

TERRITORIAL ACQUISITION

TERMINOLOGY

- ◉ Acquisition of territory = establishment of sovereignty over a given piece of „land”; acquisition or establishment of a particular territorial status
- ◉ State territory ?
- ◉ ‘**modes of acquisition of territory**’ – an analogy with domestic law for the acquisition of ownership over land

ACCRETION AND AVULSION

- ◉ Gradual physical movement of land from one territory to another (silting rivers banks)
- ◉ Process of violent change (dramatic change in the course of river, the creation of volcanic formation)



DISCOVERY

- ◎ Historically, mere discovery was not considered as a valid title of territorial sovereignty over a *terra nullius per se*

- ◎ Requirements:

- › First, discovery had to be carried out in accordance with a European sovereign's mandate or by means of papal grants
 - task of evangelization the newly discovered territories
 - a right to colonization (*erga omnes*)

Secondly, territories that were not under the actual possession of Christian Princes [*terra nullius* interpretation]

- ◎ titles to local entities' territories were to be obtained through conquest, or treaties concluded with the local chiefs
- ◎ **ICJ, Sovereignty over Pedra Branca case (Malaysia/Singapore)** – Sultanate of Johor was a State possessing sovereign rights over its territories in the beginning of the 16th century (before the European discovery of them); recognition of the sovereignty of the local chiefs over their territories

Thirdly, effective possession of a discovered territory

- At the beginning of the European expansion → **symbolic acts** were sufficient to create a title opposable to other colonial powers
- the standards for the acquisition of territorial sovereignty increased and **the mere discovery was not enough to confer title**
 - > actual or potential control of the territory concerned was required (it had to be followed by effective occupation or by recognition by other States)

○ The concept of INCHOATE TITLE

- > effective occupation must usually be a gradual process
- > some weight should be given to mere discovery
- > **temporary right to exclude** other states
- > until the state of the discovery has had **a reasonable time** within which to make an effective occupation

EFFECTIVE OCCUPATION

1. TERRA NULLIUS

- never belonged to any State or abandoned by the foreign sovereign
- for the international law that emerged in Europe after 1648 discriminatory interpretation:
 - > Territory in which no person was present +
 - > Discovered by a European power and unclaimed by any other sovereign State **recognized by European Powers**
- **Western Sahara case (1975)**
 - > Occupation is legally an original means of peaceably acquiring sovereignty over territory
 - > Cardinal condition of valid occupation: territory should be *terra nullius* (a territory belonging to none)

- > In the case of territories inhabited by **tribes or peoples having a social or political organization** were not regarded as *terra nullius*
- > The acquisition of sovereignty
 - unilaterally through occupation of *terra nullius* by original title ?
 - **through agreements concluded with local rules** (whether or not regarded as actual cession of the territory) ?
- > **Derivative roots** of title and not original titles obtained by occupation of *terra nullius*

2. OCCUPATION CARRIED OUT BY A STATE

- Both acts performed by
 - > **central government's organs**
 - > **other State agents in their official capacity** are attributable to a State (valid manifestations of sovereignty)
- conduct of the central government has greater evidentiary weight than the conduct of local authorities (reflect with greater accuracy the intent of the State)
 - > in *Temple of Preah Vihear*, the Court considered that acts performed by local agents could not override nor nullify the consistent Siamese central authorities' conduct

○ acts of private entities

- > Principle: not attributable to a State (do not create a title of sovereignty for a State)
- > necessary to consider whether these persons have been allowed to exercise elements of governmental authority [Dubai/Sharjah Border Arbitration, 'the effective control of a territory does not depend on the actions of private individuals per se but only on the actions of public authorities or individuals acting on their behalf]
- > an individual or a chartered company authorized to perform sovereign acts on their behalf → attributable to a State

- ◉ **East India Company** → From the end of the 16th till the 19th century, companies:
 - > formed by individuals
 - > and engaged in economic pursuits (Chartered Companies)
 - > were invested by the State to whom they were subject with public powers for the acquisition and administration of colonies



3. TERRITORY MUST BE PLACED UNDER: OPEN, CONTINUOUS, EFFECTIVE AND PEACEFUL CONTROL

- ◉ activities supporting a claim of sovereignty must be public
 - > open manifestation of a State's will
 - > *ipso facto* secret and confidential actions cannot support a sovereignty claim
- ◉ achieve a state of recognition and notoriety which is normal for acts of a State

4. ACTS A TITRE DE SOUVERAIN (EFFECTIVENESS)

- generally evidenced by the creation of **legal apparatus for administration of territory**
- intention and will to act as sovereign + some actual exercise or display of such authority
- acts of sovereignty depend in each instance upon all the relevant circumstances of the case including:
 - > Nature of the territory
 - > Geographical configuration of the territory
 - > Climate
 - > Whether territory is already inhabited
 - > Amount of opposition
 - > International reaction

EFFECTIVE EXERCISE OF JURISDICTION – SCOPE, EXAMPLES

Eastern Greenland Case, PCIJ

- „effectiveness of the occupation may indeed be relative and may in certain rare circumstances be little more than symbolic“
- **Denmark:** colonies in other parts of Greenland; granted concessions to uninhabited Eastern sector; all treaties and legislation regarding Greenland covered its whole territory
- **Norway:**
wintering of expeditions,
creation of a wireless scientific station



~~Sovereignty over Pulau Ligitan and Pulau Sipadan case
(Indonesia/Malaysia), ICJ~~

- ⦿ Malaysian sovereignty was declared by the Court based on its legislation regulating turtle egg fishing
- ⦿ both the measures taken to regulate and control the collecting of turtle eggs and the establishment of a bird reserve must be seen as **regulatory and administrative assertions of authority** over territory



Clipperton island case (France v. Mexico), 1932

Sufficient acts *a titre de souverain*:

- ⦿ a French naval officer commissioned for that purpose formally proclaimed French sovereignty from the deck of a French merchant ship cruising off the island (a brief landing, no visible mark of French sovereignty)
- ⦿ the proclamation of French sovereignty:
 - > reported to the French consulate in Honolulu
 - > notified to the government of Hawaii
 - > published in a local Hawaiian newspaper
- ⦿ concession granted to exploit the island's guano resources



CESSION

- territory is transferred from one State to another with **the consent of both States**
 - > relating only to part of a State's territory → distinguished from incorporation
 - > territory concerned integrated into the territory of an existing State → distinguished from secession
- **cession v. lease?**
- cession transfers full title to the territory concerned (territorial sovereignty passes from one State to another)
- lease – the right to exercise the latter's territorial authority on the territory concerned

CESSION – CONDITIONS OF LEGALITY

1. Legal Form

- **consent of both States involved**
- **explicit** – different from acquiescence (a State does not protest against its territory being claimed or used by another State → prescription)

2. Validity

○ **proper consent**

- the distribution of their own territory between two States is their sovereign prerogative
- effects are **opposable to all third States**
 - > it is the sovereign right of the affected States to determine the legal status of their own territory (determination, transfer) → effects erga omnes

PRESCRIPTION

- the result of the peaceable exercise of de facto sovereignty for a very long period over territory subject to the sovereignty of another State
- stems from the **Roman law concept** of usucapio that required:
 - > an object susceptible of ownership
 - > a title even if defective
 - > good faith (bona fide)
 - > possession (intent to possess as an owner + physical control)
 - > and an uninterrupted possession during a certain period of time prescribed by law

Prescription v. occupation ?

- Status of the territory concerned ?
- Effective control over territory concerned ?
 - > requirement of effective occupation is interpreted more flexibly in the case of occupation than in the case of acquisitive prescription
- Acts carried out by State
- Open, continuous, effective and peaceful control
- Recognition by international society?
 - > Chamizal Arbitration (American-Mexican Boundary Disputes and Co-operation) it was held that possession in the face of constant opposition could not transfer title by prescription.

Possession has endured a certain period of time

- ◉ No fixed period of time
- ◉ Guyana-Venezuela Border Dispute: a treaty provision laid down a period of 50 years
- ◉ Alaska Boundary Dispute (American-Canadian Ocean Boundary Disputes and Co-operation): US claimed that possession for 60 years established title by prescription
- ◉ Chamizal Arbitration the US deemed 43 years sufficient
- ◉ Some authors deem 30 years sufficient

- ◉ Acquisitive prescription only plays a role in the **establishing of sovereignty over land or maritime areas**
 - > Other rights (right of passage; historic title; jurisdiction over nationals) are not established by acquisitive prescription, but by acquiescence or custom
- ◉ Legal character ?
 - > Invoked inconsistently and frequently **not as the exclusive ground to base title over territory**
 - > cannot constitute a rule of customary international law → **a general principle of law**
- ◉ it has never been explicitly recognized (elements of the doctrine have been touched upon in various arbitral awards)

INTERNATIONAL LAW OF TERRITORIES II

LLB SEMESTER III

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INTERNATIONAL LEGAL RULES FOR DECIDING TERRITORIAL DISPUTES

LEGAL TITILE V. EFFECTIVITES

- „acts correspond to the law”
 - > To confirm the exercise of the right derived from legal title
 - > Evidence of the existing title, probative value
- „acts do not correspond to the law”, territory effectively administered by a other State than the one possessing legal title
 - > primacy of legal title over contradictory effectivités

- ◉ „effectivités do not coexist with legal title”
 - > Taken into consideration
 - > Residual function, able to create legal title
- ◉ ambiguous legal title
 - > Effectivités play a role of an interpretation tool

ROLE OF THE FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW

Principle of territorial integrity

- ◉ ‘Between independent States, respect for territorial sovereignty is an essential foundation of international relations’ (Corfu Channel Case)
- ◉ the principle of territorial integrity is an important part of the international legal order’ (Kosovo Advisory Opinion)
- ◉ acts performed in violation of a State’s territorial integrity → a territory possessed as a result of a violation of the principle of territorial integrity cannot be considered as belonging to the possessor

Principle of the Prohibition of the Use of Force

- '[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal'
- formerly valid titles of sovereignty
 - > Conquest
 - > Debellatio

ceased to exist in international law

Principle of *uti possidetis iuris*

- Principle originated in Roman law – territory and other property remains with its possessor at the end of a period of change unless otherwise provided by agreement
- States emerging from the dissolution of a larger entity inherit as their borders those administrative boundaries which were in place in the time of independence
- Spanish America (XIX century), the continent which
 - > first continent witnessed the phenomenon of decolonization
 - > the formation of a number of sovereign states on territory formerly belonging to a single metropolitan state

~~Legal character ?~~

- ◉ a special rule which pertains solely to one specific system of international law ?
- ◉ general principle of law ?
 - > Spanish America
 - > Respect of the administrative boundaries established by the colonial powers (Africa) → emergence of customary norm, rule of general scope

~~Purpose ?~~

- ◉ ensure the independence and stability of new States being endangered by fratricidal struggle

Aspects , elements of the principle of *uti possidetis iuris*

- ◉ Pre-eminence accorded to **legal title** over effective possession
- ◉ Securing respect for the territorial boundaries at the moment when independence is achieved
(administrative boundaries transformed into international frontiers)
- ◉ Obligation to **respect pre-existing boundaries** in the event of state succession derives from a general rule of international law (rules expressed in the formula of *uti possidetis iuris*)
- ◉ **Ius** referred to
 - > international law ?
 - > constitutional or administrative law?

Principle of self-determination

- ◉ Art. 1 (2) UN Charter states that it is one of the purposes of the UN to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace'
- ◉ Art. 55 UN Charter lists several goals the organization should promote in the spheres of economics, education, culture, and human rights with a view, as is noted in the introductory clause, 'to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.

◉ People:

- › As with other collective rights, the lack of definition does not by itself mean that it is always unclear in concrete instances whether one or more peoples exist

TECHNICAL RULES IN TERRITORIAL DISPUTES

Critical date

- Sovereignty over *Pedra Branca/Pulau Batu Puteh* Case
 - > to 'distinguish ... between those acts which should be taken into consideration for the purpose of establishing or ascertaining sovereignty and those acts occurring after such date'
- facts occurring after the critical date will not be taken into account to determine the title of sovereignty

- the critical date is determined when the dispute crystallized → when the parties formally opposed each other's claim
 - > one side asserts its sovereignty and the other side protests for the first time
 - > the first protest by one State is rejected by the other

Intertemporal law

- the legal significance of any subjective right or objective rule is governed by the legal standards valid at the time of its enactment
- qualified as
 - > a theory,
 - > a principle,
 - > doctrine,
 - > supported by a comparison of domestic legal systems, it amounts to **a general principle of law**.
- **a juridical fact** must be appreciated in the light of the **law contemporary with it**, and not of the law in force at the time when the dispute in regard to it arises or falls to be settled (Island of Palmas Case 845)

- As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case, a **distinction must be made between the creation of rights and the existence of rights**.
 - > the acts creative of a right subject to the law in force at the time the right arises
 - > the existence of the right, its continued manifestation, shall follow the conditions required by the evolution of law.
- distinction between the creation and the existence of rights
 - > rights should be analysed in the light of the legal system contemporaneous with their creation
 - > necessity to pay attention to changes and evolutions in the existence of these rights

Intertemporal law in ICJ proceedings:

- ◉ It is sufficient to state that the validity of a **treaty** (Treaty of Poona 1779) concluded as long ago as the last quarter of **the eighteenth century**, in the conditions then prevailing in the Indian Peninsula, should not be judged **upon the basis of practices and procedures which have since developed only gradually** (Right of passage over Indian territory case)
- ◉ Interpretation of the expression "disputes relating to the territorial status of Greece" → territorial status broadly interpreted as „**the geographical / spatial extent of Greece's rights** over the continental shelf in the Aegean Sea" (Aegean Continental Shelf case)

JURISDICTION

- ◉ aspect of sovereignty
- ◉ State's competence under international law to regulate the conduct of natural and juridical persons (otherwise impact)
- ◉ authority to affect legal interests / exercise authority : create, modify, alter, terminate legal relationship
- ◉ reflects the basic principles of: state sovereignty, equality of states and non-interference into domestic affairs
- ◉ traditionally, three forms of jurisdiction are distinguished:
 - > Legislative / prescriptive – power to make laws, decisions and rules
 - > Judicial / adjudicative – power to take judicial action in pursuance of or consequent on the making of decisions or rules
 - > Executive / enforcement – ensure compliance with law

Basic rules with regard to State jurisdiction

- Every state has exclusive jurisdiction within its territory,
 - > Absolute ?
 - > Subject to any limitations ?
- Basic presumption:
 - > jurisdiction (in all its forms) is territorial,
 - > jurisdiction may not be exercised extra-territorially without some **specific basis in international law**
- extra-territorial jurisdiction → **genuine connection**
 - > subject-matter of jurisdiction and the territorial base
 - > reasonable interests of the state in question

Burden of establishing the relevant international rule in the case of extraterritorial jurisdiction

- **Lotus case, PCIJ**
 - > International law allows the exercise of national jurisdiction **unless a specific prohibition** in doing so is identified in international law (prescriptive jurisdiction)
 - > the burden of proof → a State ascertaining the violation of international law
 - > Prohibitive norm of international law
- **Arrest Warrant case, ICJ**
 - > When a State seeks to regulate matters extraterritorially, obliged to demonstrate the existence of an appropriate basis in international law
 - > Permissive norm of international law

- ① **International law** tries to set down rules dealing with the limits of a state's exercise of governmental functions
- ② Conflict of laws (or **private international law**) attempt to regulate in a case involving a foreign element
 - > whether the particular country has jurisdiction to determine the question,
 - > the rules of which country will be applied in resolving the dispute

Principles of international law governing the exercise of national jurisdiction:

- ③ **Territorial principle** – whatever happens in the territory of a state is of that state's primary concern
- ④ **Nationality principle** – exercise of jurisdiction over persons or things that possess its nationality

- ⑤ **Passive personality principle** – jurisdiction exercised in order to protect state's nationals
- ⑥ **Protective principle** – State's jurisdiction to protect itself against acts that threaten its existence or its proper functioning as a state
- ⑦ **Universal principle** – any state has a legal interest in exercising jurisdiction to control certain activities universally condemned

TERRITORIAL PRINCIPLE

- ◉ State's ability to legislate with regard to activities within its territory and to prosecute for offences committed upon its soil
- ◉ **Scope of the territorial principle:**
 - > **Subjective territorial principle** – states in which acts taken to initiate or perpetuate the offence may claim jurisdiction; even if completed or consummated abroad
 - > **Objective territorial principle** – states in which injury takes place may claim jurisdiction (physical effects of an offence); constituent element of a crime is consummated on the forum state's territory

Effect doctrine

- ◉ Non-physical effects within state's territory caused by the non-national conduct abroad

Anti-trust laws

- ◉ Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in US → London reinsurers engaged in unlawful conspiracies to effect the market for insurance in US and that their conduct in fact produced substantial effect [Hartford Fire Insurance C.O v. California]
- ◉ Vitamin producers filed a class action alleging that vitamin manufacturers and distributors had engaged in a price-fixing conspiracy, which raised vitamin prices in US and foreign countries in violation of Sherman and Clayton Acts [F. Hoffmann-La Roche Ltd. V. Empagran, S.A.]

- **Internet activity** – a French court ruled that French laws barring racist propaganda and sale of Nazi memorabilia would apply to the operations of Yahoo!, a US-based Internet service provider and it instructed Yahoo! to block access by French nationals to the auction sections of its website
- **Overseas bribery** –the American plaintiff alleged that American defendant had violated the Foreign Corrupt Practices Act of 1977 by bribing Nigerian officials in order to obtain a construction contract and that plaintiff had suffered damages as a consequence
- **Trafficking in property outside the territory**
 - > Deter persons in third countries from engaging in transactions involving investments or trade with the targeted States

- > **Helmas-Burton Act** – enables US nationals to recover civil damages in US courts from any person / entity that trafficked property confiscated by Cuban government
- > **Iran and Libya Sanctions Act** – sanctions imposed on any person / entity engaging in trade / making investments contributing to petroleum resources development
- Criticized by number of countries as violating of international law
 - > Effect doctrine imposes penalties for actions outside US that are legal in the countries under the applicable national law

NATIONALITY PRINCIPLE

Active personality principle

- ⦿ generally recognized as a basis for jurisdiction over extra-territorial acts
 - > Mark of allegiance
 - > Aspect of sovereignty
- ⦿ Territorial and nationality principles create parallel jurisdictions and possible double jeopardy, and many states place limitations on the nationality principle, for example by confining it to serious offences, examples:
 - > treason
 - > murder
 - > bigamy
 - > soccer hooliganism
 - > child sexual abuse

- ⦿ Jurisdiction based upon nationality principle with regard to corporations:
 - > Legal persons organized under particular State's law
 - > Legal person whose principle place of business or registered office is located in particular State's territory
 - > Legal person organized or having principle place of business abroad where this person is owned or controlled by particular State's nationals
- ⦿ Vessels, aircrafts, space vehicles and other objects – jurisdiction based upon active personality principle [the concept of „floating part of state territory” abandoned]

Passive personality principle:

- ◉ a State may claim jurisdiction to try an individual for offences committed abroad which have affected or will affect nationals of that State
- ◉ aliens may be punished for acts abroad harmful to nationals of the forum state
- ◉ Controversial legal character in international law ?
 - > Lacks overwhelming recognition by international society
 - > increasingly accepted: terrorism, organized attacks on State's nationals by reason of their nationality [use of weapons of mass destruction or chemical weapons]

PROTECTIVE PRINCIPLE

- ◉ Jurisdiction over aliens for acts done abroad which affect the internal or external security or other key interest of the State
- ◉ Vital interests:
 - > currency and economic offences
 - > murder of governmental official
 - > falsification of governmental documents
 - > espionage, conspiracy, treason
 - > drug smuggling
 - > immigration matters

UNIVERSAL PRINCIPLE

- ⦿ Each and every State has jurisdiction to try particular offences , crimes:
 - > particularly offensive to the international community as a whole
 - > irrespective of the place of commission
 - > regardless of nationality

Legal basis:

- ⦿ Customary international law → piracy
- ⦿ Treaty → construction:
 - > definition of crime
 - > establishment of universal jurisdiction
 - > Obligation: all States parties obliged either to investigate and eventually prosecute or to extradite the suspect to a State willing to do so (*aut dedere aut iudicare*)

Examples of **treaty based-universal jurisdiction:**

- ⦿ aggression,
- ⦿ genocide, crimes against humanity, war crimes,
- ⦿ unlawful possession and/or use of certain weapons, theft of nuclear materials,
- ⦿ apartheid,
- ⦿ slavery and slave-related practices,
- ⦿ torture, unlawful human experimentation,
- ⦿ aircraft hijacking, unlawful acts against civil maritime navigation
- ⦿ unlawful acts against internationally protected persons
- ⦿ taking of civilian hostages,
- ⦿ unlawful traffic in drugs and dangerous substances,
- ⦿ destruction and/or theft of national treasures and cultural heritage
- ⦿ unlawful acts against the environment

Judge Guillaume (Separate Opinion), Arrest Warrant case

- Traditionally, customary international law did, however, recognize one case of universal jurisdiction, that of piracy (Judge Guillaume (Separate Opinion), Arrest Warrant case)
- universal jurisdiction is accepted in cases of piracy because piracy is **carried out on the high seas, outside all State territory**
- even on the high seas, classic international law is highly restrictive, it recognizes universal jurisdiction only in cases of piracy and not of other comparable crimes which might also be committed outside the jurisdiction of coastal States, such as trafficking in slaves or in narcotic drugs or psychotropic substances

Judge Ranjeva (declaration), Arrest Warrant case

- Universal jurisdiction [in the case of piracy] may be explained by the **lack of any predetermined sovereignty** over the high seas and by the régime of their freedom
- normally, the jurisdiction of the flag State serves as the mechanism which ensures respect for the law → piracy by definition involves the pirate's **denial and evasion of the jurisdiction of any State system**, the exercise of universal jurisdiction enables **the legal order to be re-established**.
- in this particular situation the conferring of universal jurisdiction on national courts to try pirates and acts of piracy is explained by the **harm done to the international system of State jurisdiction**.
- the **inherent seriousness** of the offence itself has, however, not been deemed sufficient per se to establish universal jurisdiction (slave trade, human trafficking)