

INTERNATIONAL LAW OF TERRITORIES I

LLB SEMESTER III
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TERRITORIAL REGIMES RECOGNIZED BY INTERNATIONAL LAW

- ◉ Territory subject to State sovereignty
- ◉ Territory not subject to the sovereignty of any State or States, and possesses a status of its own
- ◉ Res nullius, land legally susceptible to acquisition by States but not yet placed under any territorial sovereignty
- ◉ Res communis, not capable of being placed under the sovereignty of any State, used by all States on equal footing for peaceful purposes

SOVEREIGNTY

- ◉ Basic notion: a **State occupies a definite part of the surface of the earth**
 - > jurisdiction over persons and things
 - > limitation imposed by international law
 - > to the exclusion of other states
- ◉ **Sovereignty**
 - > nature of the rights over territory
 - > full set of legal rights over territory v. the minor territorial rights

SOVEREIGNTY

- ◉ pivotal and founding principle of international legal order
- ◉ most of the institutions and principles of international law rely on State sovereignty, e.g.
 - > equality of States, territorial integrity, political independence
 - > conditions and attributes of statehood
 - > territorial or personal jurisdiction
 - > immunity

SOVEREIGNTY

- ◎ **Territorial sovereignty** = a right to exercise on the territory, to the exclusion of any other state, the functions of a sovereign (Max Huber, Island of Palmas, p. 838)
- ◎ **Aspects of territorial sovereignty**
 - > **Internal** – authority exercised by a State within its borders over persons and situations, events that occur there + right to dispose of the territory
 - > **External** – entails that a State must respect the territorial integrity of other States (not to interfere in another State's internal and external affairs; ensure the safety of foreign nationals present within its territory)

SOVEREIGNTY V. PROPERTY

- ◎ horizontal system of territorial sovereignty v. vertical order of land law
- ◎ clear distinction: acquisition of private rights over a given territory and the acquisition of sovereignty over that territory
- ◎ Examples of pieces of land that are under the sovereignty of one State and the property of another:
 - > The Mundat Forest – under German sovereignty and French ownership
 - > The region of Tiwinza, under Peruvian sovereignty and Ecuadorian ownership

SOVEREIGNTY V. ADMINISTRATION

- ◉ **Territorial sovereignty**
 - > plenitude of a State's competences over a territory
 - > exclusivity of State competences
 - > capacity to make decisions concerning the fate of the territory (to alienate it)
- ◉ **Title of administration**
 - > specific powers that are conferred on a State by the title it holds (mandate, trusteeship agreement, any treaty-based and customary rules, factual situation in which a State finds itself in control of a territory)
- ◉ The distinction: **lies in the ability of its holder to dispose of the territory concerned**

JURISDICTION

- ◉ An aspect of sovereignty → State's competence under international law to regulate (or otherwise impact) the conduct of natural and juridical persons
- ◉ Authority to affect legal interests → create, alter or terminate legal relationships, including rights and obligations
- ◉ 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

MINOR RIGHTS OVER TERRITORY – LEASE

- ◉ An agreement by which State grants another State the **right to use and exercise control** over part of the former's territory

Lessor State	Lessee State
<ul style="list-style-type: none"> - Sovereignty remains with the lessor - Legal capacity to cede the leased territory to a third State 	<ul style="list-style-type: none"> - Jurisdiction is granted to the lessee - Transfer of the lease rights to other State upon the approval of the lessor State

- ◉ No general international law of leasehold
 - > each lease is sui generis
 - > its terms depend upon particular treaty governing it

MINOR RIGHTS OVER TERRITORY – LEASE

- ◉ **Purpose:**
 - > adjust boundaries of European colonial holding in Africa
 - > construct canals, railways or communication infrastructure across foreign territory
 - > provide sea and ports access to land-locked States
 - > secure military bases on foreign territory
- ◉ **Treaty-based regime** (particular treaty + law of treaties)
 - > scope of the lessee's powers, obligations
 - > duration of the lease (a determined period or for perpetuity)

MINOR RIGHTS OVER TERRITORY – LEASES

◉ Lessee State powers

- > Complete replacement of the lessor's jurisdiction (lessee: exclusive jurisdiction)
- > Restriction of the lessee's powers in accordance with the purpose of the lease (Salonic port lease)
- > Limitations placed on the powers of the lessee State

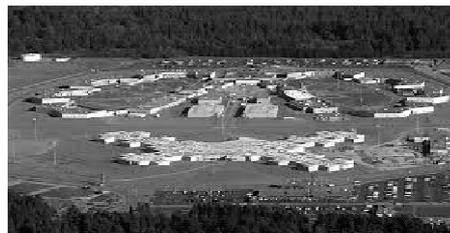
◉ Criminal jurisdiction over lessor's State nationals

- > Lessee: full criminal and civil jurisdiction over the leased territory
- > Exception: leases granted for the purpose of establishing military bases

MINOR RIGHTS OVER TERRITORY – LEASE

Guantánamo Bay

- ◉ leased by Cuba to the US
- ◉ for the purposes of coaling and naval stations
- ◉ the lease agreement (1934) effectively gives the US the prerogative to decide whether to end the lease
- ◉ US recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over Guantánamo, but shall exercise complete jurisdiction and control over it
- ◉ Mid-1990s US used Guantánamo Bay to accommodate asylum seekers fleeing from Haiti; post-2001 used as an internment facility → compatibility with lease's purpose?



MINOR RIGHTS OVER TERRITORY – LEASE

Russian Leases in Former Soviet States

- ⊙ Since the mid-1990s Russia has concluded a number of bilateral lease agreements under international law with **successor States of the Soviet Union**
- ⊙ Purpose: to give access to and use of strategic installations of which it is the owner as continuator of the Soviet Union, situated on the territories of these States
- ⊙ lease over the **Baikonur cosmodrome in Kazakhstan**; a 10-year lease over the advance radar-detection station in Gabala, Azerbaijan; and a 49-year lease over a military base in Nurek, Tajikistan, which contains an anti-missile warning system
- ⊙ **an express Russian acknowledgement that the areas remain under the sovereignty of the lessor States**

MINOR RIGHTS OVER TERRITORY – SERVITUDES

- ⊙ Nature of the servitude in Roman law: right enjoyed by the owner of one piece of land over land which belongs to another

SERVIENT STATE	DOMINANT STATE
- Preserves its sovereignty, localized obligations	- Exercises the corresponding rights within the limits provided by the act establishing the servitude - Servitude = right <i>in rem</i> , not in personal capacity (exercised by any successor in title)

MINOR RIGHTS OVER TERRITORY – SERVITUDES

„Servitudes” in international law:

- ◉ a regime of restrictions applicable to the territory of one State in the interest of the territory of one or more other States
- ◉ no transfer of territorial sovereignty (limitation)
- ◉ legal basis ?
- ◉ regime permanently attached to the territory
 - > opposable to third States
 - > transmissible in case of any change in sovereignty
- ◉ categories (purpose):
 - > communication regimes
 - > economic servitudes
 - > military servitudes

MINOR RIGHTS OVER TERRITORY – SERVITUDES

North Atlantic Coast Fisheries Case
(Great Britain v. United States)
1910

- ◉ US enjoyed certain fishing rights off coast of Newfoundland under a treaty of 1818, and it argued that this treaty had created a servitude in their favour; the right was a derogation from British sovereignty and as the result Britain had no independent right to regulate the fishery (US claims)
- ◉ Tribunal – the right was not a sovereign right but merely an economic one, and there was



- ◉ In abstract, the Tribunal argued that *the servitude would derogate from the sovereignty of the servient State only in so far as the exercise of the rights of sovereignty by the servient State would be contrary to the*

MINOR RIGHTS OVER TERRITORY – SERVITUDES

Servitudes based upon customary international law

- ◉ Right of passage over Indian territory (Portugal v. India), 1960
 - > Portugal: right of passage for civilians between her territories in India
 - > right had been established by custom based on the practice of Portugal and Britain as well as by subsequent practice by India
 - > Servitude:
 - Right of passage: private persons, civil officials and goods
 - India preserves the right of regulation and control

- ◉ Eritrea – Yemen arbitration
 - > Yemen: „the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of lives and livelihoods of this poor and industrious order of men’
 - > ‘a sort of „servitude internationale” falling short of territorial sovereignty’
 - > beneficiaries ?
 - servitude enforced for the common good of the beneficiaries
 - beyond the state

Objective regimes concept

- ⊙ controversial category linked to the law of treaties, according to which some kinds of treaties produce effects with regard to States not parties to it
- ⊙ an exception to the principle *pacta tertiis neque nocent neque prosunt*
- ⊙ treaties which cause general effects and contain obligations *erga omnes*
- ⊙ examples: international settlements, international territories, boundaries, and extraterritorial regimes

PROTECTORATE

- ⊙ powerful State promises to protect a weaker State from external aggression or internal disturbance, in return for which the protected entity **yields certain powers** to the protector
- ⊙ the legal basis for a regime of protection is a **treaty**
 - > **the protecting State:** full control over the external affairs
 - > the **protected State:** control over its internal affairs
- ⊙ legal regime:
 - > the dependant entity is not annexed or formally incorporated
 - > the loss of control over foreign affairs involves a loss of independence to some extent

PROTECTORATE	PROTECTOR
- Control over internal affairs	- Control over external affairs
- Separate international status and personality; threshold for sovereign, independent statehood ?	- Protectorate is not annexed or formally incorporated
- Loses capacity to act internationally on its own behalf	- Absorbs the conduct of foreign affairs and treaty-making powers
<ul style="list-style-type: none"> ◉ protectorate agreements are not effective in relation to third States → the regime of protection must receive recognition 	

CONDOMINIUM
<p>territory over which two or more States jointly exercise governmental authority</p> <ul style="list-style-type: none"> ◉ traditional condominiums involved the joint exercise of <u>sovereign authority</u>; modern instances frequently involve joint exercise of more <u>limited authority</u> ◉ the States exercising the condominium <ul style="list-style-type: none"> > administer the territory jointly or > retain common authority only over major decisions, separately exercise jurisdiction over part of the territory in other matters ◉ condominium-like arrangements may have a role in post-conflict situations

MANDATES

- ◉ created in the aftermath of World War I
- ◉ colonial territories detached from the defeated nations of Germany and the Ottoman (Turkish) Empire
 - > selected nation States were granted mandates to govern selected territories on behalf of the League of Nations
 - > system introduced and institutionalized form of international supervision over colonial administration
 - > purpose: to ensure the well-being and development of mandate inhabitants [areas were 'inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world']

- ◉ **the precise legal status of mandates** → the two principal theories vested sovereignty in the League or in mandated communities
- ◉ League sovereignty was based on ?!
 - > League as successor to the defunct German and Ottoman empires
 - > Mandates exercised on behalf of the League (Art. 22 League Covenant)
 - > Mandatories were subjected to increasing obligations (League's supervision)
 - > it was uncertain, however, whether a body such as the League was **capable of possessing sovereignty over territories?**

International Status of South-West Africa, ICJ

- ◉ a special regime where the doctrine of sovereignty did not apply
- ◉ new species of international government that did not fit into previous understandings of sovereignty
- ◉ sovereignty over mandated territories was in abeyance → when the inhabitants obtained recognition as an independent State, sovereignty was revived and vested in the new State
- ◉ virtual sovereignty resided in the people who were temporarily deprived of it by domination or tutelage (ICJ, *Legal Consequences of South Africa in Namibia, Advisory Opinion*)

UNITED NATIONS TRUSTEESHIP SYSTEM

- ◉ International Trusteeship System was established in 1945 under the authority of the UN (successor of the mandate system)
- ◉ the administration and supervision of a certain category of non-self-governing territories
- ◉ purpose:
 - > to govern the territories for the benefit of their inhabitants and promote their progressive development towards self-governance or independence (depends upon the democratically expressed will of the peoples concerned)



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- ◉ Art. 77 (1) UN Charter explicitly enumerates **categories of territories** that may be brought to the TS according to individual agreements
 - > those 'held under mandate'
 - > those 'detached from enemy states' as a result of war
 - > those 'voluntarily placed under the system by states responsible for their administration'
- ◉ agreements → **treaties between an administering power and the UN** intended to be binding and containing rights and obligations under international law
- ◉ the status of trust territories:
 - > a certain degree of international personality
 - > hardly deemed subjects of international law

- ◉ **TS supervision** rested upon three pillars:
 - > annual reports of the administering powers
 - > individual petitions
 - > visiting missions
- ◉ The UN Charter does not provide for an enforcement mechanism or sanctions in cases of non-compliance with obligations under the TS

INTERNATIONAL ADMINISTRATION OF TERRITORIES

- ⊙ **governmental functions in a specific territory are exercised not by the territorial State, but by an entity mandated** to do so under international law
- ⊙ common feature of all ITAs:
 - > the territorial **sovereignty** of the territorial State is **limited** in favour of another State, a group of States, or an international organization
 - > **decisions** of the **external entity** are **directly applicable** in the legal order of the territory concerned

- ⊙ ITAs need to be distinguished from **other forms of international administration**, especially:
 - > Non-self-governing territories
 - > Mandates
 - > Trust territories under the UN trusteeship system
(There is now universal agreement, however, that Chapters XI and XII of the UN Charter are not exhaustive or exclusive and allow for other forms of territorial administration by the UN)
- ⊙ ITA is to be distinguished from **other forms of exercise of political authority by one or more States in the territory of another**, such as:
 - > Protectorates
 - > Condominium
 - > Occupation (belligerent or peaceful)
(ITA does not **serve** the interests of one single State, but rather the **interests of a larger group of States**, an international or regional organization, or the **international community as a whole**)

- ◉ minimum requirement: **some administrative competences must be exercised by the external entity** (mere assistance or consultation with regard to the concerned State is exempted from ITA)
- ◉ purpose:
 - > determination of the final territorial status (frontier disputes, decolonization or the preparation of a territory for independence)
 - > filling a governmental vacuum, economic and political reconstruction in fragile or failing States
 - > protection of human rights and rights of minorities resolving internal conflict

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 ?
- ◉ Traditionally, doctrine has referred to the different means of acquiring territorial sovereignty as '**modes of acquisition of territory**', by drawing an analogy with domestic law for the acquisition of ownership over land

- ◉ **Title to territory**

- > refers generally to the acts or facts that constitute the legal foundation for the establishment of a right over
- > refer either to **the source of a right or to the proof of it** (Frontier Dispute Case [Burkina Faso/Republic of Mali] [Judgment] para. 18).

- ◉ Maps:

- > annexed to a treaty of cession of sovereignty, maps have the same value as the treaty; an integral element of the relevant 'title-source' (treaty of cession)
- > not annexed to such a treaty, merely constitute evidence that a State may invoke in order to prove its title over the territory in dispute

ACCRETION AND AVULSION

- ◉ Gradual physical movement of land from one territory to another, such as occurs in the silting rivers banks
- ◉ Process of violent change, eg. dramatic change in the course of river or the creation of volcanic formation within State's territory



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
 - colonial powers entrusted with the task of evangelizing the newly discovered territories
 - a right to colonization, opposable to other European colonial powers under penalty of excommunication

- ⊙ Secondly, discovery was to be effected only with respect to territories that were not under the actual possession of Christian Princes [*terra nullius* understanding]
 - > 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

- ◉ 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
 - > Weather conditions
 - > 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

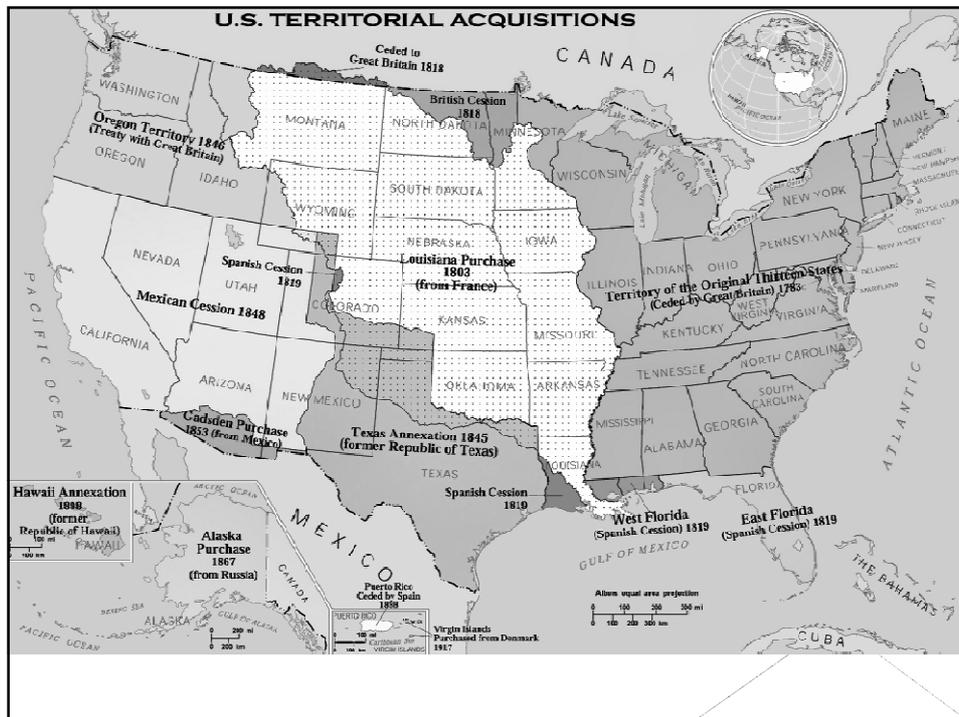


- ◉ the construction of lighthouses and other aids to navigation
 - > do not constitute per se an act manifesting the exercise of sovereignty, considered as **acts à titre de souverain** in the case of very small islands in the Case between Qatar and Bahrain
- ◉ military activities, police surveillance (Rann of Kutch Arbitration [Indo-Pakistan Western Boundary]) and naval patrols (Sovereignty over Pedra Branca/ Pulau Batu Puteh case) were considered to be **effectivités**.



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*

3. Issues of Legality

- ⊙ an acquisition of territory by cession presupposes the consent, or at least the consultation of **the population affected by the transfer of territory?**
Derived from the right of peoples to self-determination?
 - > entitlement to self-determination depended upon qualification as 'people'
 - > a group of human beings must be characterized by at least one common feature which binds them together as a homogenous group] – living on a common territory?
- ⊙ **International practice** does not seem to regard the will of the population as decisive for the legality of cessions or other territorial changes

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)