was not possible to ignore every act of the Confederate authorities and so the idea developed that such rules adopted by the Confederate states as were not hostile to the Union or the authority of the Central Government, or did not conflict with the terms of the US Constitution, would be treated as valid and enforceable in the courts system.[156] The doctrine was developed in a case before the New York Court of Appeals, when, discussing the status of the unrecognised Soviet government, Judge Cardozo noted that an unrecognised entity which had maintained control over its territory, 'may gain for its acts and decrees a validity quasi-governmental, if violence to fundamental principles of justice or to our public policy might otherwise be done'.[157]

This thesis progressed rapidly in the period immediately preceding the American recognition of the USSR and led in *Salimoff* v. *Standard Oil Co. of New York*[158] to the enforcement of a Soviet oil nationalisation decree, with the comment that: 'to refuse to recognise that Soviet Russia is a government regulating the internal affairs of the country, is to give to fictions an air of reality which they do not deserve'.

This decision, diametrically opposed to the *Luther* v. *Sagor* approach,[159] constituted a step towards the abolition of differences between the judicial treatment of the acts of recognised and unrecognised governments.

However, the limits of this broad doctrine were more carefully defined in *The Maret*,[160] where the Court refused to give effect to the nationalisation of an Estonian ship by the government of the unrecognised Soviet Republic of Estonia. However, the ship in dispute was located in an American port at the date of the nationalisation order, and there appears to be a difference in treatment in some cases depending upon whether the property was situated inside or outside the country concerned.

One can mention, in contrast to *The Maret*, the case of *Upright* v. *Mercury Business Machines*,[161] in which the non-recognition of the German Democratic Republic was discussed in relation to the assignment of a bill to the plaintiff by a state-controlled company of the GDR. The judge of the New York Supreme Court declared, in upholding the plaintiff's claim, that a foreign government, although unrecognised by the executive:

[156] See e.g. *Texas* v. *White* 74 US 700 (1868).
[157] *Sokoloff* v. *National City Bank of New York* 239 NY 158 (1924); 2 AD, p. 44.
[158] 262 NY 220 (1933); 7 AD, pp. 22, 26.
[159] [1921] 1 KB 456; 1 AD, p. 47; above, p. 472.
[160] 145 F.2d 431 (1944); 12 AD, p. 29.
[161] 213 NYS (2d) 417 (1961); 32 ILR, p. 65.

> may nevertheless have *de facto* existence which is judicially cognisable. The acts of such a *de facto* government may affect private rights and obligations arising either as a result of activity in, or with persons or corporations within, the territory controlled by such *de facto* government.

However, the creation of judicial entities by unrecognised states will not be allowed to circumvent executive policy. In *Kunstsammlungen zu Weimar* v. *Elicofon*,[162] the KZW was an East German governmental agency until 1969, when it was transformed into a separate juristic person in order to avoid the problems relating to unrecognised states in the above litigation. This concerned the recovery of pictures stolen from a museum during the American occupation of Germany.

As a branch of an unrecognised state, the KZW could not of course be permitted to sue in an American court, but the change of status in 1969 was designed to circumvent this. The Court, however, refused to accept this and emphasised that to allow the KZW to intervene in the case 'would render our government's non-recognition of the German Democratic Republic a meaningless gesture'.[163] Further, in *Autocephalous Church of Cyprus* v. *Goldberg*, the Court of Appeals held that it would not give effect to confiscatory decrees adopted by the unrecognised 'Turkish Federated State of Cyprus', later called the 'Turkish Republic of Northern Cyprus'.[164]

In *Ministry of Defense of the Islamic Republic of Iran* v. *Gould*,[165] the Court was faced with an action in which the unrecognised Iranian government sought to enforce an award. However, the US intervened and filed a statement of interest supporting Iran's argument and this proved of significant influence. This general approach was reinforced in *National Petrochemical* v. *The M/T Stolt Sheaf*,[166] where the Court stressed that the executive must have the power to deal with unrecognised governments and that therefore the absence of formal recognition did not necessarily result in a foreign government being barred from access to US courts.[167] However, where the executive has issued a non-recognition certificate and makes known its view that in the instant case the unrecognised party

[162] 358 F.Supp. 747 (1972); 61 ILR, p. 143.

[163] 358 F.Supp. 747, 757; 61 ILR, p. 154. See also *Federal Republic of Germany* v. *Elicofon*, 14 ILM, 1976, p. 806, following the US recognition of the GDR in which KZW was permitted to intervene in the litigation in progress. See also *Transportes Aereos de Angola* v. *Ronair* 544 F.Supp. 858.

[164] 917 F.2d 278 (1990); 108 ILR, p. 488.

[165] 1988 *Iranian Assets Litig. Rep.* 15, 313. See also 82 AJIL, 1988, p. 591.

[166] 860 F.2d 551 (1988); 87 ILR, p. 583.

[167] 860 F.2d 551, 554.

should not be permitted access to the courts, the courts appear very willing to comply.[168]

It is somewhat difficult to reconcile the various American cases or to determine the extent to which the acts of an unrecognised state or government may be enforced in the courts system of the United States. But two factors should be particularly noted. First of all, the declaration of the executive is binding. If that intimates that no effect is to be given to acts of the unrecognised entity, the courts will be obliged to respect this. It may also be the case that the State Department 'suggestions' will include some kind of hint or indication which, while not clearly expressed, may lead the courts to feel that the executive is leaning more one way than another in the matter of the government's status, and this may influence the courts. For example, in the *Salimoff*[169] case the terms of the certificate tended to encourage the court to regard the Soviet government as a recognised government, whereas in the case of *The Maret*[170] the tone of the executive's statement on the Soviet Republic of Estonia was decidedly hostile to any notion of recognition or enforcement of its decrees.

The second point is the location of the property in question. There is a tendency to avoid the enforcement of acts and decrees affecting property situated outside the unrecognised state or government and in any event the location of the property often introduces additional complications as regards municipal law provision.[171]

There is some uncertainty in the United States as to the operation of the retroactivity doctrine, particularly as it affects events occurring outside the country. There is a line of cases suggesting that only those acts of the unrecognised government performed in its own territory could be validated by the retroactive operation of recognition[172] while, on the other hand, there are cases illustrating the opposite proposition decided by the Supreme Court.[173]

[168] See e.g. *Republic of Panama* v. *Republic National Bank of New York* 681 F.Supp. 1066 (1988); 86 ILR, p. 1 and *Republic of Panama* v. *Citizens & Southern International Bank* 682 F.Supp. 1144 (1988); 86 ILR, p. 10. See also T. Fountain, 'Out From the Precarious Orbit of Politics: Reconsidering Recognition and the Standing of Foreign Governments to Sue in US Courts', 29 Va. JIL, 1989, p. 473.

[169] 262 NY 220 (1933); 7 AD, p. 22.

[170] 145 F.2d 431 (1944); 12 AD, p. 29.

[171] See e.g. *Civil Air Transport Inc.* v. *Central Air Transport Corporation* [1953] AC 70; 19 ILR, p. 85.

[172] See e.g. *Lehigh Valley Railroad Co.* v. *Russia* 21 F.2d 396 (1927); 4 AD, p. 58.

[173] See e.g. *US* v. *Pink* 315 US 203 (1942); 10 AD, p. 48, and *US* v. *Belmont* 301 US 324 (1937); 8 AD, p. 34.

Suggestions for further reading

J. Crawford, *The Creation of States in International Law*, 2nd edn, Oxford, 2006
J. Dugard, *Recognition and the United Nations*, Cambridge, 1987
H. Lauterpacht, *Recognition in International Law*, Cambridge, 1947
S. Talmon, *Recognition of Governments in International Law*, Oxford, 1998

10

Territory

The concept of territory in international law

International law is based on the concept of the state. The state in its turn lies upon the foundation of sovereignty, which expresses internally the supremacy of the governmental institutions and externally the supremacy of the state as a legal person.[1]

But sovereignty itself, with its retinue of legal rights and duties, is founded upon the fact of territory. Without territory a legal person cannot be a state.[2] It is undoubtedly the basic characteristic of a state and the one most widely accepted and understood. There are currently some 200 distinct territorial units, each one subject to a different territorial sovereignty and jurisdiction.

Since such fundamental legal concepts as sovereignty and jurisdiction can only be comprehended in relation to territory, it follows that the legal nature of territory becomes a vital part in any study of international law. Indeed, the principle whereby a state is deemed to exercise exclusive power over its territory can be regarded as a fundamental axiom of

[1] See e.g. *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, chapter 5; J. Castellino and S. Allen, *Title to Territory in International Law: A Temporal Analysis*, Aldershot, 2002; G. Distefano, *L'Ordre International entre Légalité et Effectivité: Le Titre Juridique dans le Contentieux Territorial*, Paris, 2002; R. Y. Jennings, *The Acquisition of Territory in International Law*, Manchester, 1963; J. H. W. Verzijl, *International Law in Historical Perspective*, Leiden, 1970, vol. III, pp. 297 ff.; Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, pp. 464 ff. and pp. 529 ff.; M. N. Shaw, 'Territory in International Law', 13 Netherlands YIL, 1982, p. 61; N. Hill, *Claims to Territory in International Law and Relations*, London, 1945; J. Gottman, *The Significance of Territory*, Charlottesville, 1973; S. Akweenda, *International Law and the Protection of Namibia's Territorial Integrity*, The Hague, 1997; S. P. Sharma, *Territorial Acquisition, Disputes and International Law*, The Hague, 1997; W. Schoenborn, 'La Nature Juridique du Territoire', 30 HR, 1929, p. 85, and K. H. Kaikobad, *Interpretation and Revision of International Boundary Decisions*, Cambridge, 2007.

[2] See *Oppenheim's International Law*, p. 563.

classical international law.[3] The development of international law upon the basis of the exclusive authority of the state within an accepted territorial framework meant that territory became 'perhaps the fundamental concept of international law'.[4] Most nations indeed developed through a close relationship with the land they inhabited.[5]

The central role of territory in the scheme of international law may be seen by noting the development of legal rules protecting its inviolability. The principle of respect for the territorial integrity of states is well founded as one of the linchpins of the international system, as is the norm prohibiting interference in the internal affairs of other states.[6] A number of factors, however, have tended to reduce the territorial exclusivity of the state in international law. Technological and economic changes have had an impact as interdependence becomes more evident and the rise of such transnational concerns as human rights and self-determination have tended to impinge upon this exclusivity.[7] The growth of international organisations is another relevant factor, as is the development of the 'common heritage' concept in the context of the law of the sea and air law.[8] Nevertheless, one should not exaggerate the effects upon international law doctrine today of such trends.[9] Territorial sovereignty remains as a key concept in international law.

Since the law reflects political conditions and evolves, in most cases, in harmony with reality, international law has had to develop a series of rules governing the transfer and control of territory. Such rules, by the

[3] See L. Delbez, 'Du Territoire dans ses Rapports avec l'État', 39 *Revue Générale de Droit International Public*, 1932, p. 46. See also Hill, *Claims to Territory*, p. 3.

[4] D. P. O'Connell, *International Law*, 2nd edn, London, 1970, vol. I, p. 403. See also Jennings, *Acquisition*, p. 87, and Judge Huber, *The Island of Palmas* case, 2 RIAA, pp. 829, 838 (1928).

[5] See generally, Gottman, *Significance*.

[6] See e.g. articles 2(4) and 2(7) of the UN Charter; the 1970 Declaration on Principles of International Law adopted by the UN General Assembly, resolution 2625 (XXV), and article 1 of the 1974 Consensus Definition of Aggression adopted by the General Assembly, resolution 3314 (XXIX).

[7] See e.g. R. Falk, 'A New Paradigm for International Legal Studies: Prospects and Proposals', 84 *Yale Law Journal*, 1975, pp. 969, 973, 1020. See also H. Lauterpacht, *International Law and Human Rights*, London, 1950, and C. W. Jenks, *The Common Law of Mankind*, London, 1958.

[8] See e.g. the Treaty on Outer Space, 1967 and the Convention on the Law of the Sea, 1982. See also Shaw, 'Territory', pp. 65–6; and below, p. 541.

[9] See e.g. the *Asylum* case, ICJ Reports, 1950, pp. 266, 275; 17 ILR, pp. 280, 283. The International Court emphasised in the *Malaysia/Singapore* case, ICJ Reports, 2008, para. 122, the 'central importance in international law and relations of state sovereignty over territory and of the stability and certainty of that sovereignty'.

very nature of international society, have often (although not always) had the effect of legitimising the results of the exercise of power. The lack of a strong, central authority in international law has emphasised, even more than municipal legal structures, the way that law must come to terms with power and force.

The rules laid down by municipal legislation and judicial decisions regarding the transfer and control of land within a particular state are usually highly detailed, for they deal with one of the basic resources and wealth-creating factors of the nation. Land law has often reflected the power balance within a society, with feudal arrangements being succeeded by free market contracts and latterly the introduction of comprehensive provisions elaborating the rights and duties of landlords and their tenants, and the development of more sophisticated conveyancing techniques. A number of legal interests are capable of existing over land and the possibility exists of dividing ownership into different segments.[10] The treatment of territory in international law has not reached this sophisticated stage for a number of reasons, in particular the horizontal system of territorial sovereignty that subsists internationally as distinct from the vertical order of land law that persists in most municipal systems. There is thus a critical difference in the consequences that result from a change in the legal ownership of land in international law and in municipal law.

In international law a change in ownership of a particular territory involves also a change in sovereignty, in the legal authority governing the area. This means that the nationality of the inhabitants is altered, as is the legal system under which they live, work and conduct their relations, whereas in municipal law no such changes are involved in an alteration of legal ownership. Accordingly international law must deal also with all the various effects of a change in territorial sovereignty and not confine its attentions to the mere mechanism of acquisition or loss of territory.[11]

Territorial sovereignty

Judge Huber noted in the *Island of Palmas* case[12] that:

> sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular state.

[10] See e.g. R. Megarry and H. W. R. Wade, *The Law of Real Property*, 5th edn, London, 1984.
[11] See below, chapter 17, dealing with the problems of state succession.
[12] 2 RIAA, pp. 829, 838 (1928); 4 AD, pp. 103, 104. See also the Report of the Commission of Jurists in the *Aaland Islands* case, LNOJ, Supp. no. 3, p. 6.

Brierly defined territorial sovereignty in terms of the existence of rights over territory rather than the independence of the state itself or the relation of persons to persons. It was a way of contrasting 'the fullest rights over territory known to the law' with certain minor territorial rights, such as leases and servitudes.[13] Territorial sovereignty has a positive and a negative aspect. The former relates to the exclusivity of the competence of the state regarding its own territory,[14] while the latter refers to the obligation to protect the rights of other states.[15]

The international rules regarding territorial sovereignty are rooted in the Roman law provisions governing ownership and possession, and the classification of the different methods of acquiring territory is a direct descendant of the Roman rules dealing with property.[16] This has resulted in some confusion. Law, being so attached to contemporary life, cannot be easily transposed into a different cultural milieu.[17] And, as shall be noted, the Roman method of categorising the different methods of acquiring territory faces difficulties when applied in international law.

The essence of territorial sovereignty is contained in the notion of title. This term relates to both the factual and legal conditions under which territory is deemed to belong to one particular authority or another. In other words, it refers to the existence of those facts required under international law to entail the legal consequences of a change in the juridical status of a particular territory.[18] As the International Court noted in the *Burkina Faso/Mali* case,[19] the word 'title' comprehends both any evidence which may establish the existence of a right and the actual source of that right.[20]

One interesting characteristic that should be noted and which again points to the difference between the treatment of territory under

[13] *The Law of Nations*, 6th edn, Oxford, 1963, p. 162.

[14] See Judge Huber, *Island of Palmas* case, 2 RIAA, pp. 829, 838 (1928); 4 AD, pp. 103, 104.

[15] 2 RIAA, p. 839. See also Shaw, 'Territory', pp. 73 ff., and S. Bastid, 'Les Problèmes Territoriaux dans la Jurisprudence de la Cour Internationale', 107 HR, 1962, pp. 360, 367.

[16] See e.g. Schoenborn, 'Nature Juridique', p. 96. See also O'Connell, *International Law*, pp. 403–4. Note in particular the Roman law distinction between *imperium* and *dominium*: Shaw, 'Territory', p. 74.

[17] See, as regards the theories concerning the relationship between states and territory, Shaw, 'Territory', pp. 75–9.

[18] See e.g. Jennings, *Acquisition*, p. 4. See also I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, p. 119.

[19] ICJ Reports, 1986, pp. 554, 564; 80 ILR, pp. 440, 459.

[20] This was reaffirmed in the *Land, Island and Maritime Frontier (El Salvador/Honduras)* case, ICJ Reports, 1992, pp. 351, 388; 97 ILR, pp. 266, 301.

international law and municipal law is that title to territory in international law is more often than not relative rather than absolute.[21] Thus, a court, in deciding to which of contending states a parcel of land legally belongs, will consider all the relevant arguments and will award the land to the state which relatively speaking puts forward the better (or best) legal case.[22] Title to land in municipal law is much more often the case of deciding in uncertain or contentious circumstances which party complies with the legal requirements as to ownership and possession, and in that sense title is absolute. It is not normally a question of examining the facts to see which claimant can under the law put forward a better claim to title. Further, not all rights or links will amount to territorial sovereignty. Personal ties of allegiance may exist but these may not necessarily lead to a finding of sovereignty.[23] The special characteristics of the territory need to be taken into account, as does the particular structure of the sovereignty in question.[24]

Disputes as to territory in international law may be divided into different categories. The contention may be over the status of the country itself, that is, all the territory comprised in a particular state, as for example Arab claims against Israel at one time and claims formerly pursued by Morocco against Mauritania.[25] Or the dispute may refer to a certain area on the borders of two or more states, as for example Somali claims against the north-east of Kenya and south-east of Ethiopia.[26] Similarly, claims to territory may be based on a number of different grounds, ranging from the traditional method of occupation or prescription to the newer concepts such as self-determination, with various political and legal factors, for example, geographical contiguity, historical demands and economic

[21] See e.g. the *Eastern Greenland* case, PCIJ, Series A/B, No. 53, 1933, p. 46; 6 AD, p. 95.

[22] See the *Minquiers and Ecrehos* case, ICJ Reports, 1953, pp. 47, 52; 20 ILR, p. 94. The Court noted in the *Malaysia/Singapore* case, ICJ Reports, 2008, para. 120, that the passing of sovereignty may be by way of agreement between states, either in the form of a treaty or tacitly arising from the conduct of the parties. The emphasis was to be placed on the intention of the parties.

[23] *Western Sahara* case, ICJ Reports, 1975, pp. 12, 48, 64 and 68; 59 ILR, p. 14. See also *Qatar* v. *Bahrain*, ICJ Reports, 2001, para. 86. But see as to the confirmatory value of such ties, the *Malaysia/Singapore* case, ICJ Reports, 2008, paras. 74–5. Note that there is a critical difference between territorial sovereignty on the one hand and the regular rights of property on the other, *ibid.*, paras. 138–9 and 222.

[24] See e.g. the *Western Sahara* case, ICJ Reports, 1975, pp. 12, 41–3; 59 ILR, p. 14; the *Rann of Kutch* case, 50 ILR, p. 2; the *Dubai/Sharjah* award, 91 ILR, pp. 543, 587 and the *Eritrea/Yemen* case, 114 ILR, pp. 1, 116.

[25] See below, p. 524. [26] See below, p. 525.

elements, possibly being relevant. These issues will be noted during the course of this chapter.

Apart from territory actually under the sovereignty of a state, international law also recognises territory over which there is no sovereign. Such territory is known as *terra nullius*. In addition, there is a category of territory called *res communis* which is (in contrast to *terra nullius*) generally not capable of being reduced to sovereign control. The prime instance of this is the high seas, which belong to no-one and may be used by all. Another example would be outer space. The concept of common heritage of mankind has also been raised and will be examined in this chapter.

New states and title to territory[27]

The problem of how a state actually acquires its own territory in international law is a difficult one and one that may ultimately only be explained in legal–political terms. While with long-established states one may dismiss the question on the basis of recognition and acceptance, new states pose a different problem since, under classical international law, until a new state is created, there is no legal person in existence competent to hold title. None of the traditional modes of acquisition of territorial title satisfactorily resolves the dilemma, which has manifested itself particularly in the post-Second World War period with the onset of decolonisation. The international community has traditionally approached the problem of new states in terms of recognition, rather than in terms of acquisition of title to territory. This means that states have examined the relevant situation and upon ascertainment of the factual conditions have accorded recognition to the new entity as a subject of international law. There has been relatively little discussion of the method by which the new entity itself acquires the legal rights to its lands. The stress has instead been on compliance with factual requirements as to statehood coupled with the acceptance of this by other states.[28]

One approach to this problem has been to note that it is recognition that constitutes the state, and that the territory of the state is, upon recognition, accepted as the territory of a valid subject of international law irrespective

[27] See Jennings, *Acquisition*, pp. 36 ff.; J. G. Starke, 'The Acquisition of Title to Territory by Newly Emerged States', 41 BYIL, 1965–6, p. 411; J. Crawford, *The Creation of States in International Law*, 2nd edn, Oxford, 2006, and M. N. Shaw, *Title to Territory in Africa*, Oxford, 1986, pp. 168–73.

[28] See e.g. *Oppenheim's International Law*, p. 677.

of how it may have been acquired.[29] While this theory is not universally or widely accepted,[30] it does nevertheless underline how the emphasis has been upon recognition of a situation and not upon the method of obtaining the rights in law to the particular territory.[31]

One major factor that is relevant is the crucial importance of the doctrine of domestic jurisdiction. This constitutes the legal prohibition on interference within the internal mechanisms of an entity and emphasises the supremacy of a state within its own frontiers. Many of the factual and legal processes leading up to the emergence of a new state are therefore barred from international legal scrutiny and this has proved a deterrent to the search for the precise method by which a new entity obtains title to the territory in question.[32]

In recent years, however, the scope of the domestic jurisdiction rule has been altered. Discussions in international conferences and institutions, such as the United Nations, have actively concerned themselves with conditions in non-independent countries and it has been accepted that territorial sovereignty in the ordinary sense of the words does not really exist over mandate or trust territories.[33] This is beginning to encourage a re-examination of the procedures of acquiring title. However, the plea of domestic jurisdiction does at least illustrate the fact that not only international law but also municipal law is involved in the process of gaining independence.

There are basically two methods by which a new entity may gain its independence as a new state: by constitutional means, that is by agreement with the former controlling administration in an orderly devolution of power, or by non-constitutional means, usually by force, against the will of the previous sovereign.

The granting of independence according to the constitutional provisions of the former power may be achieved either by agreement between the former power and the accepted authorities of the emerging state, or by a purely internal piece of legislation by the previous sovereign. In many cases a combination of both procedures is adopted. For example, the independence of Burma was preceded by a Burmese–United Kingdom

[29] *Ibid.* [30] See above, chapter 9.

[31] See e.g. Jennings, *Acquisition*, p. 37, and Starke, 'Acquisition of Title', p. 413.

[32] See Shaw, *Title to Territory*, pp. 168–9.

[33] See e.g. *International Status of South-West Africa*, ICJ Reports, 1950, p. 128; 17 ILR, p. 47; the *South West Africa* cases, ICJ Reports, 1966, p. 6; 37 ILR, p. 243; the *Namibia* case, ICJ Reports, 1971, p. 16; 49 ILR, p. 2, and the *Western Sahara* case, ICJ Reports, 1975, p. 12; 59 ILR, p. 14. See further above, chapter 5, p. 224.

agreement and treaty (June and October, 1947) and by the Burma Independence Act of 1947 passed by the British legislature, providing for Burmese independence to take effect on 4 January 1948. In such cases what appears to be involved is a devolution or transfer of sovereignty from one power to another and the title to the territory will accordingly pass from the previous sovereign to the new administration in a conscious act of transference.

However, a different situation arises where the new entity gains its independence contrary to the wishes of the previous authority, whether by secession or revolution. It may be that the dispossessed sovereign may ultimately make an agreement with the new state recognising its new status, but in the meantime the new state might well be regarded by other states as a valid state under international law.[34]

The principle of self-determination is also very relevant here. Where a state gains its sovereignty in opposition to the former power, new facts are created and the entity may well comply with the international requirements as to statehood, such as population, territory and government. Other states will then have to make a decision as to whether or not to recognise the new state and accept the legal consequences of this new status. But at this point a serious problem emerges.

For a unit to be regarded as a state under international law it must conform with the legal conditions as to settled population, a definable area of land and the capacity to enter into legal relations. However, under traditional international law, until one has a state one cannot talk in terms of title to the territory, because there does not exist any legal person capable of holding the legal title. So to discover the process of acquisition of title to territory, one has first to point to an established state. A few ideas have been put forward to explain this. One theory is to concentrate upon the factual emergence of the new state and to accept that since a new state is in existence upon a certain parcel of land, international law should look no further but accept the reality of possession at the moment of independence as denoting ownership, that is, legal title.[35] While in most cases this would prove adequate as far as other states are concerned, it can lead to problems where ownership is claimed of an area not in possession and it does little to answer the questions as to the international legal explanation of territorial sovereignty. Another approach is to turn to the

[34] Shaw, *Title to Territory*. See also D. Greig, *International Law*, 2nd edn, London, 1976, p. 156.

[35] See e.g. *Oppenheim's International Law*, p. 677, and Starke, 'Acquisition of Title', p. 413.

constitutive theory of recognition, and declare that by recognition not only is a new state in the international community created, but its title to the territory upon which it is based is conclusively determined.[36] The disadvantage of this attitude is that it presupposes the acceptance of the constitutive theory by states in such circumstances, something which is controversial.[37]

One possibility that could be put forward here involves the abandonment of the classical rule that only states can acquire territorial sovereignty, and the substitution of a provision permitting a people to acquire sovereignty over the territory pending the establishment of the particular state. By this method the complicated theoretical issues related to recognition are avoided. Some support for this view can be found in the provision in the 1970 Declaration on Principles of International Law that the territory of a colony or other non-self-governing entity possesses, under the United Nations Charter, a status separate and distinct from that of the administering power, which exists until the people have exercised the right of self-determination.[38] However, the proposition is a controversial one and must remain tentative.[39]

The acquisition of additional territory

The classical technique of categorising the various modes of acquisition of territory is based on Roman law and is not adequate.[40] Many of the leading cases do not specify a particular category or mode but tend to adopt an overall approach. Five modes of acquisition are usually detailed: occupation of *terra nullius*, prescription, cession, accretion and subjugation (or conquest); and these are further divided into original and derivative modes.[41]

Boundary treaties and boundary awards

Boundary treaties, whereby either additional territory is acquired or lost or uncertain boundaries are clarified by agreement between the states concerned, constitute a root of title in themselves. They constitute a special

[36] Starke, 'Acquisition of Title', p. 413. See also Jennings, *Acquisition*, p. 37.
[37] See above, chapter 9, p. 445.
[38] See the *Namibia* case, ICJ Reports, 1971, pp. 16, 31; 49 ILR, pp. 2, 21.
[39] See Shaw, *Title to Territory*, pp. 171–3.
[40] See O'Connell, *International Law*, p. 405.
[41] See *Oppenheim's International Law*, p. 677, and Brownlie, *Principles*, pp. 127 ff.

kind of treaty in that they establish an objective territorial regime valid *erga omnes*.[42] Such a regime will not only create rights binding also upon third states, but will exist outside of the particular boundary treaty and thus will continue even if the treaty in question itself ceases to apply.[43] The reason for this exceptional approach is to be found in the need for the stability of boundaries.[44] Further, the establishment or confirmation of a particular boundary line by way of referring in a treaty to an earlier document (which may or may not be binding of itself) laying down a line is also possible and as such invests the line in question with undoubted validity.[45] Indeed, this earlier document may also be a map upon which a line has been drawn.

Accordingly, many boundary disputes in fact revolve around the question of treaty interpretation. It is accepted that a treaty should be interpreted in the light of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969, 'in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose'.[46] Essentially the aim is to find the 'common will' of the parties, a concept which includes consideration of the subsequent conduct of the parties.[47] Since many of the boundary treaties that need to be interpreted long pre-date the coming into force of the Vienna Convention,[48] the problem of the applicability of its provisions has arisen. Courts have taken the view that the Convention in this respect at least represents customary international law, thus apparently obviating the problem.[49]

More generally, the difficulty in seeking to interpret both general concepts and geographical locations used in early treaties in the

[42] See *Eritrea/Yemen* 114 ILR, p. 48.

[43] See *Libya/Chad*, ICJ Reports, 1994, pp. 6, 37; 100 ILR, p. 1.

[44] *Ibid.* and the *Temple* case, ICJ Reports, 1962, pp. 6, 34; 33 ILR, p. 48.

[45] See *Libya/Chad*, ICJ Reports, 1994, pp. 6, 23; 33 ILR, p. 48. See also *Cameroon* v. *Nigeria*, ICJ Reports, 2002, paras. 50–1.

[46] *Libya/Chad*, pp. 21–2.

[47] See the *Argentina/Chile Frontier Award (La Palena)* 38 ILR, pp. 10, 89 and the *Eritrea/Ethiopia* case, decision of 13 April 2002, 130 ILR, pp. 1, 34. See also, with regard to acquiescence, below, p. 515.

[48] See article 4 providing that the Convention applies only to treaties concluded after the coming into force of the Convention itself (27 January 1980).

[49] See e.g. *Libya/Chad*, ICJ Reports, 1994, pp. 6, 21–2; the *Beagle Channel* case, 52 ILR, pp. 93, 124 and the *Botswana/Namibia* case, ICJ Reports, 1999, pp. 1045, 1059–60. But cf. the Separate Opinion of Judge Oda, *ibid.*, p. 1118. See also D. W. Greig, *Intertemporality and the Law of Treaties*, British Institute of International and Comparative Law, 2001, pp. 108 ff.

light of modern scientific knowledge has posed difficulties. In the *Botswana/Namibia* case, the Court, faced with the problem of identifying the 'main channel' of the River Chobe in the light of an 1890 treaty, emphasised that 'the present-day state of scientific knowledge' could be used in order to illuminate terms of that treaty.[50] In the *Eritrea/Ethiopia* case, the Boundary Commission referred to the principle of contemporaneity, by which it meant that a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded. In particular, the determination of a geographical name (whether of a place or of a river) depended upon the contemporary understanding of the location to which that name related at the time of the treaty. However, in seeking to understand what that was, reference to subsequent practice and to the objects of the treaty was often required.[51] In interpreting a boundary treaty, in particular in seeking to resolve ambiguities, the subsequent practice of the parties will be relevant. Even where such subsequent practice cannot in the circumstances constitute an authoritative interpretation of the treaty, it may be deemed to 'be useful' in the process of specifying the frontier in question.[52] However, where the boundary line as specified in the pertinent instrument is clear, it cannot be changed by a court in the process of interpreting delimitation provisions.[53]

Like boundary treaties, boundary awards may also constitute roots or sources of legal title to territory.[54] A decision by the International Court or arbitral tribunal allocating title to a particular territory or determining the boundary line as between two states will constitute establishment or confirmation of title that will be binding upon the parties themselves and for all practical purposes upon all states in the absence of maintained protest.[55] It is also possible that boundary allocation decisions that do not constitute international judicial or arbitral awards may be binding,

[50] ICJ Reports, 1999, pp. 1045, 1060. But see here the Declaration of Judge Higgins noting that the task of the Court was to 'decide what general idea the parties had in mind, and then make reality of that general idea through the use of contemporary knowledge' rather than to decide *in abstracto* 'by a mechanistic appreciation of relevant indicia', *ibid.*, p. 1114. See also the *Argentina/Chile Award (La Laguna del Desierto)* 113 ILR, pp. 1, 76. In the *Cameroon* v. *Nigeria* case, the Court, in seeking to determine the location of the mouth of the River Ebeji, emphasised that 'the Court must seek to ascertain the intention of the parties at the time', ICJ Reports, 2002, pp. 303, 346.

[51] Decision of 13 April 2002, 130 ILR, pp. 1, 34.

[52] *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 345.

[53] *Ibid.*, p. 370.

[54] See e.g. Brownlie, *Principles*, p. 132.

[55] See e.g. the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, ICJ Reports, 1992, pp. 351, 401; 97 ILR, p. 112.

providing that it can be shown that the parties consented to the initial decision.[56]

Accretion[57]

This describes the geographical process by which new land is formed and becomes attached to existing land, as for example the creation of islands in a river mouth or the change in direction of a boundary river leaving dry land where it had formerly flowed. Where new land comes into being within the territory of a state, it forms part of the territory of the state and there is no problem. When, for example, an island emerged in the Pacific after an under-sea volcano erupted in January 1986, the UK government noted that: 'We understand the island emerged within the territorial sea of the Japanese island of Iwo Jima. We take it therefore to be Japanese territory.'[58]

As regards a change in the course of a river forming a boundary, a different situation is created depending whether it is imperceptible and slight or a violent shift (*avulsion*). In the latter case, the general rule is that the boundary stays at the same point along the original river bed.[59] However, where a gradual move has taken place the boundary may be shifted.[60] If the river is navigable, the boundary will be the middle of the navigable channel, whatever slight alterations have occurred, while if the river is not navigable the boundary will continue to be the middle of the river itself. This aspect of acquiring territory is relatively unimportant in international law but these rules have been applied in a number of cases involving disputes between particular states of the United States of America.[61]

[56] See e.g. the *Dubai/Sharjah* case, 91 ILR, pp. 543, 577 (where the Court of Arbitration termed such procedures 'administrative decisions', *ibid.*) and *Qatar/Bahrain*, ICJ Reports, 2001, paras. 110 ff.

[57] See e.g. C. C. Hyde, *International Law*, 2nd edn, Boston, 1947, vol. I, pp. 355–6; O'Connell, *International Law*, pp. 428–30, and *Oppenheim's International Law*, pp. 696–8.

[58] 478 HL Deb., col. 1005, Written Answer, 17 July 1986. See also A. J. Day, *Border and Territorial Disputes*, 2nd edn, London, 1987, p. 277, regarding a new island appearing after a cyclone in 1970 on a river boundary between India and Bangladesh. Title is disputed. See also *Georgia* v. *South Carolina* 111 L.Ed.2d 309; 91 ILR, p. 439.

[59] See e.g. *Georgia* v. *South Carolina* 111 L.Ed.2d 309, 334; 91 ILR, pp. 439, 458. See also the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, ICJ Reports, 1992, pp. 351, 546.

[60] ICJ Reports, 1992, pp. 351, 546.

[61] See e.g. *The Anna* 5 C.Rob. 373 (1805); *Arkansas* v. *Tennessee* 246 US 158 (1918); *Louisiana* v. *Mississippi* 282 US 458 (1940); *Georgia* v. *South Carolina* 111 L.Ed.2d 309; 91 ILR,

Cession[62]

This involves the peaceful transfer of territory from one sovereign to another (with the intention that sovereignty should pass) and has often taken place within the framework of a peace treaty following a war. Indeed the orderly transference of sovereignty by agreement from a colonial or administering power to representatives of the indigenous population could be seen as a form of cession.

Because cession has the effect of replacing one sovereign by another[63] over a particular piece of territory, the acquiring state cannot possess more rights over the land than its predecessor had. This is an important point, so that where a third state has certain rights, for example, of passage over the territory, the new sovereign must respect them. It is expressed in the land law phrase that the burden of obligations runs with the land, not the owner. In other words, the rights of the territorial sovereign are derived from a previous sovereign, who could not, therefore, dispose of more than he had.

This contrasts with, for example, accretion which is treated as an original title, there having been no previous legal sovereign over the land.

The *Island of Palmas* case[64] emphasised this point. It concerned a dispute between the United States and the Netherlands. The claims of the United States were based on an 1898 treaty with Spain, which involved the cession of the island. It was emphasised by the arbitrator and accepted by the parties that Spain could not thereby convey to the Americans greater rights than it itself possessed.

The basis of cession lies in the intention of the relevant parties to transfer sovereignty over the territory in question.[65] Without this it cannot legally operate. Whether an actual delivery of the property is also required for

p. 439, and the *Chamizal* arbitration, 5 AJIL, 1911, p. 782. See also E. Lauterpacht, 'River Boundaries: Legal Aspects of the Shatt-Al-Arab Frontier', 9 ICLQ, 1960, pp. 208, 216; L. J. Bouchez, 'The Fixing of Boundaries in International Boundary Rivers', 12 ICLQ, 1963, p. 789; S. McCaffrey, *The Law of International Watercourses*, 2nd edn, Oxford, 2007, and the *Botswana/Namibia* case, ICJ Reports, 1999, p. 1045.

62 See e.g. *Oppenheim's International Law*, pp. 679–86, and O'Connell, *International Law*, pp. 436–40.

63 See *Christian* v. *The Queen* [2006] UKPC 47, para. 11, 130 ILR 696, 700, 711, where the Privy Council noted that cession 'contemplates a transfer of sovereignty by one sovereign power to another'.

64 2 RIAA, p. 829 (1928); 4 AD, p. 103.

65 Sovereignty over the territorial sea contiguous to and the airspace above the territory concerned would pass with the land territory: see the *Grisbadarna* case, 11 RIAA, p. 147 (1909) and the *Beagle Channel* case, HMSO, 1977; 52 ILR, p. 93. This suggests the corollary

a valid cession is less certain. It will depend on the circumstances of the case. For example, Austria ceded Venice to France in 1866, and that state within a few weeks ceded the territory to Italy. The cession to the Italian state through France was nonetheless valid.[66] In the *Iloilo* case,[67] it was held that the cession of the Philippines to the United States took place, on the facts of the case, upon the ratification of the Treaty of Paris of 1898, even though American troops had taken possession of the town of Iloilo two months prior to this.

Although instances of cession usually occur in an agreement following the conclusion of hostilities,[68] it can be accomplished in other circumstances, such as the purchase of Alaska by the United States in 1867 from Russia or the sale by Denmark of territories in the West Indies in 1916 to the United States. It may also appear in exchanges of territories or pure gifts of territory.[69]

Conquest and the use of force

How far a title based on force can be regarded as a valid, legal right recognisable by other states and enforceable within the international system is a crucial question. Ethical considerations are relevant and the principle that an illegal act cannot give birth to a right in law is well established in municipal law and is an essential component of an orderly society.

However, international law has sometimes to modify its reactions to the consequences of successful violations of its rules to take into account the exigencies of reality. The international community has accepted the results of illegal aggression in many cases by virtue of recognition.

Conquest, the act of defeating an opponent and occupying all or part of its territory, does not of itself constitute a basis of title to the land.[70] It

that a cession of the territorial sea or airspace would include the relevant land territory: see *Oppenheim's International Law*, p. 680. But see Brownlie, *Principles*, pp. 117–18.

[66] See *Oppenheim's International Law*, p. 681. Note also that in 1859 Austria ceded Lombardy to France, which then ceded it to Sardinia without having taken possession: see O'Connell, *International Law*, p. 438. Cf. *The Fama* 5 C.Rob. 106, 115 (1804).

[67] 4 RIAA, p. 158 (1925); 3 AD, p. 336.

[68] Note now that article 52 of the Vienna Convention on the Law of Treaties, 1969 provides that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations. However, prior treaties of cession are subject to the rule of intertemporal law: see below, p. 508.

[69] See, for further examples, *Oppenheim's International Law*, pp. 681–2.

[70] *Ibid.*, p. 699. See also S. Korman, *The Right of Conquest*, Oxford, 1996.

does give the victor certain rights under international law as regards the territory, the rights of belligerent occupation,[71] but the territory remains subject to the legal title of the ousted sovereign.[72] Sovereignty as such does not merely pass by conquest to the occupying forces, although complex situations may arise where the legal status of the territory occupied is, in fact, in dispute prior to the conquest.[73]

Conquest, of course, may result from a legal or an illegal use of force. By the Kellogg–Briand Pact of 1928, war was outlawed as an instrument of national policy, and by article 2(4) of the United Nations Charter all member states must refrain from the threat or use of force against the territorial integrity or political independence of any state. However, force will be legitimate when exercised in self-defence.[74] Whatever the circumstances, it is not the successful use of violence that in international law constituted the valid method of acquiring territory. Under the classical rules, formal annexation of territory following upon an act of conquest would operate to pass title. It was a legal fiction employed to mask the conquest and transform it into a valid method of obtaining land under international law.[75] However, it is doubtful whether an annexation proclaimed while war is still in progress would have operated to pass a good title to territory. Only after a war is concluded could the juridical status of the disputed territory be finally determined. This follows from the rule that has developed to the effect that the control over the relevant territory by the state purporting to annex must be effective and that there must be no reasonable chance of the former sovereign regaining the land.

These points were emphasised by the Nuremberg War Crimes Tribunal after the Second World War, in discussing the various purported German annexations of 1939 and 1940. The Tribunal firmly declared that annexations taking place before the conclusion of a war were ineffective and invalid in international law.[76] Intention to annex was a crucial aspect

[71] See e.g. M. S. McDougal and F. P. Feliciano, *Law and Minimum World Public Order*, New Haven, 1961, pp. 733–6 and 739–44, and J. Stone, *Legal Controls of International Conflict*, London, 1959, pp. 744–51. See also E. Benveniste, *The International Law of Occupation*, Princeton, 1993.

[72] See generally *The Arab–Israeli Conflict* (ed. J. N. Moore), Princeton, 4 vols., 1974–89.

[73] But cf. Y. Blum, 'The Missing Reversioner', in *ibid.*, vol. II, p. 287.

[74] See article 51 of the UN Charter and below, chapter 20.

[75] See e.g. *Oppenheim's International Law*, p. 699. See also O'Connell, *International Law*, pp. 431–6.

[76] O'Connell, *International Law*, p. 436. See also e.g. *Re Goering* 13 AD, p. 203 (1946).

of the equation so that, for example, the conquest of Germany by the Allies in 1945 did not give rise to an implied annexation by virtue of the legislative control actually exercised (as it could have done) because the Allies had specifically ruled out such a course in a joint declaration.[77] It is, however, clear today that the acquisition of territory by force alone is illegal under international law. This may be stated in view of article 2(4) of the UN Charter and other practice. Security Council resolution 242, for example, emphasised the 'inadmissibility of the acquisition of territory by war', while the 1970 Declaration of Principles of International Law adopted by the UN General Assembly provides that:

> the territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.[78]

In Security Council resolution 662 (1990), adopted unanimously, the Council decided that the declared Iraqi annexation of Kuwait 'under any form and whatever pretext has no legal validity and is considered null and void'. All states and institutions were called upon not to recognise the annexation and to refrain from actions which might be interpreted as indirect recognition.[79]

Acquisition of territory following an armed conflict would require further action of an international nature in addition to domestic legislation to annex. Such further necessary action would be in the form either of a treaty of cession by the former sovereign or of international recognition.[80]

The exercise of effective control

It is customary in the literature to treat the modes of occupation and prescription as separate categories. However, there are several crucial factors

[77] Cmd 6648 (1945). See also *Oppenheim's International Law*, pp. 699–700.

[78] See also article 5(3) of the Consensus Definition of Aggression adopted in 1974 by the UN General Assembly. Similarly, by article 52 of the Vienna Convention on the Law of Treaties, 1969, a treaty providing for the transfer of territory may be void for duress.

[79] See *The Kuwait Crisis – Basic Documents* (eds. E. Lauterpacht, C. Greenwood, M. Weller and D. Bethlehem), Cambridge, 1991, p. 90.

[80] See, for example, Security Council resolution 497 (1981), condemning Israel's decision to extend its laws, jurisdiction and administration to the occupied Golan Heights. The UN has also condemned Israel's policy of establishing settlements in the occupied territories: see e.g. Security Council resolution 465 (1980). See further below, chapter 20, with regard to self-determination and the use of force.

that link the concepts, so that the acquisition of territory by virtue of these methods, based as they are upon the exercise of effective control, is best examined within the same broad framework. The traditional definition of these two modes will be noted first.

Occupation is a method of acquiring territory which belongs to no one (*terra nullius*) and which may be acquired by a state in certain situations. The occupation must be by a state and not by private individuals, it must be effective and it must be intended as a claim of sovereignty over the area. The high seas cannot be occupied in this manner for they are *res communis*, but vacant land may be subjected to the sovereignty of a claimant state. It relates primarily to uninhabited territories and islands, but may also apply to certain inhabited lands.

The issue was raised in the *Western Sahara* case before the International Court of Justice.[81] The question was asked as to whether the territory in question had been *terra nullius* at the time of colonisation. It was emphasised by the Court that the concept of *terra nullius* was a legal term of art used in connection with the mode of acquisition of territory known as 'occupation'.[82] The latter mode was defined legally as an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession.[83] In an important statement, the Court unambiguously asserted that the state practice of the relevant period (i.e. the period of colonisation) indicated that territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terrae nullius*.[84] Further, international case-law has recognised that sovereign title may be suspended for a period of time in circumstances that do not lead to the status of *terra nullius*. Such indeterminacy could be resolved by the relevant parties at a relevant time.[85]

In fact the majority of territories brought under European control were regarded as acquired by means of cessions, especially in Asia and

[81] ICJ Reports, 1975, p. 12; 59 ILR, p. 14. See also M. N. Shaw, 'The *Western Sahara* case', 49 BYIL, 1978, pp. 119, 127–34.

[82] ICJ Reports, 1975, pp. 12, 39; 59 ILR, pp. 14, 56. [83] *Ibid.*

[84] *Ibid.* This ran counter to some writers of the period: see e.g. M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law*, London, 1926, pp. 11–20; J. Westlake, *Chapters on the Principles of International Law*, London, 1894, pp. 141–2; Jennings, *Acquisition*, p. 20, and *Oppenheim's International Law*, p. 687, footnote 4.

[85] See *Eritrea/Yemen*, 114 ILR, pp. 1, 51. See also N. S. M. Antunes, 'The *Eritrea–Yemen* Arbitration: First Stage – The Law of Title to Territory Re-averred', 48 ICLQ, 1999, p. 362, and A. Yannis, 'The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics', 13 EJIL, 2002, p. 1037.

Africa.[86] However, there were instances of title by occupation, for example Australia, and many sparsely inhabited islands.

Occupation, both in the normal sense of the word and in its legal meaning, was often preceded by discovery, that is the realisation of the existence of a particular piece of land.[87] But mere realisation or sighting was never considered (except for periods in the fifteenth and sixteenth centuries and this is not undisputed) as sufficient to constitute title to territory. Something more was required and this took the form of a symbolic act of taking possession, whether it be by the raising of flags or by solemn proclamations or by more sophisticated ritual expressions. As time passed, the conditions changed and the arbitrator in the *Island of Palmas* case pointed to the modern effect of discovery as merely giving an inchoate title which had to be completed within a reasonable time by the effective occupation of the relevant region. Discovery only put other states on notice that the claimant state had a prior interest in the territory which, to become legally meaningful, had to be supplemented by effective occupation within a certain period.[88]

Prescription[89] is a mode of establishing title to territory which is not *terra nullius* and which has been obtained either unlawfully or in circumstances wherein the legality of the acquisition cannot be demonstrated. It is the legitimisation of a doubtful title by the passage of time and the presumed acquiescence of the former sovereign, and it reflects the need for stability felt within the international system by recognising that territory in the possession of a state for a long period of time and uncontested cannot be taken away from that state without serious consequences for the international order. It is the legitimisation of a fact. If it were not for some such doctrine, the title of many states to their territory would be jeopardised.[90] The International Court in the *Botswana/Namibia* case,

[86] See Shaw, *Title to Territory*, chapter 1, and C. H. Alexandrowicz, *The European–African Confrontation*, Leiden, 1973.

[87] See e.g. *Oppenheim's International Law*, pp. 689–90, and F. A. F. Von der Heydte, 'Discovery, Symbolic Annexation and Virtual Effectiveness in International Law', 29 AJIL, 1935, p. 448. See also A. S. Keller, O. J. Lissitzyn and F. J. Mann, *Creation of Rights of Sovereignty Through Symbolic Acts, 1400–1800*, New York, 1938.

[88] 2 RIAA, pp. 829, 846 (1928); 4 AD, pp. 103, 108.

[89] See generally e.g. D. H. Johnson, 'Acquisitive Prescription in International Law', 27 BYIL, 1950, p. 332, and H. Post, 'International Law Between Dominium and Imperium' in *Reflections on Principles and Practice of International Law* (eds. T. D. Gill and W. P. Heere), The Hague, 2000, p. 147.

[90] As noted in the *Grisbadarna* case, 'it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible', J. B. Scott, *Hague Court Reports*, New York, 1916, vol. I, pp. 121, 130.

while making no determination of its own, noted that the two parties were agreed that acquisitive prescription was recognised in international law and further agreed on the criteria to be satisfied for the establishment of such a title, viz. the possession must be *à titre de souverain*, peaceful and uninterrupted, public and endure for a certain length of time. The Court did not contradict this position.[91]

Prescription differs from occupation in that it relates to territory which has previously been under the sovereignty of a state. In spite of this, both concepts are similar in that they may require evidence of sovereign acts by a state over a period of time. And although distinct in theory, in practice these concepts are often indistinct since sovereignty over an area may lapse and give rise to doubts whether an abandonment has taken place,[92] rendering the territory *terra nullius*.

In fact, most cases do not fall into such clear theoretical categories as occupation or prescription. Particular modes of acquisition that can be unambiguously related to the classic definitions tend not to be specified. Most cases involve contesting claims by states, where both (or possibly all) the parties have performed some sovereign acts. As in the instance of occupation, so prescription too requires that the possession forming the basis of the title must be by virtue of the authority of the state or *à titre de souverain*, and not a manifestation of purely individual effort unrelated to the state's sovereign claims. And this possession must be public so that all interested states can be made aware of it.

This latter requirement also flows logically from the necessity for the possession to be peaceful and uninterrupted, and reflects the vital point that prescription rests upon the implied consent of the former sovereign to the new state of affairs. This means that protests by the dispossessed sovereign may completely block any prescriptive claim.[93]

In the *Chamizal* arbitration[94] between the United States and Mexico, the Rio Grande River forming the border between the parties changed course and the United States claimed the ground between the old and the new river beds partly on the basis of peaceful and uninterrupted possession. This claim was dismissed in view of the constant protests by Mexico and

[91] ICJ Reports, 1999, pp. 1045, 1101 ff.

[92] For abandonment of territory, the fact of the loss plus the intention to abandon is required. This is very rare: see e.g. the *Delagoa Bay* case, C. Parry, *British Digest of International Law*, Cambridge, 1965, vol. V, p. 535, and the *Frontier Land* case, ICJ Reports, 1959, p. 209; 27 ILR, p. 62. See also Brownlie, *Principles*, pp. 138–9.

[93] See Johnson, 'Acquisitive Prescription', pp. 343–8.

[94] 5 AJIL 1911, p. 782. See also the *Minquiers and Ecrehos* case, ICJ Reports, 1953, pp. 47, 106–8; 20 ILR, pp. 94, 142–4.

in the light of a Convention signed by both parties that there existed a dispute as to the boundary which had to be resolved. The fact that Mexico did not go to war over the issue was not of itself sufficient to make the possession of the tract of land by the United States peaceful.

Thus acquiescence in the case of prescription, whether express or implied from all the relevant circumstances, is essential, whereas in the case of occupation it is merely an evidential point reinforcing the existence of an effective occupation, but not constituting the essence of the legal claim.

Precisely what form the protest is to take is open to question but resort to force is not acceptable in modern international law, especially since the 1928 Kellogg–Briand Pact and article 2(4) of the United Nations Charter.[95] The bringing of a matter before the United Nations or the International Court of Justice will be conclusive as to the existence of the dispute and thus of the reality of the protests, but diplomatic protests will probably be sufficient. This, however, is not accepted by all academic writers, and it may well be that in serious disputes further steps should be taken such as severing diplomatic relations or proposing arbitration or judicial settlement.[96] What is clear is that anything less than sustained and credible protests may well risk the title of the dispossessed party.

The requirement of a 'reasonable period' of possession is similarly imprecise and it is not possible to point to any defined length of time.[97] It will depend, as so much else, upon all the circumstances of the case, including the nature of the territory and the absence or presence of any competing claims.

In the *Minquiers and Ecrehos* case,[98] concerning disputed sovereignty over a group of islets and rocks in the English Channel, claimed by both France and the United Kingdom, the International Court of Justice exhaustively examined the history of the region since 1066. However, its decision was based primarily on relatively recent acts relating to the exercise of jurisdiction and local administration as well as the nature of

[95] See above, p. 500, and below, chapter 20.

[96] See e.g. Johnson, 'Acquisitive Prescription', pp. 353–4, and I. MacGibbon, 'Some Observations on the Part of Protest in International Law', 30 BYIL, 1953, p. 293. Cf. Brownlie, *Principles*, p. 149, who notes that 'if acquiescence is the crux of the matter (and it is believed that it is) one cannot dictate what its content is to be'.

[97] In the *British Guiana and Venezuela Boundary* case, the parties agreed to adopt a fifty-year adverse holding rule, 89 BFSP, 1896, p. 57.

[98] ICJ Reports, 1953, p. 47; 20 ILR, p. 94.

legislative enactments referable to the territory in question. And upon these grounds, British sovereignty was upheld. The sovereign acts of the United Kingdom relating to the islets far outweighed any such activities by the French authorities and accordingly the claims of the latter were dismissed.

As in other cases, judgment was given not on the basis of clearly defined categories of occupation or prescription, but rather in the light of the balance of competing state activities.

De Visscher has attempted to render the theoretical classifications more consonant with the practical realities by the introduction of the concept of historical consolidation.[99] This idea is founded on proven long use, which reflects a complex of interests and relations resulting in the acquisition of territory (including parts of the sea). Such a grouping of interests and relations is considered by the courts in reaching a decision as of more importance than the mere passage of time, and historical consolidation may apply to *terra nullius* as well as to territories previously occupied. Thus it can be distinguished from prescription. It differs from occupation in that the concept has relevance to the acquisition of parts of the sea, as well as of land. And it may be brought into existence not only by acquiescence and consent, but also by the absence of protest over a reasonable period by relevant states.[100]

However, de Visscher's discussion, based on the *Anglo-Norwegian Fisheries* case,[101] does fail to note the important distinction between the acquisition of territory in accordance with the rules of international law, and the acquisition of territory as a permitted exception to the generally accepted legal principles. The passage in the *Anglo-Norwegian Fisheries* case relied upon[102] is really concerned with general acquiescence with regard to a maritime area, while the criticism has been made[103] that de Visscher has over-emphasised the aspect of 'complex of interests and relations which *in themselves* have the effect of attaching a territory or an expanse of sea to a given state'.[104] Effectiveness, therefore, rather than consolidation would be the appropriate term. Both occupation and prescription rely primarily upon effective possession and control. The element of time is here also relevant as it affects the effectiveness of control.

[99] *Theory and Reality in Public International Law*, 1968, p. 209. See below, p. 520.
[100] *Ibid.* [101] ICJ Reports, 1951, pp. 116, 138; 18 ILR, pp. 86, 100. [102] *Ibid.*
[103] See Jennings, *Acquisition*, pp. 25–6. See also D. H. Johnson, 'Consolidation as a Root of Title in International Law', *Cambridge Law Journal*, 1955, pp. 215, 223.
[104] De Visscher, *Theory and Reality*, p. 209, emphasis added. See further below, p. 515.

Intertemporal law[105]

One question that arises is the problem of changing conditions related to particular principles of international law, in other words the relevant time period at which to ascertain the legal rights and obligations in question. This can cause considerable difficulties since a territorial title may be valid under, for example, sixteenth-century legal doctrines but ineffective under nineteenth-century developments. The general rule in such circumstances is that in a dispute the claim or situation in question (or relevant treaty, for example)[106] has to be examined according to the conditions and rules in existence at the time it was made and not at a later date. This meant, for example, that in the *Island of Palmas* case,[107] the Spanish claim to title by discovery, which the United States declared it had inherited, had to be tested in the light of international legal principles in the sixteenth century when the discovery was made. This aspect of the principle is predicated upon a presumption of, and need for, stability.[108]

But it was also noted in this case that while the creation of particular rights was dependent upon the international law of the time, the continued existence of such rights depended upon their according with the evolving conditions of a developing legal system, although this stringent test would not be utilised in the case of territories with an 'established order of things'.[109] This proviso has in practice been carefully and flexibly interpreted within the context of all the relevant rules relating to the acquisition of territory, including recognition and acquiescence.[110] However,

[105] See e.g. the *Western Sahara* case, ICJ Reports, 1975, pp. 12, 38–9; 59 ILR, pp. 14, 55. See also Shaw, '*Western Sahara* Case', pp. 152–3; Jennings, *Acquisition*, pp. 28–31; T. O. Elias, 'The Doctrine of Intertemporal Law', 74 AJIL, 1980, p. 285; Brownlie, *Principles*, pp. 124–5; *Oppenheim's International Law*, pp. 1281–2; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Cambridge, 1986, vol. I, p. 135, and H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989 (Part One)', 60 BYIL, 1989, pp. 4, 128. See also R. Higgins, 'Time and the Law: International Perspectives on an Old Problem', 46 ICLQ, 1997, p. 501, and Greig, *Intertemporality*.

[106] See e.g. the *Right of Passage* case, ICJ Reports, 1960, pp. 6, 37; 31 ILR, pp. 23, 50.

[107] 2 RIAA, pp. 829, 845 (1928); 4 AD, p. 103.

[108] See e.g. *Eritrea/Yemen*, 114 ILR, pp. 1, 46 and 115; *Eritrea/Ethiopia* case, 2002, 130 ILR, pp. 1, 34 and *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 303, 404–5.

[109] 2 RIAA, pp. 839–45. See P. Jessup, 'The Palmas Island Arbitration', 22 AJIL, 1928, p. 735. See also M. Sørensen, 'Le Problème Dit du Droit Intertemporal dans l'Ordre International', *Annuaire de l'Institut de Droit International*, Basle, 1973, pp. 4 ff., and subsequent discussions, *ibid.*, at pp. 50 ff., and the Resolution adopted by the Institut de Droit International, *Annuaire de l'Institut de Droit International*, 1975, pp. 536 ff.

[110] Note that the 1970 Declaration on Principles of International Law provides that the concept of non-acquisition of territory by force was not to be affected *inter alia* by any international agreement made prior to the Charter and valid under international law.

the Court in the *Aegean Sea Continental Shelf* case[111] declared that the phrase 'disputes relating to the territorial status of Greece' contained in a Greek reservation to the 1928 Kellogg–Briand Pact had to be interpreted 'in accordance with the rules of international law as they exist today, and not as they existed in 1931'. The evolution of international law concerning the continental shelf, therefore, had to be considered, so that the territorial status of Greece was taken to include its continental shelf, although that concept was completely unknown in the 1920s. How far this aspect of the principle of international law may be extended is highly controversial. The better view is to see it as one element in the bundle of factors relevant to the determination of effective control, but one that must be applied with care.[112]

Critical date

In certain situations there may exist a determining moment at which it might be inferred that the rights of the parties have crystallised so that acts after that date cannot alter the legal position.[113] Such a moment might be the date of a particular treaty where its provisions are at issue[114] or the date of occupation of territory.[115] It is not correct that there will or should always be such a critical date in territorial disputes, but where there is, acts undertaken after that date will not be taken into consideration, unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the party relying on them.[116]

The concept of a critical date is of especial relevance with regard to the doctrine of *uti possidetis*, which posits that a new state has the boundaries of the predecessor entity, so that the moment of independence itself is

[111] ICJ Reports, 1978, pp. 3, 33–4; 60 ILR, pp. 562, 592. See Elias, 'Intertemporal Law', pp. 296 ff. See also the Indian argument regarding the invalidity of Portugal's title to Goa, SCOR, S/PV-987, 11, 18 December 1961.

[112] See, as to time and the interpretation of treaties, above, p. 496.

[113] L. F. E. Goldie, 'The Critical Date', 12 ICLQ, 1963, p. 1251. See also G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Points of Substance, Part II', 32 BYIL, 1955–6, p. 20; Y. Blum, *Historic Titles in International Law*, The Hague, 1965, pp. 208–22, and Brownlie, *Principles*, p. 125. See also M. N. Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', 67 BYIL, 1996, pp. 75, 130, and Shaw, 'Title, Control and Closure? The Experience of the Eritrea–Ethiopia Boundary Commission', 56 ICLQ, 2007, pp. 755, 760 ff.

[114] See e.g. the *Island of Palmas* case, 2 RIAA, p. 845.

[115] See e.g. the *Eastern Greenland* case, PCIJ, Series A/B, No. 53, p. 45.

[116] See the *Indonesia/Malaysia* case, ICJ Reports, 2002, pp. 625, 682. See also *Argentina/Chile* 38 ILR, pp. 10, 79–80 and *Nicaragua* v. *Honduras*, ICJ Reports, 2007, para. 117. Note also the *Malaysia/Singapore* case, ICJ Reports, 2008, paras. 32–6.

invariably the critical date.[117] This does not preclude the possibility that the relevant territorial situation or rights had crystallised at an earlier time, in the sense of having become established and not altered subsequently.[118] Where there is more than one state involved, then the date of later independence[119] or possibly the dates of the independence of the respective states,[120] may be taken depending on the circumstances.[121] Further, it is possible for there to be different critical dates for different circumstances (for example, land and maritime disputes within the same case).[122] However, the date of independence may simply mark the date of succession to boundaries which have been established with binding force by earlier instruments.[123]

The moment of independence may not be 'critical' for these purposes for several possible reasons. There may be a dispute between the parties as to whether the date of independence or the date of the last exercise of jurisdiction for administrative organisational purposes by the former sovereign is the more appropriate date[124] or the *uti possidetis* line may in some circumstances only be determined upon a consideration of materials appearing later than the date of independence,[125] or such a 'critical date' may have been moved to a later date than that of independence by a subsequent treaty[126] or by an adjudication award.[127] The importance of the critical date concept, thus, is relative and depends entirely upon the circumstances of the case.[128]

[117] The *Burkina Faso/Mali* case, ICJ Reports, 1986, p. 568; 80 ILR, p. 440. This may be reinforced by the terms of the *compromis* itself. For example, in the *Eritrea/Ethiopia* case, the parties referred specifically to the principle of respect for borders existing at the moment of independence, 130 ILR, pp. 1, 43 and see further below, p. 525.

[118] *Eritrea/Ethiopia* case, 130 ILR, pp. 1, 102–3.

[119] *Ibid.*, p. 43.

[120] See the *Benin/Niger* case, ICJ Reports, 2005, pp. 90, 120. See also the views of the Arbitration Commission of the Conference on Yugoslavia in Opinion No. 11 as to the varying dates of succession (and independence) of the successor states of the Former Yugoslavia: see 96 ILR, pp. 719, 722.

[121] See the *Burkino Faso/Mali* case, ICJ Reports, 1986, p. 570; 80 ILR, p. 440, and the *Dubai/Sharjah* case, 91 ILR, pp. 590–4 for examples where the concept was held to be of little or no practical value.

[122] See e.g. *Nicaragua* v. *Honduras*, ICJ Reports, 2007, para. 123.

[123] As in the *Libya/Chad* case, ICJ Reports, 1994, p. 6; 100 ILR, p. 1.

[124] See the *Burkina Faso/Mali* case, ICJ Reports, 1986, p. 570; 80 ILR, p. 440.

[125] See the *El Salvador/Honduras* case, ICJ Reports, 1992, pp. 56 ff.; 97 ILR, p. 112.

[126] See the *Beagle Channel* case, 21 RIAA, pp. 55, 82–3; 52 ILR, p. 93.

[127] The *El Salvador/Honduras* case, ICJ Reports, 1992, p. 401; 97 ILR, p. 112. See also the *Burkina Faso/Mali* case, ICJ Reports, 1986, p. 570; 80 ILR, p. 440, and the Separate Opinion of Judge Ajibola, the *Libya/Chad* case, ICJ Reports, 1994, p. 91; 100 ILR, p. 1.

[128] See e.g. the *Burkino Faso/Mali* case, ICJ Reports, 1986, p. 570; 80 ILR, p. 440, for an example where the concept was held to be of little or no practical value. A similar view

Sovereign activities (*effectivités*)

The exercise of effective authority, therefore, is the crucial element. As Huber argued, 'the actual continuous and peaceful display of state functions is in case of dispute the sound and natural criterion of territorial sovereignty'.[129]

However, control, although needing to be effective, does not necessarily have to amount to possession and settlement of all of the territory claimed. Precisely what acts of sovereignty are necessary to found title will depend in each instance upon all the relevant circumstances of the case, including the nature of the territory involved, the amount of opposition (if any) that such acts on the part of the claimant state have aroused, and international reaction.

Indeed in international law many titles will be deemed to exist not as absolute but as relative concepts. The state succeeding in its claim for sovereignty over *terra nullius* over the claims of other states will in most cases have proved not an absolute title, but one relatively better than that maintained by competing states and one that may take into account issues such as geography and international responses.[130] The Court noted in the *Eastern Greenland* case that 'It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other state could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.'[131] However, the arbitral tribunal in *Eritrea/Yemen* emphasised that the issue did not turn solely upon relativity since 'there must be some absolute minimum requirement' for the acquisition of territorial sovereignty.[132]

was taken in the *Dubai/Sharjah* case, 91 ILR, pp. 590–4 and the *Eritrea/Yemen Arbitration*, 114 ILR, pp. 1, 32.

[129] 2 RIAA, pp. 829, 840 (1928). The Tribunal in *Eritrea/Yemen* noted that 'The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis', 114 ILR, pp. 1, 69.

[130] See the *Island of Palmas* case, 2 RIAA, pp. 829, 840 (1928); 4 AD, p. 103. See also the *Eastern Greenland* case, PCIJ, Series A/B, No. 53, 1933, p. 46; 6 AD, p. 95; the *Clipperton Island* case, 26 AJIL, 1932, p. 390; 6 AD, p. 105, and the *Minquiers and Ecrehos* case, ICJ Reports, 1953, p. 47; 20 ILR, p. 94.

[131] PCIJ, Series A/B, No. 53, pp. 45–6. See also *Qatar* v. *Bahrain*, ICJ Reports, 2001, para. 198, and *Indonesia/ Malaysia*, ICJ Reports, 2002, pp. 625, 682. Note also the *Malaysia/Singapore* case, ICJ Reports, 2008, paras. 62–7.

[132] 114 ILR, pp. 1, 118. Other obvious factors in such situations would include consideration of the geographical position, *ibid.*, p. 119.

In the *Island of Palmas* arbitration[133] the dispute concerned sovereignty over a particular island in the Pacific. The United States declared that, since by a treaty of 1898 Spain had ceded to it all Spanish rights possessed in that region and since that included the island discovered by Spain, the United States of America therefore had a good title. The Netherlands, on the other hand, claimed the territory on the basis of the exercise of various rights of sovereignty over it since the seventeenth century. The arbitrator, Max Huber, in a judgment which discussed the whole nature of territorial sovereignty, dismissed the American claims derived from the Spanish discovery as not effective to found title.[134] Huber declared that the Netherlands possessed sovereignty on the basis of 'the actual continuous and peaceful display of state functions' evidenced by various administrative acts performed over the centuries.[135] It was also emphasised that manifestations of territorial sovereignty may assume different forms, according to conditions of time and place. Indeed, 'the intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved'. Additionally, geographical factors were relevant.[136]

The *Clipperton Island* arbitration[137] concerned a dispute between France and Mexico over an uninhabited island. The arbitrator emphasised that the actual, and not the nominal, taking of possession was a necessary condition of occupation, but noted that such taking of possession may be undertaken in different ways depending upon the nature of the territory concerned. In this case, a proclamation of sovereignty by a French naval officer later published in Honolulu was deemed sufficient to create a valid title. Relevant to this decision was the weakness of the Mexican claims to the guano-rich island, as well as the uninhabited and inhospitable nature of the territory.

These two cases, together with the *Eastern Greenland* case,[138] reveal that the effectiveness of the occupation may indeed be relative and may in certain rare circumstances be little more than symbolic. In the *Eastern Greenland* case before the Permanent Court of International Justice, both Norway and Denmark claimed sovereignty over Eastern Greenland.

[133] 2 RIAA, p. 829 (1928). [134] *Ibid.*, p. 846. [135] *Ibid.*, pp. 867–71.

[136] *Ibid.*, p. 840. See also, in this context, the American claim to the Howland, Baker and Jarvis Islands in the Pacific Ocean, where it was argued that the administration of the islands as part of the US Wildlife Refuge System constituted sufficient occupation, DUSPIL, 1975, pp. 92–4.

[137] 26 AJIL, 1932, p. 390; 6 AD, p. 105.

[138] PCIJ, Series A/B, No. 53, 1933, p. 46; 6 AD, p. 95.

Denmark had colonies in other parts of Greenland and had granted concessions in the uninhabited Eastern sector. In addition, it proclaimed that all treaties and legislation regarding Greenland covered the territory as a whole, as for example its establishment of the width of the territorial sea, and it sought to have its title to all of the territory recognised by other states. The Court felt that these acts were sufficient upon which to base a good title and were superior to various Norwegian actions such as the wintering of expeditions and the erection of a wireless station in Eastern Greenland, against which Denmark had protested. It is also to be noted that it was not until 1931 that Norway actually claimed the territory.

Such activity in establishing a claim to territory must be performed by the state in the exercise of sovereign powers (*à titre de souverain*)[139] or by individuals whose actions are subsequently ratified by their state,[140] or by corporations or companies permitted by the state to engage in such operations and thus performed on behalf of the sovereign.[141] Otherwise, any acts undertaken are of no legal consequence.[142] Another relevant factor, although one of uncertain strength, is the requirement of the intention by the state in performing various activities to assert claim in its sovereign capacity. In other words the facts are created pursuant to the will of the state to acquire sovereignty. This point was stressed in the *Eastern Greenland* case,[143] but appears not to have been considered as of first importance in the *Island of Palmas* case[144] or in the *Minquiers and Ecrehos* case,[145] where concern centred upon the nature and extent of the actual actions carried out by the contending states. Whatever the precise role of this subjective element, some connection between the actions undertaken and the assertion of sovereignty is necessary.

Account will also be taken of the nature of the exercise of the sovereignty in question, so that in the *Rann of Kutch* case, it was noted that:

[139] That is, those made as a 'public claim of right or assertion of sovereignty ... as well as legislative acts', *Eritrea/Yemen*, 114 ILR, pp. 1, 69. See also the *Minquiers and Ecrehos* case, ICJ Reports, 1953, pp. 47, 65 and 69; 20 ILR, p. 94. Such acts need to relate clearly to the territory in question,*Indonesia/Malaysia*, ICJ Reports, 2002, pp. 625, 682–3.

[140] The Court has emphasised that 'activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority', *Indonesia/Malaysia*, ICJ Reports, 2002, pp. 625, 683.

[141] *Botswana/Namibia*, ICJ Reports, 1999, pp. 1045, 1105.

[142] See Judge McNair, the *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, pp. 116, 184; 18 ILR, pp. 86, 113, and McNair, *International Law Opinions*, Cambridge, 1956, vol. I, p. 21. See also O'Connell, *International Law*, pp. 417–19.

[143] PCIJ, Series A/B, No. 53, 1933, p. 46; 6 AD, p. 95.

[144] 2 RIAA, p. 829 (1928); 4 AD, p. 103.

[145] ICJ Reports, 1953, p. 47; 20 ILR, p. 94.

> the rights and duties which by law and custom are inherent in and characteristic of sovereignty present considerable variations in different circumstances according to time and place, and in the context of various political systems.[146]

Similarly, the Court was willing to take into account the special characteristics of the Moroccan state at the relevant time in the *Western Sahara* case[147] in the context of the display of sovereign authority, but it was the exercise of sovereignty which constituted the crucial factor. While international law does appear to accept a notion of geographical or natural unity of particular areas, whereby sovereignty exercised over a certain area will raise the presumption of title with regard to an outlying portion of the territory comprised within the claimed unity,[148] it is important not to overstate this. It operates to raise a presumption and no more and that within the wider concept of display of effective sovereignty which need not apply equally to all parts of the territory.[149] Neither geographical unity nor contiguity are as such sources of title with regard to all areas contained within the area in question, nor is the proximity of islands to the mainland determinative as such of the question of legal title.[150] The Tribunal in the *Eritrea/Yemen* case felt able to consider separately the legal situation with regard to sub-groups existing within such natural unities,[151] as did the Boundary Commission in the *Eritrea/Ethiopia* case.[152] However, the significance in law of state activities or *effectivités* will depend upon the existence or not of a legal title to the territory. Where there is such a valid legal title, this will have pre-eminence and *effectivités* may play a confirmatory role. However, where the *effectivités* are in contradiction to the title, the latter will have pre-eminence. In the absence of any legal title, then *effectivités* must invariably be taken into consideration, while where the legal title is not capable of exactly defining the relevant territorial limits, *effectivités* then play an essential role in showing how the title is interpreted in practice.[153] Accordingly, examples

[146] Annex I, 7 ILM, 1968, pp. 633, 674; 50 ILR, p. 2.

[147] ICJ Reports, 1975, pp. 12, 43–4; 59 ILR, pp. 14, 60. See also the *Dubai/Sharjah Border Arbitration*, 91 ILR, pp. 543, 585–90.

[148] *Eritrea/Yemen*, 114 ILR, pp. 1, 120 ff., and see Fitzmaurice, *Law and Procedure*, vol. I, pp. 312 ff.

[149] See the *Island of Palmas* case, 2 RIAA, p. 840.

[150] See *Nicaragua* v. *Honduras*, ICJ Reports, 2007, para. 161.

[151] 114 ILR, pp. 1, 120 ff. [152] *Eritrea/Ethiopia* 130 ILR, pp. 1, 84 ff.

[153] *Burkina Faso/Mali*, ICJ Reports, 1986, pp. 554, 586–7; 80 ILR, p. 440, and the *El Salvador/Honduras* case where the Chamber also noted that these principles applied to both

of state practice may confirm or complete but not contradict legal title established, for example, by boundary treaties.[154] In the absence of any clear legal title to any area, state practice comes into its own as a law-establishing mechanism. But its importance is always contextual in that it relates to the nature of the territory and the nature of competing state claims.[155]

The role of subsequent conduct: recognition, acquiescence and estoppel

Subsequent conduct may be relevant in a number of ways: first, as a method of determining the true interpretation of the relevant boundary instrument in the sense of the intention of the parties;[156] secondly, as a method of resolving an uncertain disposition or situation, for example, whether a particular area did or did not fall within the colonial territory in question for purposes of determining the *uti possidetis* line[157] or thirdly, as a method of modifying such an instrument or pre-existing arrangement. The *Eritrea/Ethiopia* Boundary Commission explained the general principle that 'the effect of subsequent conduct may be so clear in relation to matters that appear to be the subject of a given treaty that the application of an otherwise pertinent treaty provision may be varied, or may even cease to control the situation, regardless of its original meaning'.[158] The various manifestations of the subsequent conduct of relevant parties have a common foundation in that they all rest to a stronger or weaker extent upon the notion of consent.[159] They reflect expressly or impliedly the presumed will of a state, which in turn may in some situations prove of great importance in the acquisition of title to territory. However, there are significant theoretical differences between the three concepts (recognition, acquiescence and estoppel), even if in practice the dividing lines are often blurred. In any event, they flow to some extent from the fundamental principles of good faith and equity.

colonial and post-colonial *effectivités*, ICJ Reports, 1992, pp. 351, 398; 97 ILR, p. 266. See also *Benin/Niger*, ICJ Reports, 2005, pp. 120, 127 and 149.

154 See also *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 353–5.

155 See also the general statement of principle in *Eritrea/Ethiopia* 130 ILR, pp. 1, 42. As to the role of equity in territorial disputes, see above, chapter 3, p. 108.

156 See Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969. See also the *Argentina/Chile* case, 38 ILR, pp. 10, 89.

157 See the *El Salvador/Honduras* case, ICJ Reports, 1992, pp. 351, 401, 558 ff.

158 *Eritrea/Ethiopia*, 130 ILR, p. 35. See also Shaw, 'Title, Control and Closure?', pp. 776 ff.

159 Consent, of course, is the basis of cession: see above, p. 499.

Recognition is a positive act by a state accepting a particular situation and, even though it may be implied from all the relevant circumstances, it is nevertheless an affirmation of the existence of a specific factual state of affairs,[160] even if that accepted situation is inconsistent with the term in a treaty.[161] Acquiescence, on the other hand, occurs in circumstances where a protest is called for and does not happen[162] or does not happen in time in the circumstances.[163] In other words, a situation arises which would seem to require a response denoting disagreement and, since this does not transpire, the state making no objection is understood to have accepted the new situation.[164] The idea of estoppel in general is that a party which has made or consented to a particular statement upon which another party relies in subsequent activity to its detriment or the other's benefit cannot thereupon change its position.[165] This rests also upon the notion of preclusion.[166]

While, of course, the consent of a ceding state to the cession is essential, the attitude adopted by other states is purely peripheral and will not affect the legality of the transaction. Similarly, in cases of the acquisition of title over *terra nullius*, the acquiescence of other states is not strictly relevant although of useful evidential effect.[167] However, where two or more states have asserted competing claims, the role of consent by third parties is

[160] See e.g. the *Eastern Greenland* case, PCIJ, Series A/B, No. 53, 1933, pp. 46, 51–2; 6 AD, pp. 95, 100, and the *Western Sahara* case, ICJ Reports, 1975, pp. 12, 49–57; 59 ILR, pp. 14, 66. See also G. Schwarzenberger, 'Title to Territory: Response to a Challenge', 51 AJIL, 1957, p. 308.

[161] See e.g. the *Taba* case, 80 ILR, pp. 224, 297–8 and 306.

[162] See Brownlie, *Principles*, p. 151, and I. MacGibbon, 'The Scope of Acquiescence in International Law', 31 BYIL, 1954, p. 143.

[163] See the *Land, Island and Maritime Frontier (El Salvador/Honduras)* case, ICJ Reports, 1992, pp. 351, 577; 97 ILR, pp. 266, 493, and *Eritrea/Yemen*, 114 ILR, pp. 1, 84.

[164] See e.g. the *Libya/Chad* case, ICJ Reports, 1994, pp. 6, 35; 100 ILR, pp. 1, 34, where the Court noted that 'If a serious dispute had indeed existed regarding frontiers, eleven years after the conclusion of the 1955 Treaty, one would expect it to have been reflected in the 1966 Treaty.' See also the *Malaysia/Singapore* case, ICJ Reports, 2008, paras. 231 ff.

[165] See the *Temple* case, ICJ Reports, 1962, pp. 6, 29 ff.; 33 ILR, p. 48; the *Cameroon* v. *Nigeria (Preliminary Objections)* case, ICJ Reports, 1998, pp. 275, 303, and the *Eritrea/Ethiopia* case, 130 ILR, pp. 68 ff.

[166] See e.g. the *Gulf of Maine* case, ICJ Reports, 1984, p. 305; 71 ILR, p. 74. The Court in the *Malaysia/Singapore* case, ICJ Reports, 2008, para. 228, emphasised that a party relying on an estoppel must show among other things that, 'it has taken distinct acts in reliance on the other party's statement'.

[167] Note that the Tribunal in *Eritrea/Yemen* emphasised that 'Repute is also an important ingredient for the consolidation of title', 114 ILR, pp. 1, 136.

much enhanced. In the *Eastern Greenland* case,[168] the Court noted that Denmark was entitled to rely upon treaties made with other states (apart from Norway) in so far as these were evidence of recognition of Danish sovereignty over all of Greenland.

Recognition and acquiescence are also important in cases of acquisition of control contrary to the will of the former sovereign. Where the possession of the territory is accompanied by emphatic protests on the part of the former sovereign, no title by prescription can arise, for such title is founded upon the acquiescence of the dispossessed state, and in such circumstances consent by third states is of little consequence. However, over a period of time recognition may ultimately validate a defective title, although much will depend upon the circumstances, including the attitude of the former sovereign. Where the territory involved is part of the high seas (i.e. *res communis*), acquiescence by the generality of states may affect the subjection of any part of it to another's sovereignty, particularly by raising an estoppel.[169]

Acquiescence and recognition[170] are also relevant where the prescriptive title is based on what is called immemorial possession, that is, the origin of the particular situation is shrouded in doubt and may have been lawful or unlawful but is deemed to be lawful in the light of general acquiescence by the international community or particular acquiescence by a relevant other state. Accordingly, acquiescence may constitute evidence reinforcing a title based upon effective possession and control, rendering it definitive.[171]

Estoppel is a legal technique whereby states deemed to have consented to a state of affairs cannot afterwards alter their position.[172] Although

[168] PCIJ, Series A/B, No. 53, 1933, pp. 46, 51–2; 6 AD, pp. 95, 100.

[169] See the *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, p. 116; 18 ILR, p. 86.

[170] Note also the role of recognition in the context of new states and territory, above, p. 445.

[171] See the *Land, Island and Maritime Frontier (El Salvador/Honduras)* case, ICJ Reports, 1992, pp. 351, 579; 97 ILR, pp. 266, 495. The Court, for example, in the *Indonesia/Malaysia* case felt that it 'cannot disregard' the failure of Indonesia or its predecessor, the Netherlands, to protest at the construction of lighthouses and other administrative activities on territory claimed to be Indonesian and noted that 'such behaviour is unusual', ICJ Reports, 2002, pp. 625, 685.

[172] See e.g. D. W. Bowett, 'Estoppel before International Tribunals and its Relation to Acquiescence', 33 BYIL, 1957, p. 176; Thirlway, 'Law and Procedure', p. 29; A. Martin, *L'Estoppel en Droit International Public*, Paris, 1979; C. Dominicé, 'A Propos du Principe de l'Estoppel en Droit des Gens' in *Recueil d'Études de Droit International en Hommage à Paul Guggenheim*, Geneva, 1968, p. 327, and I. Sinclair, 'Estoppel and Acquiescence' in *Fifty Years of the International Court of Justice* (eds. A. V. Lowe and M. Fitzmaurice), Cambridge, 1996, p. 104.

it cannot found title by itself, it is of evidential and often of practical importance. Estoppel may arise either by means of a prior recognition or acquiescence, but the nature of the consenting state's interest is vital. Where, for example, two states put forward conflicting claims to territory, any acceptance by one of the other's position will serve as a bar to a renewal of contradictory assertions. This was illustrated in the *Eastern Greenland* case,[173] where the Court regarded the Norwegian acceptance of treaties with Denmark, which incorporated Danish claims to all of Greenland, as preventing Norway from contesting Danish sovereignty over the area.

The leading case on estoppel is the *Temple of Preah Vihear*[174] which concerned a border dispute between Cambodia and Thailand. The frontier was the subject of a treaty in 1904 between Thailand and France (as sovereign over French Indo-China which included Cambodia) which provided for a delimitation commission. The border was duly surveyed but was ambiguous as to the siting of the Preah Vihear temple area. Thailand called for a map from the French authorities and this placed the area within Cambodia. The Thai government accepted the map and asked for further copies.[175] A number of other incidents took place, including a visit by a Thai prince to the temple area for an official reception with the French flag clearly flying there, which convinced the International Court that Thailand had tacitly accepted French sovereignty over the disputed area.[176] In other words, Thailand was estopped by its conduct from claiming that it contested the frontier in the temple area. However, it is to be noted that estoppel in that case was one element in a complexity of relevant principles which included prescription and treaty interpretation. The case also seemed to show that in situations of uncertainty and ambiguity, the doctrines of acquiescence and estoppel come into their own,[177] but it would not appear correct to refer to estoppel as a rule of substantive law.[178] The extent to which silence as such may create an estoppel is unclear and much will depend upon the surrounding circumstances, in particular the notoriety of the situation, the length of silence maintained in the light of that notoriety and the type of conduct that would be seen as reasonable

[173] PCIJ, Series A/B, No. 53, 1933, pp. 46, 68; 6 AD, pp. 95, 102.

[174] ICJ Reports, 1962, p. 6; 33 ILR, p. 48. See D. H. Johnson, 'The Case Concerning the Temple of Preah Vihear', 11 ICLQ, 1962, p. 1183, and J. P. Cot, 'Cour Internationale de Justice: Affaire du Temple de Préah Vihéar', AFDI, 1962, p. 217.

[175] ICJ Reports, 1962, pp. 6, 23; 33 ILR, pp. 48, 62.

[176] ICJ Reports, 1962, pp. 30–2; 33 ILR, p. 68.

[177] See also the *Award of the King of Spain* case, ICJ Reports, 1960, p. 192; 30 ILR, p. 457.

[178] See e.g. Jennings, *Acquisition*, pp. 47–51.

in the international community in order to safeguard a legal interest.[179] The existence of an estoppel should not, however, be lightly assumed.[180]

Subsequent conduct itself would in the material sense include the examples of the exercise of sovereign activity, various diplomatic and similar exchanges and records, and maps. So far as the status of maps is concerned, this will depend upon the facts of their production as an item of evidence. It was noted in the *Burkina Faso/Mali* case that 'maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts'.[181] In such circumstances, courts have often exhibited a degree of caution, taking into account, for example, that some maps may be politically self-serving and that topographic knowledge at the time the map is made may be unreliable.[182] However, maps annexed to treaties illustrating the boundary so delimited will be accepted as authoritative.[183] Where there is a conflict between the text of an instrument and an annexed map, all the relevant circumstances will need to be considered in order to arrive at a correct understanding of the intentions of the authors of the relevant delimitation instrument.[184] Beyond this, it is possible that cartographic material, prepared in order to help draft a delimitation instrument, may itself be used as assistance in seeking to determine the intentions of the parties where the text itself is ambiguous, while more generally the effect of a map will in other circumstances vary according to

[179] See e.g. the *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, pp. 116, 139; 18 ILR, pp. 86, 101, the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 26; 41 ILR, pp. 29, 55, the *Gulf of Maine* case, ICJ Reports, 1984, pp. 246, 308; 71 ILR, pp. 74, 135, and the *ELSI* case, ICJ Reports, 1989, pp. 15, 44; 84 ILR, pp. 311, 350. See also M. Koskenniemi, 'L'Affaire du Passage par le Great Belt', AFDI, 1992, p. 905.

[180] In *Cameroon* v. *Nigeria (Preliminary Objections)*, the Court emphasised that, 'An estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed its position to its own detriment or had suffered some prejudice', ICJ Reports, 1998, pp. 275, 303.

[181] ICJ Reports, 1986, pp. 554, 582; 80 ILR, p. 440. Note that the Court in the *Malaysia/Singapore* case, ICJ Reports, 2008, paras. 267–72, noted that a map may give a good indication of the official position of the party concerned, particularly where it is an admission against interest.

[182] See the *Eritrea/Ethiopia* case, 130 ILR, pp. 38 ff. See also the *Eritrea/Yemen* case, 114 ILR, pp. 1, 94 ff.

[183] 114 ILR, pp. 1, 94 ff., and *Eritrea/Ethiopia*, 130 ILR, pp. 39 and 45 ff. Note that a treaty provision may provide for an avowedly incorrect geographical feature on an annexed map as part of the boundary line: see *Cameroon* v. *Nigeria*, ICJ Reports, 2002, p. 372.

[184] ICJ Reports, 2002, pp. 383–4. See also p. 385.

a number of factors ranging from its provenance and cartographic quality to its consistency with other maps and the use made of it by the parties.[185]

One argument has been that peaceful possession coupled with acts of administration may in the absence of protest found the basis of title by way of 'historical consolidation'.[186] However, the International Court has emphasised that this doctrine is 'highly controversial and cannot replace the established modes of acquisition of title under international law'. It was also noted that a period of such activity of some twenty years was 'far too short, even according to the theory relied on it'.[187]

Conclusions

It will be clear from the above that apart from the modes of acquisition that rely purely on the consent of the state and the consequences of sovereignty (cession or accretion), the method of acquiring additional territory is by the sovereign exercise of effective control. Both occupation and prescription are primarily based upon effective possession and, although the time element is a factor in prescription, this in fact is really concerned with the effectiveness of control.

The principle of effective control applies in different ways to different situations, but its essence is that 'the continuous and peaceful display of territorial sovereignty . . . is as good as title'.[188] Such control has to be deliberate sovereign action, but what will amount to effectiveness is relative and will depend upon, for example, the geographical nature of the region, the existence or not of competing claims and other relevant factors, such as international reaction.[189] It will not be necessary for such control to be equally effective throughout the region.[190] The doctrine of effectiveness has displaced earlier doctrines relating to discovery and symbolic annexation as in themselves sufficient to generate title.[191] Effectiveness has also a temporal as well as a spatial dimension as the doctrine of intertemporal

[185] *Ibid.*, pp. 366 ff. See also the *Eritrea/Ethiopia* case, 130 ILR, pp. 39 ff.

[186] See e.g. the *Anglo-Norwegian Fisheries* case, ICJ Reports, 1951, pp. 116, 138, and De Visscher, *Theory and Reality*, p. 209.

[187] *Cameroon* v. *Nigeria*, ICJ Reports, 2002, p. 352. See above, p. 507.

[188] Judge Huber, *Island of Palmas* case, 2 RIAA, pp. 829, 839 (1928); 4 AD, p. 103.

[189] See further above, p. 511.

[190] See above, p. 512.

[191] See in this context article 35 of the General Act of the Congress of Berlin, 1885, in which the parties recognised the obligation to 'ensure the establishment of authority in the regions occupied by them on the coast of the African continent'.

law has emphasised, while clearly the public or open nature of the control is essential. The acquiescence of a party directly involved is also a very important factor in providing evidence of the effectiveness of control. Where a dispossessed sovereign disputes the control exercised by a new sovereign, title can hardly pass. Effectiveness is related to the international system as a whole, so that mere possession by force is not the sole determinant of title. This factor also emphasises and justifies the role played by recognition.

Bilateral recognition is important as evidence of effective control and should be regarded as part of that principle. International recognition, however, involves not only a means of creating rules of international law in terms of practice and consent of states, but may validate situations of dubious origin. A series of recognitions may possibly validate an unlawful acquisition of territory and could similarly prevent effective control from ever hardening into title.[192] The significance of UN recognition is self-evident, so that the UN Security Council itself could adopt a binding resolution ending a territorial dispute by determining the boundary in question.[193]

Sovereign territory may not only be acquired, it may also be lost in ways that essentially mirror the modes of acquisition. Territory may be lost by express declaration or conduct such as a treaty of cession or acceptance of secession; by loss of territory by erosion or natural geographic activity or by acquiescence through prescription. Further, territory may be abandoned, but in order for this to operate both the physical act of abandonment and the intention to surrender title are required.[194]

[192] See e.g. Security Council resolution 216 (1965) concerning Rhodesia; General Assembly resolution 31/6A and Security Council Statements of 21 September 1979 and 15 December 1981 concerning the South African Bantustans; Security Council resolution 541 (1983) with regard to the 'Turkish Republic of Northern Cyprus' and Security Council resolution 662 (1990) concerning the Iraqi annexation of Kuwait.

[193] See particularly Security Council resolution 687 (1991) in which the international boundary between Kuwait and Iraq was deemed to be that agreed by both parties in 'Minutes' agreed in 1963. This boundary was then formally guaranteed by the Council in Section A, paragraph 4 of this resolution. See e.g. M. H. Mendelson and S. C. Hulton, 'The Iraq–Kuwait Boundary', 64 BYIL, 1993, p. 135. See also Security Council resolution 833 (1993) and S/26006.

[194] See e.g. Brownlie, *Principles*, p. 138; *Oppenheim's International Law*, pp. 716–18, and G. Marston, 'The British Acquisition of the Nicobar Islands, 1869', 69 BYIL, 1998, p. 245. See also e.g. the *Eastern Greenland* case, PCIJ, Series A/B, No. 53, 1933, p. 47; 6 AD, p. 95 and the *Malaysia/Singapore* case, ICJ Reports, 2008, paras. 117, 196, 223, 230 and 275.

Territorial integrity, self-determination and sundry claims

There are a number of other concepts which may be of some relevance in territorial situations ranging from self-determination to historical and geographical claims. These may not necessarily be legal principles as such but rather purely political or moral expressions. Although they may be extremely persuasive within the international political order, they would not necessarily be juridically effective. One of the core principles of the international system is the need for stability and finality in boundary questions and much flows from this.[195] Case-law has long maintained this principle.[196] Reflective of this concept is the principle of territorial integrity.

The principle of the territorial integrity of states is well established and is protected by a series of consequential rules prohibiting interference within the domestic jurisdiction of states as, for example, article 2(7) of the United Nations Charter, and forbidding the threat or use of force against the territorial integrity and political independence of states, particularly article 2(4) of the United Nations Charter. This principle has been particularly emphasised by Third World states and also by other regions.[197]

However, it does not apply where the territorial dispute centres upon uncertain frontier demarcations. In addition, the principle appears to conflict on the face of it with another principle of international law, that of the self-determination of peoples.[198]

This principle, noted in the United Nations Charter and emphasised in the 1960 Colonial Declaration, the 1966 International Covenants on Human Rights and the 1970 Declaration on Principles of International Law, can be regarded as a rule of international law in the light of, *inter alia*, the number and character of United Nations declarations and resolutions and actual state practice in the process of decolonisation. However, it has been interpreted as referring only to the inhabitants of non-independent

[195] See K. H. Kaikobad, 'Some Observations on the Doctrine of the Continuity and Finality of Boundaries', 54 BYIL, 1983, p. 119, and Shaw, 'Heritage of States', pp. 75, 81.

[196] See e.g. the *Temple* case, ICJ Reports, 1962, pp. 6, 34; 33 ILR, p. 48; the *Libya/Chad* case, ICJ Reports, 1994, pp. 6, 37; 100 ILR, p. 1; the *Beagle Channel* case, 21 RIAA, pp. 55, 88; 52 ILR, p. 93, and the *Dubai/Sharjah* case, 91 ILR, pp. 543, 578.

[197] See generally, Shaw, *Title to Territory*, chapter 5. But see, as regards Europe, Principle III of the Helsinki Final Act, 14 ILM, 1975, p. 1292 and the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union adopted by the European Community and its member states on 16 December 1991, 92 ILR, p. 173.

[198] See *Burkina Faso/Mali*, ICJ Reports, 1986, pp. 554, 565; 80 ILR, p. 469.

territories.[199] Practice has not supported its application as a principle conferring the right to secede upon identifiable groups within already independent states.[200] The Canadian Supreme Court in the *Reference Re Secession of Quebec* case declared that 'international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states',[201] and that the right to unilateral secession 'arises only in the most extreme of cases and, even then, under carefully defined circumstances'.[202] The only arguable exception to this rule that the right to external self-determination applies only to colonial situations (and arguably situations of occupation) might be where the group in question is subject to 'extreme and unremitting persecution' coupled with the 'lack of any reasonable prospect for reasonable challenge',[203] but even this is controversial not least in view of definitional difficulties.[204] The situation of secession is probably best dealt with in international law within the framework of a process of claim, effective control and international recognition.

Accordingly the principle of self-determination as generally accepted fits in with the concept of territorial integrity,[205] as it cannot apply once a colony or trust territory attains sovereignty and independence, except, arguably, in extreme circumstances. Probably the most prominent exponent of the relevance of self-determination to post-independence situations has

[199] As to the application of the principle to Gibraltar, see UKMIL, 70 BYIL, 1999, p. 443.

[200] See J. Crawford, 'State Practice and International Law in Relation to Secession', 69 BYIL, 1998, p. 85; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 525, and *Self-Determination in International Law: Quebec and Lessons Learned* (ed. A. Bayefsky), The Hague, 2000. See also above, chapter 5, p. 256. Self-determination does have a continuing application in terms of human rights situations within the territorial framework of independent states (i.e. internal self-determination), *ibid.*

[201] (1998) 161 DLR (4th) 385, 436; 115 ILR, p. 536.

[202] (1998) 161 DLR (4th) 385, 438.

[203] A. Cassese, *Self-Determination of Peoples*, Cambridge, 1995, p. 120. See also T. Musgrave, *Self-Determination and National Minorities*, Oxford, 1997, pp. 188 ff.; J. Castellino, *International Law and Self-Determination*, The Hague, 2000, and K. Knop, *Diversity and Self-Determination in International Law*, Cambridge, 2002, pp. 65 ff. See also Judge Wildhaber's Concurring Opinion (joined by Judge Ryssdal) in *Loizidou* v. *Turkey*, Judgment of 18 December 1996, 108 ILR, pp. 443, 470–3. See also *Secession: International Law Perspectives* (ed. M. G. Kohen), Cambridge, 2006.

[204] The Court in the *Quebec* case, citing Cassese, *Self-Determination*, suggested that the right to external self-determination (i.e. secession) might apply to cases of foreign occupation and as a last resort where a people's right to internal self-determination (i.e. right to public participation, etc.) was blocked, *ibid*, pp. 438 ff.

[205] This analysis is supported by *Burkina Faso/Mali*, ICJ Reports, 1986, p. 554; 80 ILR, p. 459.

been Somalia with its claims to those parts of Ethiopia and Kenya populated by Somali tribes, but that country received very little support for its demands.[206]

Self-determination cannot be used to further larger territorial claims in defiance of internationally accepted boundaries of sovereign states, but it may be of some use in resolving cases of disputed frontier lines on the basis of the wishes of the inhabitants. In addition, one may point to the need to take account of the interests of the local population where the determination of the boundary has resulted in a shift in the line, at least in the view of one of the parties.[207] Geographical claims have been raised throughout history.[208] France for long maintained that its natural frontier in the east was the west bank of the Rhine, and the European powers in establishing their presence upon African coastal areas often claimed extensive hinterland territories. Much utilised also was the doctrine of contiguity, whereby areas were claimed on the basis of the occupation of territories of which they formed a geographical continuation. However, such claims, although relevant in discussing the effectivity and limits of occupation, are not able in themselves to found title, and whether or not such claims will be taken into account at all will depend upon the nature of the territory and the strength of competing claims.[209] A rather special case is that of islands close to the coast of the mainland. The Tribunal in *Eritrea/Yemen* stated that: 'There is a strong presumption that islands within the twelve-mile coastal belt will belong to the coastal state', to be rebutted only by evidence of a superior title.[210]

[206] Shaw, *Title to Territory*, chapter 5. See also the Moroccan approach, *ibid.*

[207] See, with regard to the preservation of acquired rights, *El Salvador/Honduras*, ICJ Reports, 1992, pp. 351, 400; 97 ILR, p. 112. See also *Cameroon* v. *Nigeria*, ICJ Reports, 2002, pp. 370 and 373–4. In particular, the Court stated in relation to the Bakassi peninsula and Lake Chad regions which contain Nigerian populations, that 'the implementation of the present judgment will afford the parties a beneficial opportunity to co-operate in the interests of the population concerned, in order notably to enable it to continue to have access to educational and health services comparable to those it currently enjoys', *ibid.*, p. 452. The Court also referred to the commitment of the Cameroon Agent made during the Oral Pleadings to protect Nigerians living in the areas recognised as belonging to Cameroon, *ibid.*, p. 452 and para. V(C) of the Dispositif.

[208] Shaw, *Title to Territory*, p. 195; Jennings, *Acquisition*, p. 74, and Hill, *Claims to Territory*, pp. 77–80.

[209] See the *Eastern Greenland* case, PCIJ, Series A/B, No. 53, 1933, p. 46; 6 AD, p. 95, and the *Western Sahara* case, ICJ Reports, 1975, pp. 12, 42–3; 59 ILR, pp. 14, 59. See generally, B. Feinstein, 'Boundaries and Security in International Law and Practice', 3 Finnish YIL, 1992, p. 135.

[210] 114 ILR, pp. 1, 124 and 125. But see *Nicaragua* v. *Honduras*, ICJ Reports, 2007, para. 161, where the Court noted that 'proximity [of islands to the mainland] as such is not necessarily determinative of legal title'.

Of some similarity are claims based upon historical grounds.[211] This was one of the grounds upon which Iraq sought to justify its invasion and annexation of the neighbouring state of Kuwait in August 1990,[212] although the response of the United Nations demonstrated that such arguments were unacceptable to the world community as a whole.[213] Morocco too has made extensive claims to Mauritania, Western Sahara and parts of Algeria as territories historically belonging to the old Moroccan empire.[214] But such arguments are essentially political and are of but little legal relevance. The International Court of Justice in the *Western Sahara* case[215] of 1975 accepted the existence of historical legal ties between the tribes of that area and Morocco and Mauritania, but declared that they were not of such a nature as to override the right of the inhabitants of the colony to self-determination and independence.[216]

The doctrine of uti possidetis[217]

The influence of the principle of territorial integrity may be seen in the Latin American idea of *uti possidetis*, whereby the administrative divisions

[211] See e.g. Shaw, *Title to Territory*, pp. 193–4; Jennings, *Acquisition*, pp. 76–8, and Hill, *Claims to Territory*, pp. 81–91.

[212] See *Keesing's Record of World Events*, p. 37635, 1990. Note that Iraq made a similar claim to Kuwait in the early 1960s, although not then taking military action: see Jennings, *Acquisition*, p. 77, note 2.

[213] See e.g. Security Council resolution 662 (1990); Lauterpacht *et al.*, *The Kuwait Crisis: Basic Documents*, p. 90.

[214] Shaw, *Title to Territory*, pp. 193–4. Note also the claims advanced by Indonesia to West Irian, *ibid.*, p. 22.

[215] ICJ Reports, 1975, p. 12; 59 ILR, p. 14.

[216] See also *Eritrea/Yemen*, 114 ILR, pp. 1, 37 ff. The Tribunal also discounted the notion of reversion of title, *ibid.*, pp. 40 and 115.

[217] See e.g. H. Ghebrewebet, *Identifying Units of Statehood and Determining International Boundaries*, Frankfurt am Main, 2006; A. O. Cukwurah, *The Settlement of Boundary Disputes in International Law*, Manchester, 1967, p. 114; P. De La Pradelle, *La Frontière*, Paris, 1928, pp. 86–7; D. Bardonnet, 'Les Frontières Terrestres et la Relativité de leur Tracé', 153 HR, 1976 V, p. 9; Shaw, 'Heritage of States', p. 75; M. Kohen, *Possession Contestée et Souveraineté Territoriale*, Geneva, 1997, chapter 6, and *ibid.*, '*Uti Possidetis*, Prescription et Pratique Subséquent à un Traité dans l'Affaire de l'*Ile de Kasikili/Sedudu* devant la Cour Internationale de Justice', 43 German YIL, 2000, p. 253; G. Nesi, *L'Uti Possidetis Iuris nel Diritto Internazionale*, Padua, 1996; S. Lalonde, *Determining Boundaries in a Conflicted World*, Ithaca, 2002; Luis Sánchez Rodríguez, 'L'*Uti Possidetis* et les Effectivités dans les Contentieux Territoriaux et Frontaliers', 263 HR, 1997, p. 149; J. M. Sorel and R. Mehdi, 'L'*Uti Possidetis* Entre la Consécration Juridique et la Pratique: Essai de Réactualisation', AFDI, 1994, p. 11; *Oppenheim's International Law*, pp. 669–70; T. Bartoš, '*Uti Possidetis. Quo Vadis*?', 18 Australian YIL, 1997, p. 37; 'L'Applicabilité de l'*Uti Possidetis Juris* dans les Situations de Sécession ou de Dissolution d'États', Colloque, RBDI, 1998, p. 5, and *Démembrements d'États et Délimitations Territoriales* (ed. O. Corten), Brussels, 1999.

of the Spanish empire in South America were deemed to constitute the boundaries for the newly independent successor states, thus theoretically excluding any gaps in sovereignty which might precipitate hostilities and encourage foreign intervention.[218] It is more accurately reflected in the practice of African states, explicitly stated in a resolution of the Organisation of African Unity in 1964, which declared that colonial frontiers existing as at the date of independence constituted a tangible reality and that all member states pledged themselves to respect such borders.[219]

Practice in Africa has reinforced the approach of emphasising the territorial integrity of the colonially defined territory, witness the widespread disapproval of the attempted creation of secessionist states whether in the former Belgian Congo, Nigeria or Sudan. Efforts to prevent the partition of the South African controlled territory of Namibia into separate Bantustans as a possible prelude to a dissolution of the unity of the territory are a further manifestation of this.[220]

The question of *uti possidetis* was discussed by a Chamber of the International Court in *Burkina Faso* v. *Republic of Mali*,[221] where the *compromis* (or special agreement) by which the parties submitted the case to the Court specified that the settlement of the dispute should be based upon respect for the principle of the 'intangibility of frontiers inherited from colonisation'.[222] It was noted, however, that the principle had in fact developed into a general concept of contemporary customary international law and was unaffected by the emergence of the right of peoples to self-determination.[223] In the African context particularly, the obvious purpose of the principle was 'to prevent the independence

[218] See the *Colombia–Venezuela* arbitral award, 1 RIAA, pp. 223, 228 (1922); 1 AD, p. 84; the *Beagle Channel* case, HMSO, 1977; 52 ILR, p. 93, and *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, ICJ Reports, 1992, pp. 351, 544; 97 ILR, pp. 266, 299–300.

[219] AHG/Res.16(1). See Security Council resolution 1234 (1999) which refers directly to OAU resolution 16(1) and see also article 4(i) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 2002, and the preamble to the Protocol on Politics, Defence and Security Cooperation adopted by the Southern African Development Community in 2001: see further below, chapter 18, p. 1026. See Shaw, *Title to Territory*, pp. 185–7. See also the Separate Opinion by Judge Ajibola in the *Libya/Chad* case, ICJ Reports, pp. 6, 83 ff.; 100 ILR, pp. 1, 81 ff.

[220] Shaw, *Title to Territory*, chapter 5. The principle has also been noted in Asian practice: see e.g. the *Temple of Preah Vihear* case, ICJ Reports, 1962, p. 6; 33 ILR, p. 48, and the *Rann of Kutch* case, 7 ILM, 1968, p. 633; 50 ILR, p. 2.

[221] ICJ Reports, 1986, p. 554; 80 ILR, p. 459.

[222] ICJ Reports, 1986, p. 557; 80 ILR, p. 462.

[223] ICJ Reports, 1986, p. 565; 80 ILR, p. 469.

and stability of new states being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power'.[224] The application of the principle has the effect of freezing the territorial title existing at the moment of independence to produce what the Chamber described as the 'photograph of the territory' at the critical date.[225] The Chamber, however, went further than emphasising the application of the principle to Africa. It declared that the principle applied generally and was logically connected with the phenomenon of independence wherever it occurred in order to protect the independence and stability of new states.[226] *Uti possidetis* was defined as follows:

> The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.[227]

The application of this principle beyond the purely colonial context was underlined particularly with regard to the former USSR[228] and the former Yugoslavia. In the latter case, the Yugoslav Arbitration Commission established by the European Community and accepted by the states of the former Yugoslavia made several relevant comments. In Opinion No. 2, the Arbitration Commission declared that 'whatever the circumstances, the right to self-determination must not involve changes to existing

[224] *Ibid.*

[225] ICJ Reports, 1986, p. 568; 80 ILR, p. 473. See, as to the notion of critical date, above, p. 509.

[226] ICJ Reports, 1986, p. 565; 80 ILR, p. 470.

[227] ICJ Reports, 1986, p. 566; 80 ILR, p. 459. This was reaffirmed by the Court in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* case, ICJ Reports, 1992, pp. 351, 386–7; 97 ILR, pp. 266, 299–300. The Court in the latter case went on to note that '*uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes', *ibid.*, p. 388; 79 ILR, p. 301. See M. N. Shaw, 'Case Concerning the Land, Island and Maritime Frontier Dispute', 42 ICLQ, 1993, p. 929. See also *Nicaragua* v. *Honduras*, ICJ Reports, 2007, paras. 151 ff.

[228] See e.g. R. Yakemtchouk, 'Les Conflits de Territoires and de Frontières dans les États de l'Ex-URSS', AFDI, 1993, p. 401. See also, with regard to the application of *uti possidetis* to the dissolution of the Czech and Slovak Federal Republic, J. Malenovsky, 'Problèmes Juridiques Liés à la Partition de la Tchécoslovaquie', *ibid.*, p. 328.

frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise'.[229] In Opinion No. 3, the Arbitration Commission emphasised that, except where otherwise agreed, the former boundaries[230] became frontiers protected by international law. This conclusion, it was stated, derived from the principle of respect for the territorial status quo and from the principle of *uti possidetis*.[231] It is thus arguable that, at the least, a presumption exists that, in the absence of evidence to the contrary, internally defined units within a pre-existing sovereign state will come to independence within the spatial framework of that territorially defined unit.[232]

Beyond uti possidetis

The principle of *uti possidetis* is not able to resolve all territorial or boundary problems.[233] Where there is a relevant applicable treaty, then this will

[229] 92 ILR, p. 168. See also A. Pellet, 'Note sur la Commission d'Arbitrage de la Conférence Européenne pour la Paix en Yugoslavie', AFDI, 1991, p. 329, and Pellet, 'Activité de la Commission d'Arbitrage de la Conférence Européenne pour la Paix en Yugoslavie', AFDI, 1992, p. 220.

[230] The Arbitration Commission was here dealing specifically with the internal boundaries between Serbia and Croatia and Serbia and Bosnia-Herzegovina.

[231] 92 ILR, p. 171. The Arbitration Commission specifically cited here the views of the International Court in the *Burkina Faso/Mali* case: see above, p. 526. Note also that the Under-Secretary of State of the Foreign and Commonwealth Office stated in January 1992 that 'the borders of Croatia will become the frontiers of independent Croatia, so there is no doubt about that particular issue. That has been agreed amongst the Twelve, that will be our attitude towards those borders. They will just be changed from being republican borders to international frontiers', UKMIL, 63 BYIL, 1992, p. 719.

[232] See e.g. M. N. Shaw, 'Peoples, Territorialism and Boundaries', 3 EJIL, 1997, pp. 477, 504, but cf. S. Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States', 90 AJIL, 1996, pp. 590, 613 ff. and M. Craven, 'The European Community Arbitration Commission on Yugoslavia', 65 BYIL, 1995, pp. 333, 385 ff.

[233] See generally K. H. Kaikobad, *Interpretation and Revision of International Boundary Decisions*, Cambridge, 2007; M. Kohen, 'La Relation Titres/Effectivités dans le Contentieux Territorial à la Lumière de la Jurisprudence Récente', 108 RGDIP, 2004, p. 561; M. Mendelson, 'The Cameroon–Nigeria Case in the International Court of Justice: Some Territorial Sovereignty and Boundary Delimitation Issues', 75 BYIL, 2004, p. 223; B. H. Oxman, 'The Territorial Temptation: A Siren Song at Sea', 100 AJIL, 2006, p. 830, and S. R. Ratner, 'Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber', 100 AJIL, 2006, p. 808. Note that the International Court has emphasised that the principle of *uti possidetis* applies to territorial as well as boundary problems: see the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* case, ICJ Reports, 1992, pp. 351, 387; 97 ILR, pp. 266, 300.

dispose of the matter completely.[234] Indeed, once defined in a treaty, an international frontier achieves permanence so that even if the treaty itself were to cease to be in force, the continuance of the boundary would be unaffected and may only be changed with the consent of the states directly concerned.[235] On the other hand, where the line which is being transformed into an international boundary by virtue of the principle cannot be conclusively identified by recourse to authoritative material, then the principle of *uti possidetis* must allow for the application of other principles and rules. Essentially these other principles focus upon the notion of *effectivités* or effective control.

The issue was extensively analysed by the International Court in the *Burkina Faso/Mali* case[236] and later in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua Intervening)* case.[237] The Court noted the possible relevance of colonial *effectivités*, immediate post-colonial *effectivités* and more recent *effectivités*. Each of these might be relevant in the context of seeking to determine the *uti possidetis* pre-independence line. In the case of colonial *effectivités*, i.e. the conduct of the colonial administrators as proof of the effective exercise of territorial jurisdiction in the area during the colonial period, the Court in the former case distinguished between certain situations. Where the act concerned corresponded to the title comprised in the *uti possidetis juris*, then the *effectivités* simply confirmed the exercise of the right derived from a legal title. Where the act did not correspond with the law as described, i.e. the territory subject to the dispute was effectively administered by a state other than the one possessing the legal title, preference would be given to the holder of the title. In other words, where there was a clear *uti possidetis* line, this would prevail over inconsistent practice. Where, however, there was no clear legal title, then the *effectivités* 'play an essential role in showing how the title is interpreted in practice'.[238] It would then

[234] See the *Libya/Chad* case, ICJ Reports, 1994, pp. 6, 38–40; 100 ILR, pp. 1, 37–9. See also *Oppenheim's International Law*, p. 663. Note that by virtue of article 11 of the Convention on Succession of States in Respect of Treaties, 1978, a succession of states does not as such affect a boundary established by a treaty or obligations or rights established by a treaty and relating to the regime of a boundary. Article 62 of the Vienna Convention on the Law of Treaties, 1969 provides that the doctrine of *rebus sic stantibus* does not apply to boundary treaties: see below, chapter 16, p. 950.

[235] ICJ Reports, 1994, p. 37; 100 ILR, p. 36.

[236] ICJ Reports, 1986, p. 554; 80 ILR, p. 440.

[237] ICJ Reports, 1992, p. 351; 97 ILR, p. 266. See also Shaw, 'Land, Island and Maritime Frontier Dispute'.

[238] ICJ Reports, 1986, pp. 554, 586–7; 80 ILR, pp. 440, 490–1.

become a matter for evaluation by the Court with regard to each piece of practice adduced. This approach was reaffirmed in the *Land, Island and Maritime Frontier Dispute* case with regard to the grant of particular lands to individuals or to Indian communities or records of such grants.[239] Where the colonial *effectivités* were insufficient to establish the position of the relevant administrative line, the principle of *uti possidetis* could not operate.[240] The Court also noted in the *Land, Island and Maritime Frontier Dispute* case that it could have regard in certain instances to documentary evidence of post-independence *effectivités* when it considered that they afforded indications with respect to the *uti possidetis* line, provided that there was a relationship between the *effectivités* concerned and the determination of the boundary in question.[241] Such post-independence practice could be examined not only in relation to the identification of the *uti possidetis* line but also in the context of seeking to establish whether any acquiescence could be demonstrated both as to where the line was and as to whether any changes in that line could be proved to have taken place.[242] This post-independence practice could even be very recent practice and was not confined to immediate post-independence practice.

Where the *uti possidetis* line could be determined neither by authoritative decisions by the appropriate authorities at the relevant time nor by subsequent practice with regard to a particular area, recourse to equity[243] might be necessary. What this might involve would depend upon the circumstances. In the *Burkina Faso/Mali* case, it meant that a particular frontier pool would be equally divided between the parties;[244] in the *Land, Island and Maritime Frontier Dispute* case, it meant that resort could be had to an unratified delimitation of 1869.[245] It was also noted that the suitability of topographical features in providing an identifiable and convenient boundary was a material aspect.[246]

[239] ICJ Reports, 1992, pp. 351, 389; 97 ILR, pp. 266, 302.
[240] See e.g. *Nicaragua* v. *Honduras*, ICJ Reports, 2007, para. 167.
[241] ICJ Reports, 1992, p. 399; 97 ILR, p. 266.
[242] See e.g. ICJ Reports, 1992, pp. 408, 485, 514, 525, 563 and 565; 97 ILR, pp. 321, 401, 430, 441, 479 and 481. See also *Nicaragua* v. *Honduras*, ICJ Reports, 2007, paras. 168 ff. Such post-colonial *effectivités* could show whether either of the contending states had displayed sufficient evidence of sovereign authority in order to establish legal title, *ibid.*
[243] I.e. equity *infra legem* or within the context of existing legal principles.
[244] ICJ Reports, 1986, pp. 554, 633; 80 ILR, pp. 440, 535.
[245] ICJ Reports, 1992, pp. 351, 514–15; 97 ILR, pp. 266, 430–1.
[246] ICJ Reports, 1992, p. 396; 97 ILR, p. 309.

International boundary rivers[247]

Special rules have evolved in international law with regard to boundary rivers. In general, where there is a navigable channel, the boundary will follow the middle line of that channel (the *thalweg* principle).[248] Where there is no such channel, the boundary line will, in general, be the middle line of the river itself or of its principal arm.[249] These respective boundary lines would continue as median lines (and so would shift also) if the river itself changed course as a result of gradual accretion on one bank or degradation of the other bank. Where, however, the river changed course suddenly and left its original bed for a new channel, the international boundary would continue to be the middle of the deserted river bed.[250] It is possible for the boundary to follow one of the banks of the river, thus putting it entirely within the territory of one of the states concerned where this has been expressly agreed, but this is unusual.[251]

[247] See e.g. *Oppenheim's International Law*, pp. 664–6; S. W. Boggs, *International Boundaries*, New York, 1940; L. J. Bouchez, 'International Boundary Rivers', 12 ICLQ, 1963, p. 789; A. Patry, 'Le Régime des Cours d'Eau Internationaux', 1 Canadian YIL, 1963, p. 172; R. Baxter, *The Law of International Waterways*, Harvard, 1964; Verzijl, *International Law*, vol. III, pp. 537 ff.; H. Dipla, 'Les Règles de Droit International en Matière de Délimitation Fluviale: Remise en Question?', 89 RGDIP, 1985, p. 589; H. Ruiz Fabri, 'Règles Coutumières Générales et Droit International Fluvial', AFDI, 1990, p. 818; F. Schroeter, 'Les Systèmes de Délimitation dans les Fleuves Internationaux', AFDI, 1992, p. 948, and L. Caflisch, 'Règles Générales du Droit des Cours d'Eaux Internationaux', 219 HR, 1989, p. 75.

[248] See e.g. the *Botswana/Namibia* case, ICJ Reports, 1999, p. 1062 and the *Benin/Niger* case, ICJ Reports, 2005, p. 149. See also *State of New Jersey* v. *State of Delaware* 291 US 361 (1934) and the *Laguna (Argentina/Chile)* case, 113 ILR, pp. 1, 209. See, as to the use of the thalweg principle with regard to wadis (dried river beds), Mendelson and Hutton, 'Iraq–Kuwait Boundary', pp. 160 ff.

[249] See e.g. the *Argentine–Chile Frontier* case, 38 ILR, pp. 10, 93. See also article 2A(1) of Annex I(a) of the Israel–Jordan Treaty of Peace, 1994.

[250] See e.g. the *Chamizal* case, 11 RIAA, p. 320.

[251] See e.g. the Iran–Iraq agreements of 1937 and 1975. See E. Lauterpacht, 'River Boundaries: Legal Aspects of the Shatt-al-Arab Frontier', 9 ICLQ, 1960, p. 208; K. H. Kaikobad, *The Shatt-al-Arab Boundary Question*, Oxford, 1980, and Kaikobad, 'The Shatt-al-Arab River Boundary: A Legal Reappraisal', 56 BYIL, 1985, p. 49. See, as to the question of equitable sharing of international watercourses, McCaffrey, *The Law of International Watercourses*; Brownlie, *Principles*, p. 259; the *Gabčíkovo–Nagymaros* case, ICJ Reports, 1997, pp. 7, 54; 116 ILR, p. 1; the Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997, and the Separate Opinion of Judge Kooijmans, *Botswana/Namibia*, ICJ Reports, 1999, pp. 1045, 1148 ff. See also P. Wouters, 'The Legal Response to International Water Conflicts: The UN Watercourses Convention and Beyond', 42 German YIL, 1999, p. 293. Note that in March 2003, the establishment of a Water Cooperation Facility

The Falkland Islands[252]

The long dispute between the UK and Argentina over the Falkland Islands (or Las Malvinas) well illustrates the complex factors involved in resolving issues as to title to territory. The islands were apparently discovered by a British sea captain in 1592, but it is only in 1764 that competing acts of sovereignty commenced. In that year the French established a settlement on East Falklands and in 1765 the British established one on West Falklands. In 1767 the French sold their settlement to Spain. The British settlement was conquered by the Spaniards in 1770 but returned the following year. In 1774 the British settlement was abandoned for economic reasons, but a plaque asserting sovereignty was left behind. The Spaniards left in 1811. In 1816, the United Provinces of the River Plate (Argentina) declared their independence from Spain and four years later took formal possession of the islands. In 1829 the British protested and two years later an American warship evicted Argentinian settlers from the islands, following action by the Argentinian Governor of the territory against American rebels. In 1833 the British captured the islands and have remained there ever since. The question has arisen therefore as to the basis of British title. It was originally argued that this lay in a combination of discovery and occupation, but this would be questionable in the circumstances.[253] It would perhaps have been preferable to rely on conquest and subsequent annexation for, in the 1830s, this was perfectly legal as a method of acquiring territory,[254] but for political reasons this was not claimed. By the 1930s the UK approach had shifted to prescription as the basis of title,[255] but of course this was problematic in the light of Argentinian protests made intermittently throughout the period since 1833.

to mediate in disputes between countries sharing a single river basis was announced: see http://news.bbc.co.uk/1/hi/sci/tech/2872427.stm.

[252] See e.g. J. Goebel, *The Struggle for the Falklands*, New Haven, 1927; F. L. Hoffmann and O. M. Hoffmann, *Sovereignty in Dispute*, Boulder, CO, 1984; The Falkland Islands Review, Cmnd 8787 (1983); Chatham House, *The Falkland Islands Dispute – International Dimensions*, London, 1982; W. M. Reisman, 'The Struggle for the Falklands', 93 *Yale Law Journal*, 1983, p. 287, and M. Hassan, 'The Sovereignty Dispute over the Falkland Islands', 23 Va. JIL, 1982, p. 53. See also House of Commons Foreign Affairs Committee, Session 1983/4, 5th Report, 2681, and Cmnd 9447 (1985), and Foreign and Commonwealth Office statement to the House of Commons Foreign Affairs Committee on 5 June 2006, UKMIL, 77 BYIL, 2006, pp. 760 ff.

[253] See A. D. McNair, *International Law Opinions*, Cambridge, 1956, vol. I, pp. 299–300.

[254] See e.g. Lindley, *Acquisition*, pp. 160–5 and above, p. 500.

[255] See e.g. P. Beck, *Guardian*, 26 July 1982, p. 7.