, as in the *Chagos* case, the colonial boundaries preserved by *uti possidetis* might coincide with the claim articulated by the self-determination unit. In these situations, *uti possidetis* and the principle of self-determination might indeed go hand in hand in furthering the territorial claim. In other cases, however, where the territorial claim by the self-determination unit goes beyond the colonial boundaries, *uti possidetis* may even constrain such a claim.

c) Progress After Preservation: Limits to *Uti Possidetis*

Over the last four decades, the concept of *uti possidetis* has been elevated from a method to draw the boundaries of newly independent States in Latin America to a variant of the ostensible principle of the intangibility of boundaries, arguably reflecting both customary international law as well as a general principle of law (GPL).[69] Its development suggests that it has developed from a default method to a universally binding *panacea* for disputes arising from pressure on boundary regimes. However, the 'progressive' potential of *uti possidetis* is not to be taken for granted, and might be better preserved if the following four aspects were considered.

First, the legal nature of *uti possidetis* under international law remains unclear. In all cases before the ICJ in which recourse was made to *uti possidetis*, the Parties had explicitly referred and thus consented to its application.[70] To the extent that such consent is absent, its application would need to be based on a more careful assessment by the international court or tribunal of its binding character and its precise content under general international law. This concerns particularly situations outside the context of decolonisation and where it is used – rather creatively – to respond to Sea-level rise.[71]

Second, it is unclear whether different regional understandings of *uti possidetis* exist.[72] The way in which the Latin American concept of *uti*

69 ILC, 'Sea Level Rise (n. 52), para. 111.

70 See ICJ *Frontier Dispute* (Burkina Faso/Mali) (n. 46), para. 20; ICJ, *Land, Island and Maritime Frontier Dispute* (n. 48), para. 40; ICJ *Frontier Dispute* (Benin/Niger) (n. 46), paras 23 and 45; ICJ *Territorial and Maritime Dispute* (Nicaragua v. Honduras) (n. 50), para. 145; ICJ, *Frontier Dispute* (Burkina Faso/Niger), judgment of 16 April 2013, ICJ Reports 2013, 44, para. 63.

71 See, for example, Report of the International Law Commission (ILC) (2024), UN doc A/78/10, Chapter VIII, Sea-level rise in relations to international law, paras 166-169 on the application of *uti possidetis* to maritime boundaries in the context of sea-level rise.

72 Dirdeiry M. Ahmed, *Boundaries and Secession in Africa and International Law: Challenging Uti Possidetis* (Cambridge University Press 2015), 47-74; Vanshaj R. Jain, 'Broken Boundaries: Border and Identity Formation in Postcolonial Punjab', Asian Journal of International Law 10 (2020), 261-292.

possidetis has been transposed to the African continent and used synonymously with the alleged 'principle of intangibility of frontiers' and 'principle of respect of borders existing on achievement of independence' has been severely criticised.[73] Thus, the application of this concept must be applied in accordance with any potential regional modification.

In the absence of a more specific regional variant of *uti possidetis*, thirdly, a narrow understanding of *uti possidetis* seems preferable. This entails that *uti possidetis* should not be conflated with substantive principles of international law. Contrary to some suggestions, *uti possidetis* should not be understood as establishing title to territory, but rather as presupposing such title and regulating its extension.[74]

Fourthly, in certain circumstances, the course of the boundary indicated by *uti possidetis* should not be considered to be a definitive settlement, but rather as a provisional arrangement or 'holding pattern',[75] until a more equitable and final settlement of the course of the boundary has been found by recourse to peaceful dispute settlement. This understanding would not only re-align the concept of *uti possidetis* with its Roman law roots, according to which the concept merely provided for a provisional shift of the burden of proof or a mechanism of standing – and not a definitive settlement – in property disputes.[76] It would also respond to the criticism of those who have argued that too rigid an application of *uti possidetis* perpetuates infringements of the rights of minorities and indigenous peoples stemming from arbitrarily drawn boundaries.[77]

As a concept that meets the characteristics of a preservative rule, *uti possidetis* has thus contributed to the realisation of self-determination in the context of decolonisation. At the same time, the preceding analysis also demonstrated the tension between the conservative and progressive potential inherent in *uti possidetis.* The realisation of its progressive potential depends on a limited and restrained application of *uti possidetis*.

73 Dissenting Opinion of Judge Yusuf, ICJ *Frontier Dispute* (Burkina Faso/Niger) (n. 70), 134-147.

74 See also Peters (n. 44), 101-102.

75 Dissenting Opinion of Judge Yusuf, ICJ *Frontier Dispute* (Burkina Faso/Niger) (n. 70), 139 and 143.

76 See n. 44.

77 See Steven R. Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of New States', AJIL 90 (1996), 590-624 (691); Daniel Luker, 'On the Borders of Justice: An Examination and Possible Solution to the Doctrine of Uti Possidetis', in: Russell A. Miller and Rebecca M. Bratspies (eds), *Progress in International Law* (Brill 2008), 151-170 (168-169).

2. Protection of Transboundary Rights of Non-State Actors

While *uti possidetis* may represent the 'most visible and explicit emanation of *status quo*' in international law,[78] it was the protection of transboundary rights of non-State actors that motivated the tribunal in the *Grisbådarna* case to articulate the principle of *quieta non movere*.[79]

The second category of preservative rules examined in this article thus concerns those rules which protect transboundary rights of non-State actors from being superseded and extinguished by multilateral agreements that pursue a community interest through regulatory harmonisation, such as UNCLOS.[80] This section begins by describing the wide range of concepts that serve to protect legitimate expectations arising from a long-standing practice of non-State actors qualifying these concepts as preservative rules (a). It then describes how these preservative rules interact with treaties that seek to achieve progress in the equal distribution of natural resources (b) before describing three possible ways forward on how to strike a balance between the recognition of these rights and progress in the form of a harmonious legal regime of the law of the sea (c).

a) Transboundary Rights of Non-State Actors: Between Private Rights and Rights of the State?

The customary principle of permanent sovereignty over natural resources entails that a State is generally free to dispose over its territory and the natural resources located therein, including by entering into agreements with other States.[81] At the same time, international law knows of a wide range of concepts that serve to protect transboundary rights of non-State actors from being affected by such agreements, such as rights of passage, rights to fish, and rights of access to certain culturally significant sites.

Some of these concepts protect legitimate expectations of States ('rights of the State') which are invoked by the respective State as their own right, such

78 Wasum-Rainer and Wasielewski (n. 37), para. 5.

79 PCA, *Grisbådarna* (n. 1), 161.

80 United Nations Convention on the Law of the Sea of 16 November 1994, 1833 UNTS 3.

81 ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), merits, judgment of 19 December 2005, ICJ. Reports 2005, 168, para. 244.

as local customary international law,[82] historic rights[83] and – either separately or as a component of the concept of historic rights – acquiescence[84]. Others protect legitimate expectations of non-States actors ('private rights') which may be invoked by a State on behalf of its nationals, such as the concept of vested or acquired rights,[85] traditional or artisanal rights,[86] and the rights of indigenous peoples.[87]

These concepts all share characteristics that qualify them as preservative rules: they serve to identify, protect, or entrench the *status quo* based on the respect for legitimate expectations arising from a long-standing practice of non-State actors. Their normative commonalities may be the reason why parties often invoke these concepts in parallel emphasising that a distinction between them 'matters little'[88] or 'is of little consequence'.[89]

However, for the present debate this distinction appears relevant. In contrast to transboundary rights invoked by the State in its own right, the

82 ICJ, *Right of Passage over Indian Territory* (Portugal v. India), merits, judgement of 12 April 1960, ICJ Reports 1960, 6, 40; ICJ, *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), judgment of 13 July 2009, ICJ Reports 2009, 213, para. 141.

83 *Territorial Sovereignty and Scope of the Dispute* (Eritrea/Yemen), Award of 9 October 1998, RIAA, Vol. XXII, para. 126; PCA, *South China Sea Arbitration*, Award of 12 July 2016, PCA Case No. 2013-19, para. 265.

84 PCA, *South China Sea Award* (n. 83), para. 265 describing 'historic fishing rights' as being based on 'the continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States'.

85 Already the Permanent Court had determined that 'the principle of respect for vested rights' is 'a principle which […] forms part of generally accepted international law' (PCIJ, *Certain German Interests in Polish Upper Silesia*, merits, judgment no. 7, 1926, PCIJ, Series A, No. 7, 42).

86 Clive R. Symmons, *Historic Waters and Historic Rights in the Law of the Sea. A Modern Reappraisal* (2nd edn, Brill 2019), 27: 'rather than belonging to a State (as do historic rights *stricto sensu*), traditional rights belong to individuals.', 1063; See also: *Delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army*, Award of 22 July 2009, UNRIAA, Vol. XXX, para. 753 ('the transfer of sovereignty in the context of boundary delimitation should not be construed to extinguish traditional rights to the use of land (or maritime resources)'; ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), declaration of Judge Xue, judgment of 21 April 2022, para. 2: 'Traditional fishing rights are acquired from a long process of historical consolidation of socio-economic conditions and conduct, which reflects certain cultural patterns, local customs and traditions.' and para. 10: 'such rights are derived from long, continuous and peaceful exercise of certain practices.'

87 See e. g., Article 8 of the *Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals* (United Kingdom v United States), award of 15 August 1893, RIAA, Vol. XXVIII, 271.

88 Colombia in ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), judgment of 21 April 2022, para. 202.

89 Costa Rica in *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua) (CR 2009/3, 62, para. 41 (Kohen)).

 DOI 10.17104/0044-2348-2024-4-925

protection of rights of the individual, as indicated by the Preamble and Article 1(3) of the UNCH, is often associated with 'progress' in international law. This means that in situations where the preservation of a 'private right' collides with the pursuit of a 'progressive' aim, it is less clear whether such preservation indeed inhibits progress. A concrete example for this dilemma is illustrated by the conflict between such transboundary rights and multilateral agreements aimed at legal harmonisation.

b) Progress and the Protection of Rights of Non-State Actors: the EEZ

The conflict between these two sets of legal rules, both of which are commonly considered to be progressive achievements in international law, is illustrated by the controversy over the continued existence of transboundary rights of non-state actors in the Exclusive Economic Zone (EEZ) of States as enshrined in UNCLOS. UNLCOS 'represents a monumental achievement of the international community, second only to the charter of the United Nations.'[90] One of its major successes and 'real inventions'[91] is the development of the EEZ. This '*sui generis*' maritime zone 'confers exclusively on the coastal State the sovereign rights of exploration, exploitation, conservation and management of natural resources within 200 nautical miles of its coast'.[92] Yet, to what extent does this regime, widely hailed as progress in the law of the sea, extinguish the rights of nationals of other States to exploit natural resources therein?

In contrast to other maritime zones,[93] UNCLOS neither mentions nor seems to leave any room for 'traditional rights' in relation to the EEZ. Rather, Article 62(3) UNCLOS, which requires the coastal State to 'take into account […] the need to minimize economic dislocation in States whose nationals have habitually fished in the zone', can be understood as supporting an extinction of the rights of nationals of third States as this provision would otherwise be superfluous.[94]

---

90 Tommy Koh, 'A Constitution for the Oceans' in: *The Law of the Sea: United Nations Convention on the Law of the Sea* (United Nations 1983), xxxiii.

91 Alexander Proelss, 'Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited', Ocean Yearbook 26 (2012), 87-112 (87).

92 ICJ, Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia), merits, judgment of 13 July 2023, ICJ Reports 2023, para. 69.

93 See Article 2(3) UNCLOS regarding the territorial sea and Article 47(6) and 51 UNCLOS regarding archipelagic waters.

94 See also Valentin Schatz, 'The International Legal Framework for Post-Brexit EEZ Fisheries Access between the United Kingdom and the European Union', Int'l J. Marine & Coastal L. 35 (2020), 133-162 (150 f.).

Being confronted with the question as to whether traditional fishing rights of nationals of one State survive in the territorial sea and in the EEZ of another State, the arbitral tribunal in its 2016 Award on *The South China Sea Arbitration* carefully distinguished between 'historic rights' of the State (China)[95] and 'traditional fishing rights' as 'private rights'[96]. With respect to the alleged 'historic rights' of China, the Tribunal firmly rejected the claim that these survived upon adoption of UNCLOS. It pointed out that

> '[t]hrough the Convention, China gained additional rights in the areas adjacent to its coasts that became part of its exclusive economic zone […] It necessarily follows, however, that China also relinquished the rights it may have held in the waters allocated by the Convention to the exclusive economic zones of other States.'[97]

Regarding 'traditional fishing rights', the Tribunal recognised that 'traditional livelihoods and cultural patterns are fragile in the face of development and modern ideas of interstate relations and warrant particular protection'.[98] However, while it concluded that within the territorial sea 'established traditional fishing rights remain protected by international law',[99] it did 'not consider it possible that the drafters of the Convention intended for traditional or artisanal fishing rights to survive the introduction of the exclusive economic zone'.[100]

The Tribunal's reasoning met with criticism both regarding its treatment of 'historic rights' of States as well as 'traditional fishing rights'. This criticism concerned the way in which the Tribunal dealt with case law (notably the *Eritrea/Yemen* Award of 1999) recognising the survival of transboundary rights of non-State actors facing the adoption of bilateral and multilateral agreements, the somewhat counter-intuitive distinction between the territorial sea and the EEZ regarding 'traditional fishing rights', and its interpretation of UNCLOS.[101] Notably, one commentator referred to the *quieta non movere* principle contained in the *Grisbådarna* case noting that 'the Tribunal failed to consider the nature and rationale of historic rights that are linked to

95 PCA, *South China Sea Arbitration* (n. 83), paras 235-262.
96 PCA, *South China Sea Arbitration* (n. 83), para. 798.
97 PCA, *South China Sea Arbitration* (n. 83), para. 257.
98 PCA, *South China Sea Arbitration* (n. 83), para. 794.
99 PCA, *South China Sea Arbitration* (n. 83), para. 803.
100 PCA, *South China Sea Arbitration* (n. 83), para. 803.
101 See e. g., Sophia Kopela, 'Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Aarbitration', Ocean Development & International Law 48 (2017), 181-207.

 DOI 10.17104/0044-2348-2024-4-925

the nondisturbance and preservation of a continuous, long-established, and accepted situation with the view to providing stability'.[102]

Indeed, it is unclear to what extent the *South China Sea* Award categorically excluded once and for all the recognition of the existence of transboundary rights of non-State actors in the EEZ of another State.[103] The 2016 Award does not preclude considering transboundary rights of non-State actors if these are based on legal developments after the adoption of UNCLOS, notably the increased recognition of rights of indigenous peoples[104] or on specific conduct involving the States concerned after the adoption of UNCLOS giving rise to legitimate expectations that such rights would persist, i. e., by way of local custom, acquiescence or by way of a unilateral act.

Finally, it remains to be seen to what extent the Tribunal's approach is shared by other international courts and tribunals. In its 2022 Judgment in the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* case – six years after the arbitral award – the ICJ left this question open. Dismissing Colombia's claim to traditional fishing rights for lack of evidence, the Court rather stated that it 'need not examine the Parties' arguments in respect of whether or in which circumstances the traditional fishing rights of a particular community can survive the establishment of the exclusive economic zone of another State'.[105]

c) Progress Alongside Preservation: Risks of Fragmentation and Circumvention

It is not difficult to see that the carefully negotiated compromise reflected in the EEZ regime of UNCLOS could be undermined by overly permissive respect for the transboundary rights of non-State actors. These risks include circumvention by States invoking the rights of non-State actors as a pretext for encroaching on the sovereign rights of other States. Recognition of local variations may also lead to fragmentation of a regime that was explicitly intended to be comprehensive.

Thus, in order to strike a balance between the recognition of these rights and progress in the form of a harmonious regime of the law of the sea, three

102 Kopela (n. 101), 185.

103 But see Symmons (n. 86), 52-55: 'In this writer's view, […], the clear aim (as the legislative history of this provision evidences) was to eliminate all historically-claimed rights per se in what is now another State's EEZ.'.

104 See PCA, *South China Sea Arbitration* (n. 83), paras 273-275. See on this: Dissenting Opinion of Judge *ad hoc* McRae, ICJ, *Sovereign Rights and Maritime Spaces* (n. 88), paras 50-70.

105 ICJ, *Sovereign Rights and Maritime Spaces* (n. 88), para. 231.

options could be considered. First, recognition of these transboundary rights could be conditioned on the object and purpose of the EEZ regime, i. e., the allocation of exclusive sovereign rights to the coastal State. To the extent that the rights of non-State actors qualify as 'private rights' whose scope is narrowly defined (i. e., limited to 'artisanal' or 'traditional' fishing as opposed to industrial fishing), it could be argued that they do not infringe on – and thus can coexist with – the sovereign rights of the coastal State. Second, recognition of these rights could be based on subsequent legal developments, in light of which the provisions regarding the EEZ regime would need to be interpreted. However, both options require parties to define the legal basis of their claims with respect to transboundary rights of non-State actors more precisely than they have in the past. Third, States should consider negotiating agreements regarding the access of traditional communities to natural resources located in another State's EEZ as was suggested by the ICJ in the 2022 Judgment.[106]

The preceding section demonstrated that concepts that protect legitimate expectations arising from the transboundary conduct of non-State actors qualify as preservative rules. Where the preservation of a private right collides with the pursuit of a progressive aim by way of a treaty, it is less clear whether such preservation inhibits or promotes progress in the just distribution of natural resources. To realise their progressive potential, a precise distinction between the different preservative rules protecting the rights of non-State actors is crucial.

3. Entrenchment of the Legal *Acquis* Through Unwritten International Law

The third example concerns the extent to which unwritten international law, which includes both customary international law and GPL,[107] helps to preserve the progress originally achieved in the form of treaty obligations

106 ICJ, *Sovereign Rights and Maritime Spaces* (n. 88), para. 232.

107 See for this understanding of unwritten international law: Statement of H. E. Abdulqawi Ahmed Yusuf, President of the International Court of Justice before the 6th Committee of the UN General Assembly, New York, 1 November 2019, available at: <https://icj-cij.org/sites/default/files/press-releases/0/000-20191101-STA-01-00-EN.pdf>, last access 17 January 2025, para. 5; *Case concerning the Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, Decision of 31 July 1989, UNRIAA, vol. XX, 119-213, at 149, para. 79. See on the related and equally important role of jus cogens the work of the ILC (Draft conclusions on 'Peremptory norms of general international law (*jus cogens*)' (ILC Report 2022, Chapter IV, UN doc A/77/10) and Dire Tladi, 'Between Stability and Responsiveness in International Law – The Example of Jus Cogens', ESIL Reflection 13 (2024).

over time. After introducing the term 'unwritten international law' as an umbrella category for customary international law and GPL and explaining the characteristics that qualify them as preservative rules (a), this section demonstrates how those rules serve to entrench respect for human rights by ensuring their validity independently of the continued existence of the treaties that established them at the international level (b). It then addresses the challenges for their progressive potential arising from unclear criteria for the identification of their regional variants (c).

a) Unwritten International Law: Irreconcilability of 'Generality' and 'Trailblazing'?

Be it the adoption of the Covenant of the League of Nations,[108] the United Nations Charter, the human rights covenants,[109] UNCLOS, the Rome Statute[110] and, more recently, the BBNJ Agreement[111]: many of the 'great leaps' in international law have taken the form of a treaty or were 'defin[ed]'[112] by the adoption of United Nations General Assembly (UNGA) resolutions.

In contrast, unwritten international law is not the means of first choice to respond to novel challenges in international law. Rather, it is often seen as lagging behind any 'progress'. This is because, according to the traditional rules for determining custom and general principles of law, its formation is slow, gradual and cumbersome. Indeed, the rules for identifying unwritten international law meet all three criteria of preservative rules: they serve to identify, protect, or entrench the legal *status quo* based on the respect for legitimate expectations building on the past conduct of States.

Modern approaches for identifying unwritten law, notably 'instant' custom, remain controversial and were largely rejected by International Law Commission (ILC) members and States in the 6th Committee in the debates leading to the adoption of the ILC's conclusions on the 'Identification of

108 Covenant of the League of Nations of 28 June 1919.

109 E. g., International Covenant on Civil and Political Rights of 19 December 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights of 16 December 1966, 993 UNTS 3.

110 Rome Statute of the International Criminal Court of 17 July 1998, 2187 UNTS 3854.

111 Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction of 19 June 2023.

112 See ICJ, *Chagos Advisory Opinion* (n. 65), para. 150: 'The adoption of resolution 1514 (XV) of 14 December 1960 represents a defining moment in the consolidation of State practice on decolonization.'

customary international law' in 2018.[113] While it is too early to tell, the ILC's current work on 'General principles of law' and the Commission's interplay with States in the 6th Committee do not suggest that this third category of law will find acceptance as a means to circumvent the requirements for custom, i. e. as 'custom lite'.[114]

Yet, even if what the ICJ in its *North Sea Continental Shelf* cases called 'time element'[115] is interpreted liberally, both forms of unwritten international law are defined by their 'generality', i. e., by an 'extensive and virtually uniform' State practice (customary international law)[116] and 'wide and representative' recognition (GPL)[117]. However, the requirement of 'generality' barely permits 'trailblazing' rules, which are defined by their unprecedented and – at least at first – isolated nature. The only exception to this might be regional customary international law and GPL with a regional scope of application. However, State practice applying these regional variants of unwritten law is rather sparse. Yet, this may change in light of multiple withdrawals from regional treaties.

b) Entrenchment of Progress Through Unwritten International Law: Treaty Withdrawal

One of the most common associations with progress in and through international law is the expansion of human rights guarantees at the international level. Prominently reflected in Article 1(3) UNCH ('respect for human rights') as one of the purposes of the United Nations, more and more regional treaties have been concluded to ensure the recognition and protection of international human rights since 1945. Still, many of these treaties expressly provide for the possibility of denunciation or withdrawal.[118] How-

113 See on this: Omri Sender and Michael Wood, 'Between "Time Immemorial" and "Instant Custom": The Time Element in Customary International Law', Grotiana 42 (2021), 229-251 (240).

114 Michael Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' ICLR 21 (2019), 307-324 (321) citing Jan Klabbers, *International Law* (Cambridge University Press 2017), 38.

115 ICJ, *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark), judgment of 20 February 1969, ICJ Reports 1969, para. 74.

116 ICJ, *North Sea Continental Shelf* (n. 114).

117 See Draft Conclusion 5(2) of the provisionally adopted ILC draft conclusions on 'General Principles of Law' (2023), UN doc A/CN.4/L.982.

118 See e. g., Art 58 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, 213 UNTS 2889 (ECHR); Article 78 of the American Convention on Human Rights 'Pact of San José, Costa Rica' of 22 November 1969; Article 50 of the Treaty on European Union as amended by the Treaty of Lisbon of 13 December 2007.

ever, some commentators take the view that even in those cases the possibility of withdrawal from such treaties 'is by no means self-evident' due to their special legal nature.[119]

Yet, recent practice shows that international law does not know a general 'eternity clause' protecting human rights treaties from termination or denunciation. Over the last decades, we have witnessed the exit and withdrawal of States from regional human rights treaties. Examples include Russia (ECHR and related protocols), Turkey (Istanbul Convention), the United Kingdom (European Union Charter of Fundamental Rights) and Venezuela (American Convention on Human Rights). These developments shift the focus from the 'if' and 'how' of such a withdrawal from human rights treaties to its consequences. It is at this point where preservative rules come into place as a means for entrenching the legal *acquis*.

To the extent that States comply with the procedure set out in the respective regional human rights treaty and/or the general rules reflected in the Vienna Convention on the Law of Treaties (VCLT), they are released from any obligation further to perform the treaty (Article 70(1)(a)(2) VCLT). However, the customary rule reflected in Article 43 of the 1969 VCLT provides that the denunciation of a treaty does not affect a State's parallel obligations under international law. These include rules of customary international law that are identical in content to the provisions contained in the treaty. As confirmed forty years ago by the ICJ in its 1984 Judgment on Preliminary Objections in the *Military and Paramilitary Activities (Nicaragua* v. *United States of America)* case

> 'The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions […] even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty law and on that of customary international law, these norms retain a separate existence.'[120]

This parallelism of sources in the context of treaty withdrawal has recently been confirmed by the Inter-American Court of Human Rights (IACtHR) in an Advisory Opinion issued in 2020 responding to the request by Colombia about the consequences of a denunciation of the American Convention on

119 Eckhart Klein, 'Denunciation of Human Rights Treaties and the Principle of Reciprocity' in: Ulrich Fastenrath et al. (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011), 477-487 (483).

120 ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), jurisdiction and admissibility, judgment, ICJ Reports 1984, 392 (para. 73).

Human Rights and the Charter of the Organization of American States. The IACtHR stated that

> 'customary norms, those derived from general principles of law and those pertaining to *jus cogens*, as independent sources of general international law, continue to bind a State that has denounced the American Convention'.[121]

At the same time, the Court remained very vague regarding the scope of the rules encompassed by this statement.[122] It is clear that human rights obligations under general international law continue to bind the withdrawing State. Yet, the question is to what extent the more specific regional human rights guarantees enshrined in the instruments reflect regional customary international law and/or GPL with a regional scope of application. Such regionally limited human rights guarantees might include, for example, the prohibition of the death penalty, which is not universally shared.

The ICJ has recognised that regional customary international law may develop alongside general customary international law.[123] According to Conclusion 16(2) of the ILC's conclusions on 'Identification of customary international law', it would need to be shown that the treaty provision in question reflects 'a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves'. However, this raises many follow-up questions which were not explored in-depth in the commentaries of the ILC, such as the identification of 'the States concerned' and whether the 'general practice' requirement allows for regional outliers. Moreover, given the high standard applied in the *Asylum* case[124] for identifying regional custom and the fact that the legal nature of regional custom has often been compared to treaties raises the question whether the denunciation would equally affect the identification or binding character of a rule under regional custom.

---

121 IACtHR, Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the Consequences for State Human Rights Obligations, Advisory Opinion OC-26/20, IACtHR Series A No. 26, 9 November 2020, para. 155, see also paras 94-97 and 100-110 (for the American Convention on Human Rights) and paras 155-157 (for the OAS Charter).

122 See also Philippe Frumer, '"Je suis venu te dire que je m'en vais …" La dénonciation des traités régionaux de protection des droits de l'homme', RGDIP (2021), 253-287 (261, fn. 40).

123 See ICJ, *Right of Passage* (n. 82), 39, 44; *Military and Paramilitary Activities in und against Nicaragua* (Nicaragua v. United States of America), merits, judgment, ICJ Reports 1986, para. 199; ICJ, *Dispute regarding Navigational and Related Rights* (n. 82), paras 34 and 36.

124 ICJ, *Colombian Peruvian Asylum Case*, judgment of 20 November 1950, ICJ Reports 1950, 266, 276-278.

In contrast to regional customary international law, the ICJ has never recognised that general principles of law with a regional scope of application fall within the scope of Article 38(1)(c) ICJ-Statute. States in the 6th Committee, ILC members and scholars have taken opposing positions in this regard.[125] The role played by regional general principle of law subsequent to the withdrawal from a human rights treaty thus remains open for the time being.

c) Progress Despite Preservation: Outlasting State Consent?

To the extent that provisions in regional human rights treaties reflect (regional or general) customary international law or GPL, their substance remains unaffected by the withdrawal of States.

However, considering the regional differences in human rights treaties, the question arises how regional customary international law is identified and whether GPL with a regional scope of application fall within the scope of Article 38(1)(c) ICJ-Statute. These unresolved issues make the application of the rule enshrined in Article 43 of the 1969 VCLT to regional human rights treaties a tightrope walk. Any 'automatism' that bases the identification of regional custom primarily on a regional treaty risks doing a disservice to progress in the area of human rights. A State that cannot be certain that it will be able to withdraw from a regional treaty regime, will think twice about joining such a regime in the first place. Moreover, the criteria for identifying unwritten regional international law would also need to be consistently applied, that is in a way that does not unduly favour the interests and preferences of regional hegemons. Thus, the desire to prevent regress in the area of human rights must not lead to selectively lowering the threshold for identifying unwritten international law. If this were the case, the principle of sovereign equality and the principle of consent – which are by themselves progressive achievements – would be undermined.

This section showed that rules that guide the identification and determination of unwritten rules of international law qualify as preservative rules and serve to entrench progress, for example in the form of human rights guarantees, in international law. However, the extent to which those preservative rules realise their progressive potential – instead of undermining other progressive aims in international law – depends on their consistent application.

125 Mariana De Andrade, 'Regional Principles of Law in the Works of the International Law Commission', Quest. Int'l. L., Zoom-in 86 (2021), 23-46.

V. Conclusion: Progress Through an Equilibrium of Transformative and Preservative Rules

The principle of *quieta non movere* with its various emanations is only at first glance irreconcilable with the attainment of progress in international law. Rather, respect for legitimate expectations arising from the *status quo* is itself at the heart of progress. Based on the experiences of two World Wars which revealed the fragility of the international legal order, the Preamble of the UNCH, our point of departure of what amounts to a 'betterment' in international law, also seeks 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. Progress through international law thus rests on a balance between preservative and transformative rules. The crucial question is how to maintain an equilibrium between the two types of rules. The three examples discussed demonstrate that this balance depends on a limited (*uti possidetis*), precise (transboundary rights of non-State actors), and consistent (unwritten regional international law) invocation and application of preservative rules.

 DOI 10.17104/0044-2348-2024-4-925