

# Not for sale?

## Some thoughts on human rights in cases of cession of territory

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*Pierre Thielbörger* and *Timeela Manandhar* have given an innovative and thought-provoking [account](#) of the lawfulness of the incumbent US president's potential plans to purchase Greenland. Vividly and succinctly they make their case against the possibility of a sale of the island under international law. However, their colorful picture of the legal scenery arguably glosses over some nuances.

I do not intend to comment again on President Trump's announced intention to acquire the territory. Neither will I draw upon the case of Greenland with all its specific historical and political implications, especially its autonomy status. Instead, I would like to inquire more generally into one of the post's core assumptions, the vulnerability of human rights in case of a cession of territory.

In essence, *Thielbörger* and *Manandhar* advocate that the right of a people to self-determination might prohibit a state to cede territory to another state not guaranteeing the same standard of human rights protection without a vote supporting the transfer in a popular referendum. I share the authors' view that today the transfer of territory cannot be measured against yardsticks of the 19<sup>th</sup> century and that after the adoption of the UN Charter acquisition of land by a state has to be accomplished under new premises. Moreover, it is a truism that international law as it stands does not only regulate the relations between states but takes account of the interests of peoples and individuals as well. However, in this respect there might be a point *Thielbörger* and *Manandhar* have missed: In two short sentences, and without further explanation, they state that the transfer of territory "would mean a great loss for the Greenlandic people in terms of their human and indigenous rights. [...] All of these human and indigenous rights protections would be lost for the people of Greenland were they to become part of the US territory."

I respectfully disagree.

First of all, with respect to human rights protected not only under treaty but also under universal *customary* international law, especially the mentioned right to self-determination, there is no reason why the "cessionary" state would not be obliged to respect them. However, there are, of course, only few clear-cut and universally recognized customary human rights guarantees. Furthermore, it is through treaties that dispute resolution mechanisms including competent organs individuals can turn to in case of an alleged violation of their rights are established. The question of persistence of treaty rights thus remains vital.

In this respect, a rather obvious topic which comes to one's mind in the case of transfer of territory, is the law of state succession. The widely approved definition contained in Art. 2 para. 1 lit. b) of the [1978 Vienna Convention on succession of States in respect of treaties](#) (VCST) describes succession as

*“the replacement of one State by another in the responsibility for the international relations of territory”.*

Cessions, i.e. transfers of territory from one state to another based on agreement, squarely fall into this wide definition and have been commonly accepted as a form of state succession. Admittedly, the law of state succession has often been [described](#) as obscure and doctrinally challenging and not many hard rules have yet emerged. For the VCST it took more than 18 years to enter into force and it still has attracted only 23 member states. Nevertheless, this does not mean that there are no rules at all. In fact, some of the provisions of the VCST reflect customary international law.

One of them is Art. 15 VCST, stipulating the so called *“moving treaty-frontiers”* rule. This rule, in line with Art. 29 of the [1969 Vienna Convention on the Law of Treaties](#), postulates the general principle that treaties of a state apply (only) to its own territory. A narrow reading of this rule, in fact, would lead to the conclusion that after the cession has taken place the inhabitants of the ceded territory are not able to rely on treaties concluded by their former home state.

This, however, is not the end of the story. Such a finding would run counter to *Thielbörger and Manandhar's* reliance on the recent turn to human rights by international law. It would support a doctrine placing absolute emphasis on the sovereignty of states which would be free to strip the inhabitants of a territory off their rights by mere agreement. Art. 15 VCLT itself, in its last sentence, states that

*“unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation”.*

This shows that there is room for exceptions to the general rule. And especially in cases of cession there might be good reasons to depart from it.

With respect to international *treaties*, there is a vigorous and influential international opinion (cf. e.g. [Kamminga](#), the [UN Human Rights Committee](#) and the [separate opinion of judge Weeramantry](#) to the ICJ's judgment of 11 July 1996 in the case of Bosnia and Herzegovina v. Serbia and Montenegro) advocating for the persistence of humanitarian treaties after succession. Many of these advocates rely on the argument that treaties protecting individuals once concluded are considered as building an “objective system” of law encapsulating more than mere reciprocal claims. The rights, once granted, belong to the individuals and therefore cannot be taken away without their consent. Yet, this doctrine has not been unambiguously supported by state practice, which of course favors the freedom of each state to decide freely about its international obligations. As a consequence, a rule of “automatic succession” into human rights treaties has not been considered as

having crystallized into customary international law (see e.g. [Conclusions of the ILA Committee on Aspects of the Law on State Succession](#) and [Rasulov](#)).

Nevertheless, assuming that the human rights the inhabitants enjoy would not have to be acknowledged by the “purchaser” state, what about the “seller” state’s obligations under international law? Arguably, a state being bound to guarantee rights to all persons “under its jurisdiction” or “under its effective control”, cannot evade its obligations by deliberately removing these subjects from its jurisdiction. The similarity of the problem to those at issue in the European Court of Human Rights’ judgements [Soehring](#) and [Hirsi Jamaa](#) is obvious. Any obligation in this regard could, of course, only be held against the ceding state as long as it has not freed itself from them by withdrawing from the human rights treaty. Yet, the feasibility of this, again, is controversial and dependent on the design of the specific treaty. The possibility to terminate a state’s commitments under a human rights treaty is subject to the same doubts having at their core the question of the “ownership” of human rights explained above.

However, if we disregard this argument for the moment, it is not conclusive to declare such supposedly “forfeitable” rights as a part of a people’s right to self-determination with the consequence that an otherwise valid cession of territory is precluded. *If* the positions under human rights treaties are contingent on the treaty regime by which they are granted, it does not seem convincing that a non-state party should be obliged to respect them. And to prohibit the transferal of territory by reason of an alleged loss of rights which otherwise could be lawfully achieved by mere treaty withdrawal seems questionable.

The point that the right to self-determination may add further arguments militating against the cession itself is forceful when referring to its aspect of the right of a people to decide freely by whom to be governed and represented. Even if one was to accept this component of the right, to rely on the right to self-determination in order to determine the fate of human rights after a cession can become a double-edged sword: It may blur the lines between the rights of a people and its constituent parts, the individuals. What would happen to the rights of the individuals voting in the minority in the referendum? Would international law not protect them at all?

To be clear, even if accepting some kind of “automatic succession” to humanitarian treaties, this would probably not mean that *all* rights encapsulated would be safeguarded in all situations of cession of territory. But to omit the discussion of this topic by reference to the notion of self-determination of peoples skips an important part of the whole issue.

The general postulate remains – states cannot transfer their people in the same way as their land. Considerations concerning the persistence of human rights and the subject entitled to decide about their fate will be of crucial significance for future cessions of territory between states. This post does not purport to treat the topic in a comprehensive manner. For the future, a scrupulous and thorough analysis taking into account all levels of the issue is needed. Otherwise, an already intricate problem may be further obfuscated.

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