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CHAPTER

9 Acquisition and transfer of territorial sovereignty

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Abstract

Disputes concerning title to land territory, including islands, and over the precise determination of boundaries are regularly the subject of international proceedings. While the occupation of territory not belonging to any state (*terra nullius*) is no longer a live issue, issues concerning such occupation in the past may still arise. This chapter discusses the following, the ‘modes’ of acquisition, displacement of title, territorial disputes, and territorial sovereignty and peremptory norms.

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1. Introduction

Disputes concerning title to land territory, including islands, and over the precise determination of boundaries¹ are regularly the subject of international proceedings.² Recourse to arbitration may be part of an overall peace settlement.³ But many territorial conflicts are dormant and it is only when a dispute flares up that it receives publicity. While the occupation of territory not belonging to any state (*terra nullius*) is no longer a live issue, issues concerning such occupation in the past may still arise.⁴ Legally relevant events may have occurred centuries ago.⁵ The pressures of national sentiment, the capacity to exploit areas once thought barren or inaccessible, the strategic significance of areas previously neglected, and the pressure of population on resources suggest that territorial disputes will continue to be significant.

2. Determining Title

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(A) The centrality of title

If the basic unit of the international legal system is the state, the space which the state occupies in the world is its territory, traditionally thought of as realty, with the state (a person) its proprietor.⁶ Thus, there were sales and bequests of state territory, leaseholds, and reversions, normally with little or no regard for the wishes of the inhabitants. Indeed, international law developed a notion of entitlement to territory well before the state itself developed as a normative concept. Thereafter title arose not simply by physical occupation (i.e. actual administration, often referred to as *effectivités*) but through acquisition in accordance with law—although until 1928, the law included the rule that coerced treaties were valid.⁷ Yet there were areas of uncertainty, with territory (often islands, islets, or rocks but sometimes whole provinces) contested between states.⁸ In such cases, it was largely a historical question which state had the better claim.

The basic principle of the modern law was stated by the Chamber in *Frontier Dispute (Burkina Faso/Mali)*:

Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis iuris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the

dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivité* can then play an essential role in showing how the title is interpreted in practice.⁹

Thus, title prevails over possession, but if title is equivocal, possession under claim of right matters.¹⁰

p. 205 Title to territory, like ownership of land, is normally 'objective', but there is no system of registration, no international Torrens title.¹¹ Unquestioned title is a contingency arising from history, general recognition, and the absence of any other claimant. Title may be relative in several quite different contexts.

- (1) The principle *nemo dat quod non habet* (no one can give what they do not hold) places a restrictive effect on titles dependent on bilateral agreement.
- (2) A judicial decision on title cannot foreclose the rights of third parties.
- (3) Where physical holding is not conclusive of the question of right, recognition becomes important, which may be forthcoming from some states and not others.
- (4) The *compromis* on the basis of which a dispute is submitted to a court or tribunal may assume that title is to go to one of the claimants. In *Minquiers and Ecrehos*, the Court interpreted the *compromis* as excluding a finding that the islets were *res nullius* or subject to a *condominium*.¹² In the absence of any other claimant, the result seems to be a title valid against all, but the parties may not have come up to any minimum requirements of effective control.
- (5) In any event, in instances such as *Island of Palmas* and *Minquiers and Ecrehos*,¹³ the Court assesses the relative intensity of the competing acts of state authority to determine which party has the better right.
- (6) In appropriate circumstances, the Court will lean in favour of title in one claimant even though there are grounds for a finding that the territory was at the relevant time *terra nullius*. Thus, in *Eastern Greenland*¹⁴ Danish activity in the disputed area had hardly been intensive, but the Court refused to consider the area *terra nullius*.¹⁵
- (7) In some cases, the sheer ambiguity of the facts may lead the Court to rely on matters which are less than fundamental,¹⁶ or to seek evidence of acquiescence by one party (scholarly writing uses the classification 'inchoate'). A title, though resting on very preliminary acts, is sufficient as against those without a better title.¹⁷ In coming to a decision on the question of right, it may be necessary to measure 'titles' against each other.¹⁸

p. 206 **(B) The intertemporal law**

The rights of parties to a dispute may derive from a legally significant act done, or treaty concluded, long ago.¹⁹ As Fitzmaurice says, it is 'an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed *at the time*, and not as they exist today'.²⁰ In *Island of Palmas*, where Arbitrator Huber had to consider whether Spanish sovereignty over the island subsisted at the critical date in 1898, he stated the principle and continued: 'The effect of discovery by Spain is ... to be determined by the rules of international law in force in the first half of the 16th century—or (to take the earliest date) in the first quarter of it ...'²¹ The rule has also been applied in the interpretation of treaties concerning territory.²² It is justified by reference to the need for predictability and stability in the international system of title.²³

In *Island of Palmas*, Arbitrator Huber gave a new dimension to the rule:

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.²⁴

This extension of the doctrine has been criticized on the ground that to require title to be actively maintained at every moment of time would threaten many titles and lead to instability.²⁵ This emphasizes the need for care in applying the rule.²⁶ As shown in, for example, *Pedra Branca*, the intertemporal principle does not operate in a vacuum: ↪ its impact will be reduced by the effect of recognition, acquiescence, and the rule that abandonment is not to be presumed.²⁷

(C) The critical date

In any dispute, a certain date will assume prominence in the process of evaluating the facts.²⁸ The choice of such a date is within the province of the tribunal and will depend on the logic of the claim(s) as well as on the practical necessity of confining the dossier to the more relevant facts and, in particular, to acts prior to the existence of any dispute. In the latter context, the tribunal is simply excluding evidence consisting of self-serving acts of parties after the dispute arose. But evidence of acts and statements occurring after the critical date may be admissible if not self-serving, as in the case of admissions against interest. There are several types of critical date, and it is difficult and probably misleading to formulate general definitions: the facts of the case are dominant (including the terms of a special agreement empowering the tribunal to hear the case) and there may be no necessity for a tribunal to choose any date whatever.

In some cases, there will be several dates of significance. *Eastern Greenland* arose from a Norwegian proclamation of 10 July 1931 announcing occupation of the area. The Court held that 'as the critical date is July 10th, 1931 ... it is sufficient [for Denmark] to establish a valid title in the period immediately preceding the occupation'.²⁹ In *Island of Palmas*, the US claimed as successor to Spain under a treaty of 10 December 1898, and everything turned on the character of Spanish rights at that time. The Court did not specifically choose a critical date in *Minquiers and Ecrehos*.³⁰ In *Argentine-Chile Frontier*, the tribunal 'considered the notion of the critical date to be of little value in the present litigation and ... examined all the evidence submitted to it, irrespective of the date of the acts to which such evidence relates'.³¹

(D) *Terra nullius*

*Terra nullius*³² is land not under the sovereignty or authority of any state; *occupatio* was the mode by which such territory could be acquired.³³ In the modern context, it has fallen into disuse. This is because there remains on the surface of the earth no truly 'vacant' territory,³⁴ but also because the term gradually assumed imperialist overtones when it was used to justify colonization of large areas of inhabited lands through a theory of European supremacy.³⁵ That theory underlay the Congress of Berlin of 1885 but now 'stands condemned'.³⁶ In *Western Sahara*, the Court had to decide whether the Western Sahara was *terra nullius* at the time of Spanish colonization (in the 1890s). It held it was not, because the people of the territory were socially and politically organized under chiefs with a capacity to represent them. In fact, the territory was acquired by treaty, not occupation.³⁷

3. The ‘Modes’ of Acquisition

(A) Basic principles

Standard textbooks classify the modes of acquisition in a stereotypical way reflecting those of Roman law.³⁸ Accordingly, there are five modes of acquisition—occupation, accretion, cession, conquest, and prescription. But the concept of modes of acquisition is unsound in principle: such labels only make the task of analysis more difficult.³⁹ The inadequacies of the orthodox approach will be more apparent when the relevant questions have been examined, but a few things may be usefully said here.

First, it is common to classify the five orthodox modes of acquisition as either ‘original’ or ‘derivative’. Occupation and accretion are usually described as ‘original’, cession as ‘derivative’, while there are differences of opinion in regard to conquest and prescription, and again the classification has no practical value.⁴⁰ In one sense, all titles are original, since much depends on the acts of the grantee in the case of cession. The dual classification oversimplifies the situation, and the modes described as ‘derivative’ are so in rather different ways. Moreover, the usual analyses do not explain how title is acquired when a new state comes into existence.⁴¹ Events leading to independence of the new state are mostly within the domestic jurisdiction of another state, yet they may be legally relevant to territorial disputes involving the new state. In this type of case, there is no ‘root of title’ as such: title is a by-product of the events leading to the creation of a state as a new source of territorial sovereignty.⁴²

Secondly, in determining title, a tribunal will concern itself with proof of the exercise of sovereignty via conduct *à titre de souverain* before the critical date or dates, and will not apply the orthodox analysis to describe its process of decision.⁴³ The issue of territorial sovereignty is often complex and involves the application of various legal principles to the facts, including (as concerns the modern period) principles deriving from the prohibition on the acquisition of territory by force and the invalidity of coerced treaties. The result often cannot be ascribed to any single ‘mode of acquisition’. Orthodox analysis does not allow for the interaction of acquiescence and recognition with the other rules. Furthermore, a category like ‘cession’ or ‘prescription’ may bring quite distinct situations into unhappy fellowship. Lastly, the importance of showing a better right in contentious cases, that is, of relative title, is obscured if too much credit is given to the five ‘modes’. Thus, the following headings represent categories of convenience.

(B) Original and historic title

It may happen that a current dispute involves not only reliance on the exercise of state authority but the invocation of an ancient, original, or historic title. The concept informs the principle of ‘immemorial possession’ and reliance on evidence of general repute or opinion as to matters of historical fact. Particularly in Asia, traditional boundaries play a significant role.⁴⁴ International tribunals have recognized the concept of ancient or original title, but require appropriate evidence in support.⁴⁵ Such evidence would constitute the assertion by a state of a right that it does not hold by any other title, acquiescence by other states, and ‘the passage of sufficient time to establish beyond doubt the existence of both the right and a general acquiescence’.⁴⁶ In disputes over historic title to maritime territory, however, the tribunal in the *South China Sea Arbitration* asserted that the entry into force of the UN Convention on the Law of the Sea had the effect of extinguishing—at least between member states—‘any historic rights that a State may once have had in the areas that now form part of the exclusive economic zone and continental shelf of another state’.⁴⁷

(C) Effective occupation

The concept of effective occupation in international law represents the type of legal relation which in private law would be described as possession.⁴⁸ In *Eastern Greenland*, the Permanent Court said ‘a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority’.⁴⁹ This statement has not lost its force, and was (in part) reiterated in *Eritrea v Yemen*: ‘[t]he 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 or State functions, on a continuous and peaceful basis.’⁵⁰

In the absence of a formal basis of title in a treaty or judgment,⁵¹ and in a system without registration of title, possession plays a significant role. What is important is *state activity* and especially acts of administration: use by local peoples generally lacks this element and is only tangentially relevant.⁵² ‘Occupation’ here derives from *occupatio* in Roman law and does not necessarily signify occupation in the sense of actual settlement and a physical holding.

As in private law, the concept of effective occupation is complex, as difficulties arise in applying it to the facts. Precisely what acts will be sufficient to found sovereignty are a matter of fact and degree,⁵³ and may depend on the character of the territory: for example, the bar with respect to remote and sparsely settled areas will be set lower than in the context of more heavily populated territory.

Effective and long-established occupation is key to a claim of acquisitive prescription, although courts and tribunals have rarely applied that doctrine as such.⁵⁴ In practice, it may not be easy to distinguish effective occupation and prescription, and neither *Island of Palmas* nor *Eastern Greenland* employs the categories. Arguably, the former can be classified as a case of prescription, the latter as resting on occupation, but in both cases the issue was simply which of two competing sovereignties had the better right. Prescription classically involves usurpation, yet these cases involved, for all practical purposes, contemporaneous competing acts of state sovereignty. In *Minquiers and Ecrehos*, the Court stated the issue as one of possession,⁵⁵ which in the context was equated with sovereignty.⁵⁶ Its task was ‘to appraise the relative strength of the opposing claims to sovereignty over the Ecrehos’.⁵⁷

(i) Discovery

This category, much employed, is unsatisfactory for the purpose of legal analysis.⁵⁸ It links the concept of ‘discovery’ to that of *terra nullius*, and is discredited for the same reasons. It was long thought that in the fifteenth and sixteenth centuries discovery conferred a complete title,⁵⁹ but an effective act of appropriation was still necessary.⁶⁰ The modern view, certainly, is that discovery gave at best an inchoate title, an option, as against other states, to proceed to effective occupation within a reasonable time.⁶¹ In *Island of Palmas*, the US argued that, as successor to Spain, its title derived from Spanish discovery in the sixteenth century. Arbitrator Huber responded that, even if discovery without more gave title at that time, the continued existence of the right had to be determined according to the law prevailing in 1898, the critical date: ‘an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered’.⁶² British⁶³ and Norwegian⁶⁴ practice supports this view. The current US view is that mere discovery gives no title, inchoate or otherwise.⁶⁵ The notion of discovery only makes sense if it is placed firmly in the context of effective occupation, so the notion of inchoate title is misleading. Title exists or it does not: it is never ‘inchoate’, though it may be weak if it rests on slight evidence of state activity.

p. 212 **(ii) Symbolic annexation**

Symbolic annexation⁶⁶ may be defined as a declaration or other act of sovereignty or an act of private persons, duly authorized or subsequently ratified by a state, intended to provide unequivocal evidence of the acquisition of sovereignty over a parcel of territory or an island. The subject must be seen as a part of the general question of effective occupation. There is no magic in the declaration of sovereignty by a government, whether or not this is preceded, accompanied, or followed by a formal ceremony in the vicinity. In the case of uninhabited, inhospitable, and remote regions little is required in terms of state activity and a first, decisive act of sovereignty may suffice to create a valid title, but in principle the state activity must satisfy the normal requirements of 'effective occupation'. 'Symbolic annexation' does not give title except in special circumstances (as in *Clipperton Island*). However, it is a part of the evidence of state activity: 'a prior State act of formal annexation cannot after a long interval prevail against an actual and continuous display of sovereignty by another State'.⁶⁷ But if the initial act was effective to vest title then a latecomer can only succeed, if at all, on the basis of prescription or acquiescence. To require too much in respect of the maintenance of rights may encourage threats to the peace. In the case of remote islands, it is unhelpful to require a determinate minimum of 'effectiveness', once title is actually established.⁶⁸

In *Clipperton Island*, a French lieutenant, duly authorized, proclaimed French sovereignty in 1858: this was notified to the government of Hawaii by the French consulate. In 1897, after inactivity in the intervening years, a French vessel called at the island and found three Americans collecting guano for a US company. The US denied any intention of claiming sovereignty. In the same year, the island received its first visit from a Mexican gunboat and a diplomatic controversy began. The Mexican case rested on Spanish discovery, but the arbitrator held that even if a historic right existed, it was not supported by any manifestation of Mexican sovereignty.⁶⁹ The annexation, though symbolic in form, had legal effect.

(iii) Effective and continuous display of state authority

As was noted in *Island of Palmas*, 'the actual continuous and peaceful display of state functions is in the case of dispute the sound and natural criterion of territorial sovereignty'.⁷⁰ This is in contrast to older works, stressing a nineteenth-century view of occupation in terms of settlement and close physical possession.⁷¹ Rather, the question has become one of administrative action, under which those acts which are reflective of the intention to govern, and not merely to possess in some nominal fashion, are constitutive of title.⁷²

p. 213 Thus, in *Island of Palmas* the Dutch claim to the contested territory was preferred on the basis of evidence 'which tends to show that there were unchallenged acts of peaceful display of Netherlands sovereignty from 1700 to 1906 and which ... may be regarded as sufficiently proving the existence of Netherlands sovereignty'.⁷³ In *Eastern Greenland*, the Danish claim, based not on any physical presence in the contested territory but on (1) the long-term presence of colonies in other parts of Greenland and (2) the wording of legislation and treaties rendering them applicable to Eastern Greenland, was held to be superior to the Norwegian claim, based on the wintering of various expeditions in the territory and the construction of a wireless station there. The Permanent Court held that Denmark, at least in the ten years prior to Norwegian involvement, had 'displayed and exercised sovereign rights to an extent sufficient to constitute valid title to sovereignty'.⁷⁴

The emphasis on the display of state activity, and the interpretation of the facts in the light of a legal policy which favours stability and allows for the special characteristics of uninhabited and remote territories, suggest a change in the law. The modern law concentrates on title, on evidence of sovereignty, and the notion of occupation has been refined accordingly. Thus, in *Minquiers and Ecrehos*, in relation to the Ecrehos group the Court was concerned with acts involving the exercise of jurisdiction, local administration, such as the holding of inquests,⁷⁵ and a British Treasury Warrant of 1875 constituting Jersey a Port of the Channel Islands.⁷⁶ In *Territorial and Maritime Dispute (Nicaragua v Colombia)*, the Court described relevant acts as 'in

particular, but not limited to, legislative acts or acts of administrative control, acts relating to the application and enforcement of criminal or civil law, acts regulating immigration, acts regulating fishing and other economic activities, naval patrols as well as search and rescue operations'.⁷⁷ Acts by private persons purporting to appropriate territory may be ratified by the state and may then constitute evidence of its effective occupation.⁷⁸ Otherwise they will have no legal effect.⁷⁹

(iv) The intention to act as sovereign

p. 214 The requirement of an intention to act as sovereign, otherwise referred to as *animus occupandi*⁸⁰ or *animus possidendi*,⁸¹ is generally stressed. However, the notion may create more problems than it solves: the subjective criterion is unrealistic in seeking a coherent intention from activity involving numerous individuals often over a considerable period of time.⁸² Furthermore, the criterion begs the question in many cases where there are competing acts of sovereignty.⁸³

In certain contexts, however, the *animus occupandi* has a function. First, the activity must be *à titre de souverain* in the sense that the agency must be that of the state and not of unauthorized persons. Secondly, it has a negative role: if the activity is carried out with the consent of another state recognized as the sovereign, then no amount of activity is capable of maturing into sovereignty. Thirdly, the state activity taken as a whole may be explicable only on the basis that sovereignty is assumed.⁸⁴ Thus, in *Minquiers and Ecrehos* the fact that both parties had conducted official hydrographic surveys of the area was not necessarily referable to an assertion of sovereignty by either. But certain forms of activity, whilst not necessarily connected with territorial sovereignty, have probative value, for example the exercise of criminal jurisdiction.

(D) Cession

A right to territory may be conferred by treaty, provided the transferee takes in accordance with the treaty.⁸⁵ An actual transfer is not required.⁸⁶ The date on which title changes will normally be the date on which the treaty comes into force:⁸⁷ an unratified treaty does not confer sovereignty.⁸⁸

p. 215 Apart from cession⁸⁹ and transfer in accordance with a treaty, title may exist on the basis of a treaty alone, the treaty marking a reciprocal recognition of sovereignty in solemn form.⁹⁰ In the case of a disputed frontier, the boundary treaty which settles the dispute will *create* title, previously unsettled, whereas a treaty of cession merely transfers an extant, definitive, title.⁹¹ In the case where a territorial regime is established by a treaty, this settlement achieves a permanence which the treaty itself does not necessarily enjoy: the continued existence of the regime is not dependent on the treaty under which the regime was agreed continuing in force.⁹²

(i) Agreements concluded with indigenous rulers

Treaties between indigenous peoples and the state were a feature of the period of colonization but are of limited relevance, externally, following the partition of the world into independent states.⁹³ The early position was defined primarily in the era of West European colonial expansion, notably in the so-called 'Scramble for Africa',⁹⁴ under which a large number of treaties were concluded with various African polities.⁹⁵ Such arrangements with indigenous rulers were not normally considered as cessions, but gave a form of derivative title distinguishing the act of acquisition from that of mere occupation. As characterized in *Island of Palmas*:

In substance, it is not an agreement between equals; it is rather a form of internal organisation of a colonial territory, on the basis of autonomy of the natives ... And thus suzerainty over the native

States becomes the basis of territorial sovereignty as towards other members of the community of nations.⁹⁶

Subsequent decisions of the International Court have qualified Huber's dictum to a degree. In *Western Sahara*, the Court stated that in the period beginning in 1884, 'agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terra nullius*'.⁹⁷

In *Cameroon v Nigeria*, the Court was called upon to determine the legal effect of an 1884 treaty between the UK and the 'Kings and Chiefs of Old Calabar', an area in the Niger Delta, and its consequent effect on the UK's capacity to deal later with the territory.⁹⁸ Nigeria argued that the 1884 treaty had created an international protectorate which did not result in the transfer of title to the UK; rather, title remained vested in Old Calabar as a sovereign entity. The Court disagreed, noting that: (1) at the time, the UK did not regard Old Calabar as a state, a position consistent with its activity in the rest of the region; (2) the region did not possess a central or federal authority sufficient to create a protectorate; (3) British activity in the region was reflective of an intention to administer, rather than merely protect; and (4) Nigeria was unable to identify with any degree of precision the source and character of Old Calabar's international personality, either in 1884 or thereafter.⁹⁹ The Court concluded that 'under the law at the time, Great Britain was in a position in 1913 to determine its boundaries with Germany in respect of Nigeria, including in the southern section'.¹⁰⁰

(ii) Renunciation or relinquishment

States can renounce title over territory in circumstances in which the subject matter does not thereby become *terra nullius*, thereby distinguishing renunciation from abandonment. Furthermore, there is no reciprocity and no commitment to transfer, as in the case of a treaty of cession. Renunciation may be recognition that another state has title¹⁰¹ or an agreement to confer a power of disposition to be exercised by another state or a group of states.¹⁰²

A series of unilateral acts may constitute evidence of an implicit relinquishment of rights.¹⁰³ Renunciation is to be distinguished from reversion, that is, recognition by an aggressor that territory seized is rightfully under the sovereignty of the victim. Here, there is no title to renounce.¹⁰⁴

(E) Adjudication

While the subject is generally neglected, some jurists accept adjudication by a judicial organ as a mode of acquisition.¹⁰⁵ The question then, as with a treaty of cession, is whether the award is self-executing, or merely gives an executory right.¹⁰⁶ At least in certain cases, the award is dispositive as between the parties: (1) when the character of the territory is such that no physical act is necessary to its effective appropriation (this is true of maritime delimitations); (2) where the two disputants are both exercising acts of administration in respect of the territory concerned and the award merely declares which of the two 'possessors' is a lawful holder; (3) where the loser is to continue in possession with delegated powers of administration and jurisdiction; (4) when the successful claimant is already in possession; and (5) (perhaps) where the award relates only to the detailed fixing of a frontier line.

4. Displacement of Title

(A) The concept of 'prescription'

(i) The place of prescription in the law

Prescription refers to the removal of defects in a putative title arising from usurpation of another's sovereignty by the acquiescence of the former sovereign.¹⁰⁷ The standard apology for the principle rests on considerations of good faith and the need to preserve international order and stability. It is not a mode of acquisition: the real source of title is recognition of or acquiescence in the consequences of unchallenged possession and control.

Prescription is distinct from the outright abandonment or relinquishment of territory. Abandonment refers to a situation where a state is held to have surrendered its title, converting the territory to *res nullius*, before another state establishes its own title by way of lawful allocation or effective occupation. In the case of abandonment, there is no usurpation of sovereignty since there are no contemporaneous competing claims. Relinquishment is the giving up of a claim to territory in face of what is thereby acknowledged to be a better claim, or at least a subsisting one.¹⁰⁸

The difference between prescription and effective occupation is not easy to establish. In *Island of Palmas*, for example, there was competing state activity: the tribunal had to apply the criterion of effective control associated with 'effective occupation'.¹⁰⁹ In that context, to speak of prescription is unhelpful.¹¹⁰

(ii) The role of private law analogies

In addressing problems of prescription, writers have drawn on analogies from the private law of both civil and common law traditions.¹¹¹ From the civilian tradition has been drawn the concept of abandonment or *derelictio*, under which the title-holder makes a conscious decision to relinquish its rights with respect to the contested territory, which may result in its becoming *res nullius* prior to the assertion of the other state's claim. From the common law comes the doctrine of estoppel, under which a representation made by one state that is relied on by another to its detriment may preclude the former state from acting in a contrary fashion. Another source of analogy has been the civil law doctrine of acquisitive prescription and the common law 'equivalent' of adverse possession.

Apart from the imperfect character of these 'sources', there is the distinct issue of the effect of the presumption of legality. Although some have argued that acquisitive prescription is a general principle of law,¹¹² what is the content of the general principle? Instead of providing guidance, analogies to acquisitive prescription, adverse possession, or similar concepts tend to spark confusion and lead to inconsistent terminology.

(B) The requirements of prescription

(i) Conduct on the part of the usurping party

To establish a case for the usurpation of title, certain prerequisites need to be clearly established.¹¹³

- (1) Possession must be exercised *à titre de souverain*,¹¹⁴ through a display of state authority and the absence of recognition of sovereignty of another state. Without adverse possession there can be no prescription.

- (2) The possession must be public, peaceful, and uninterrupted.¹¹⁵ By contrast, in a situation of competing state activity, as in *Island of Palmas*, publicity will not play an important role because acquiescence may not be relevant except in minor respects.
- (3) Finally, possession must be persistent and not merely ephemeral.¹¹⁶ In the case of recent possession, it is difficult to adduce evidence of tacit acquiescence. Suggestions of fixed periods¹¹⁷ are due to a yearning after municipal models. The better view is that the length of time required is a matter of fact depending on the particular case.

Where the necessary *effectivités* on the part of the usurping party have been established, the competing conduct of the title-holder must be assessed to determine whether title has been relinquished.

p. 219 **(ii) The importance of acquiescence**

In *Island of Palmas*, Arbitrator Huber observed that the continuous and peaceful display of *effectivités* by a state 'may prevail even over a prior, definitive title put forward by another State'.¹¹⁸ In the face of competing activity and claims by another, a state may by conduct or admission acquiesce in the extension of its competitor's sovereignty.¹¹⁹

At its simplest, this may take the form of an express declaration by one state that it considers another to hold title to the territory, combined with evidence of conduct *à titre de souverain* by that other. This was a key feature in *Eastern Greenland*: Norway had, through a declaration by its Foreign Minister, Nils Ihlen, accepted Danish title to the disputed territory.¹²⁰ In *Pulau Batu Puteh*, the Court gave decisive weight to a response given in 1953 by the Acting Secretary of State of Johor that 'the Johor government [did] not claim ownership of Pedra Branca'.¹²¹

Even without an express declaration of relinquishment, the absence of state activity, combined with an absence of protest that might otherwise be expected in response to the *effectivités* of the opposing party, may be decisive.¹²² In the jurisprudence of the International Court, this has become known as acquiescence, a concept which is equivalent to tacit recognition manifested by unilateral conduct which the other party may properly interpret as consent. Although the term originally emerged in the context of maritime delimitation,¹²³ it has been adopted by the Court in the context of territorial disputes as well.¹²⁴ But because of the need to maintain stability and to avoid 'squatting', abandonment is not to be presumed.¹²⁵ As the Chamber said in *Burkina Faso/Mali*, where there is a conflict between title and *effectivités*, preference will be given to the former.¹²⁶ Accordingly, little evidence of *effectivités* will be required to prove maintenance of title, particularly in regard to remote and uninhabited areas.¹²⁷ In *Eastern Greenland*, Norway argued that Greenland became *terra nullius* after the disappearance of the early settlements. The Court, rejecting the argument, observed:

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.¹²⁸

Similarly, in *Cameroon v Nigeria* the Court found that Cameroon had not abandoned its title to the Bakassi region, despite having engaged in only occasional acts of administration in the area due to a lack of resources.¹²⁹

Thus, it would seem that nothing short of the total (or near-total) absence of conduct *à titre de souverain* in an area by the title-holder will be sufficient to signal movement away from the status quo. An illustration is

Pulau Batu Puteh where the Court held that ‘any passing of sovereignty over territory on the basis of the conduct of the Parties ... must be manifested clearly and without any doubt by that conduct and the relevant facts ... especially so if what may be involved, in the case of one of the parties, is in effect the abandonment of sovereignty over part of its territory’.¹³⁰ This was only established with reference to Pulau Batu Puteh (Pedra Branca) itself and then only because of the declaration of the Acting State Secretary.

(iii) Estoppel

Recognition, acquiescence, admissions constituting a part of the evidence of sovereignty,¹³¹ and estoppel form an interrelated subject matter; everything depends on the precise alchemy of the opposing parties’ *effectivités*, combined with the presence of some form of representation by a party that it does not consider itself as sovereign.¹³² In *Temple*, the Court held that by its conduct Thailand had recognized the frontier line contended for by Cambodia in the area of the temple, as marked on the map drawn up by French members of a Mixed Delimitation Commission. In particular, the Court placed reliance on a visit of a ‘quasi-official character’ by a member of the Siamese royal family to the disputed territory where he was ‘officially received’ by the local French plenipotentiary ‘with the French flag flying’.¹³³ The Court remarked:

Looking at the incident as a whole, it appears to have amounted to a tacit recognition by Siam of the sovereignty of Cambodia (under French Protectorate) over Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title in the face of an obvious rival claim. What seems clear is that either Siam did not in fact believe that she had any title—and this would be wholly consistent with her attitude all along ... —or else she decided not to assert it, which again means she accepted the French claim, or accepted the frontier of Preah Vihear as it was drawn on the map.¹³⁴

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The Court disregarded the fact that the Thai prince held no office at the time and was engaged on a private visit.

In many situations, acquiescence and express admissions are but part of the evidence of sovereignty. Estoppel differs in that, if the conditions for an estoppel are satisfied, it suffices to settle the issue. Resting on good faith and the principle of consistency in state relations, estoppel may involve holding a government to a declaration which in fact does not correspond to its real intention, if the declaration is unequivocal and the state to which it is made has relied on it to its detriment. Such a principle must be used with caution, particularly in dealing with territorial issues.¹³⁵ Thus, the Court held that the declaration of the Acting State Secretary that Johor did not possess sovereignty over Pedra Branca did not give rise to an estoppel:

[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 ... The Court observes that Singapore did not point to any such acts. To the contrary, it acknowledges in its Reply that, after receiving the letter, it had no reason to change its behaviour; the actions after 1953 to which it refers were a continuation and development of the actions it had taken over the previous century.¹³⁶

By contrast, in cases such as *Temple*, where much of the evidence is equivocal, acquiescence over a long period may be treated as decisive: here it is not itself a root of title but an aid in the interpretation of the facts and legal instruments.¹³⁷ To be decisive, acquiescence must rest on very cogent evidence. Express recognition in a treaty of the existence of title in the other party (as opposed to recognition by third states) is of course conclusive.¹³⁸

(C) ‘Negative prescription’

Some writers seem to suggest that prescriptive title arises even without acquiescence, simply by lapse of time and possession not disturbed by measures of forcible self-help. A similar result is reached by p. 222 formulations which presume acquiescence under certain ↪ conditions. Such views are not supported by the jurisprudence, which sets an exacting evidentiary standard for the displacement of confirmed title, a standard which requires at least some evidence (tacit or express) of acquiescence. They commonly antedate the period when forcible self-help and conquest were prohibited. Prescription can no longer create rights out of situations brought about by illegal acts.¹³⁹ Finally, in *Island of Palmas, Minquiers and Ecrehos*, and other like cases, the possession upheld by the tribunal was adverse only in a special sense; there is no deliberate usurpation with a sequel of adverse holding, but a more or less contemporaneous competition.

(D) Historical consolidation of title: an epitaph

Historical consolidation as a concept refers to an acquisition of title on the basis of its use without challenge over a significant period of time.¹⁴⁰ In *Anglo-Norwegian Fisheries*, the Court, having established that Norway had delimited the territorial sea by a system of straight baselines since 1869, had to decide whether, as against other states, it had title to waters so delimited. The Court said:

[I]t is indeed this system itself [of straight baselines] which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States ... The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. The notoriety of the facts, the general toleration of the international community, Great Britain’s position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway’s enforcement of her system against the United Kingdom.¹⁴¹

There, the attitude of other states was taken as evidence of lawfulness of the system, but there were certain special features. The extension of sovereignty claimed was over a *res communis* and therefore the toleration of other states was of significance. Moreover, the Court appeared to regard British silence as an independent basis of legality as against the UK. In *Territorial and Maritime Dispute (Nicaragua v Colombia)*, the attitude of other states was taken into consideration over territory not considered *res communis*.¹⁴²

De Visscher took the decision as an example of the ‘fundamental interest of the stability of territorial situations from the point of view of order and peace’, which ‘explains the place that consolidation by historic titles holds in international law’.¹⁴³ Thus, ‘consolidation’ differs from prescription and occupation in de Visscher’s doctrine. It is, moreover, certain that the elements which he calls ‘consolidation’ are influential; the essence of the matter is peaceful holding and acquiescence or toleration by other states.¹⁴⁴ But the concept of historical consolidation is not much more than a compendium of pre-existing modes of acquisition. Certainly, as late as 1998 a distinguished arbitral tribunal referred ↪ to the concept of consolidation of title with approval.¹⁴⁵ Nonetheless, the accepted view is that consolidation does not exist as a concept independent of the established rules governing effective occupation and prescription. In *Cameroon v Nigeria*, the Court stated that ‘the theory of historical consolidation is highly controversial and cannot replace the established modes of acquisition of title under international law’.¹⁴⁶

5. Extent of Sovereignty: Territorial Disputes

Certain logical and equitable principles which are not themselves roots of title are important in determining the actual extent of sovereignty derived from some source of title such as a treaty of cession or effective occupation.¹⁴⁷

(A) The principle of contiguity

Considerations of contiguity and geographical unity come to the fore when the disputed territory was at relevant times uninhabited, barren, or uncharted. In relation to islands in particular, contiguity is a relevant concept. Thus, in *Land, Maritime and Frontier Dispute*, the Chamber held that the island of Meanguerita was a dependency of the larger island of Meanguera, due to its small size, its proximity, and the fact that the claimants to the dispute treated the two as a single unit.¹⁴⁸ But this is a presumption only: in *Pulau Batu Puteh*, one of three disputed features was held to belong to Singapore, a second (and by inference a third) to Malaysia.¹⁴⁹

Such considerations are a part of judicial reasoning, but also have significance in other respects. State activity as evidence of sovereignty need not press uniformly on every part of territory. Associated with this is the presumption of peripheral possession based on state activity, for example on the coast of a barren territory.¹⁵⁰ In *Eastern Greenland*,¹⁵¹ the Court gave effect to the idea of geographical unity, concluding that localized Danish activity gave title over the whole of Greenland. Writing of the decision, Lauterpacht remarked on 'those principles of finality, stability and effectiveness of international relations which have characterized the work of the Court'.¹⁵² Contiguity may be an earnest of effectiveness, but in itself it is little more than a technique in the application of the normal principles of effective occupation.

p. 224 (B) The *uti possidetis* principle

The concept of *uti possidetis* provides that states emerging from the dissolution of a larger entity inherit as their borders those administrative boundaries which were in place at the time of independence.¹⁵³ In *Burkina Faso/Mali*, the Chamber in applying the principle to Africa said as follows:

The essence of the principle lies in its primary aim of securing respect for 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.¹⁵⁴

Though it has its origins in Roman law,¹⁵⁵ the modern application of the doctrine began in Latin America in the nineteenth century, where the administrative divisions imposed by Spain were adopted as the borders of the new states that emerged in the region.¹⁵⁶ The principle involves implied agreement to base territorial settlement on a rule of presumed possession by the previous Spanish administrative unit in 1821, in Central America, or in 1810, in South America. Its use has persisted and in a slightly different form it has been adopted by governments and tribunals concerned with boundaries in Asia¹⁵⁷ and Africa.¹⁵⁸ The principle was applied in relation to the appearance of new states on the territory of the former Yugoslavia,¹⁵⁹ and to the boundaries between those states.¹⁶⁰ It is also applicable in maritime delimitation.¹⁶¹

The operation of *uti possidetis* does not always give satisfactory solutions. Ratner identifies two central complaints: (1) its inherent simplicity gives rise to the temptation on the part of ethnic separatists to further divide territory along existing boundaries; (2) application of the principle to modern state collapses may

p. 225 lead to significant populations both unsatisfied with their status in the new state and uncertain of their political participation there.¹⁶² The administrative boundaries are frequently ill-defined or difficult to prove.¹⁶³ Furthermore, the colonial boundaries on which the future of contested regions now rely were often not drawn in the first place with any degree of ethnic sensitivity, leading to the inclusion of opposed groups within the same new state.¹⁶⁴ Finally, the doctrine may impede the recognition of new states due to the unwillingness of states to acknowledge a desire for independence contrary to *uti possidetis*.¹⁶⁵

The principle is not peremptory and states are free to adopt other principles as the basis of a settlement,¹⁶⁶ but the general principle that pre-independence boundaries of former administrative divisions subject to the same sovereign remain in existence is in accordance with good policy. Three arguments are generally posited as justifying this conclusion:¹⁶⁷ (1) the doctrine renders the division of a state susceptible to only one outcome, preventing armed conflict over territory; (2) a division based on administrative boundaries is as valid as any other approach in principle, and far simpler in execution; and (3) *uti possidetis* has achieved the status of a general principle or default rule of international law.¹⁶⁸

(C) Accretion

Accretion concerns the process of increase of territory through new geological formations.¹⁶⁹ Simply put, deposits on a sea coast may result in an extension of sovereignty. A more dramatic example is provided with the emergence of an island within the territorial sea of Iwo Jima due to volcanic activity in 1986; this was subject to immediate recognition by the UK government as part of the territory of Japan.¹⁷⁰ In such a case, '[n]o formal acts of appropriation are required'.¹⁷¹

(D) Hydraulic boundaries

(i) Boundary rivers

p. 226 The principle of delimitation apparently established in the law is that of the *thalweg*, presumed to mean the middle of the main navigable channel.¹⁷² However, the term may have another meaning in particular instruments and treaties, viz, the line of deepest soundings. The two definitions will often coincide. But conditions prevailing, even within the same river system, are very variable and scholarly opinion is unhelpful in practice. Technical expertise is called for, particularly in relation to the determination of the main channel among several arms of a river.¹⁷³

Unlike purely terrestrial borders, boundary rivers may change their course. This is not a true case of accretion. Thus, in relation to the southern boundary of New Mexico, the solution of disputes between the US and Mexico depended on principles of acquiescence and the interpretation of agreements as to the outcome of natural changes.¹⁷⁴ In this type of case, even in the absence of applicable agreements, sudden, forcible, and significant changes in river courses (avulsion) will not be considered to have changed the frontier line.¹⁷⁵ In other words, the boundary will be fixed along the route of the former river bed, following not the river but the land underneath. Accretion, the gradual and imperceptible addition of sediments, can give rise to an extension of the sovereignty of the co-riparian state to areas already under effective occupation¹⁷⁶ on the basis of principles of contiguity and certainty. The gradual nature of the process leads to a presumption of occupation by the riparian state and of acquiescence by other states; thus, the boundary will be held to move with the river.¹⁷⁷

In *Eritrea–Ethiopia Boundary Commission*, the tribunal issued certain directions for the demarcation stage of its work, including the following:

[T]he identification of a river as a boundary should normally suffice without actual demarcation therein, save as regards the identification of confluences, turning points that may give rise to doubts, and headwaters or sources.¹⁷⁸

Moreover, 'the turning point of the boundary is at the point of the meeting of the main channel of each river or stream' and that, topography permitting, 'the turning point shall be identified by three pillars, one on each bank of the river that meets the other and the third on the bank of the latter opposite the confluence, with the distances of each pillar from the point of meeting being marked thereon'.¹⁷⁹ Regard should be paid to equitable considerations—the customary rights of the local people to have access to the river—at the demarcation stage of the decision regarding a line within rivers.¹⁸⁰

p. 227 (ii) Boundary lakes

As to boundary lakes, the principle of the median line applies, but as usual, express agreement or acquiescence may produce other modes of division. Indeed, in the case of both Lake Albert (separating Uganda and the Democratic Republic of the Congo) and Lake Geneva (between France and Switzerland), the 'formal middle line' was agreed upon as the frontier.¹⁸¹ Uganda, Tanzania, and Kenya are divided by the 'astronomical line' on Lake Victoria in terms of the Anglo-German Agreement of 1890.¹⁸² The matter of the border between Austria, Switzerland, and Germany on Lake Constance remains unresolved for lack of agreement.¹⁸³ Border lakes can also be regulated through condominium status,¹⁸⁴ but the presumption is against.

(E) The polar regions: the sector principle

Particularly in the case of the Arctic, the question of rights over frozen sea or 'ice territory' arises,¹⁸⁵ but otherwise normal principles apply to territory situated in polar regions.¹⁸⁶ In claiming ice deserts and remote groups of islands, governments seek to establish the limits of territorial sovereignty by means of straight lines, and similar systems of delimitation may be found in other regions, for example in North America. In the polar regions, use has been made of lines of longitude converging at the Poles to produce a sector of sovereignty. While the 'sector principle' does not give title, it may represent a reasonable application of the principles of effective occupation as applied in *Eastern Greenland*.¹⁸⁷ It remains a rough method of delimitation, and has not become a separate rule of law.¹⁸⁸

Confusion of claims has arisen primarily from the indecisive nature of state activity in the polar regions. However, three reservations may be made: the 'sector principle' has the defects of any doctrine based upon contiguity; its application is absurd insofar as there is claim to a narrow sliver of sovereignty stretching to the Pole; and, lastly, it cannot apply so as to include areas of the high seas.

p. 228 In the Arctic, Denmark, Finland, Norway, and the US have refrained from sector claims linked to territories peripheral to the polar seas. On the other hand, Canada¹⁸⁹ and the Russian Federation¹⁹⁰ have made use of the sector principle. Probably, recognition by treaty or otherwise creates title in the Arctic rather than the sector principle as such.¹⁹¹

Sector claims in Antarctica have been made by the UK, New Zealand, Australia, France, Norway, Argentina, and Chile. But, first, some claims depend not on contiguity but on discovery. Secondly, claimants are not confined to peripheral neighbours as in the Arctic. And thirdly, recognition¹⁹² is important in establishing title in an otherwise fluid situation created by overlapping claims, many of which in law may amount to little more than ambit claims or declarations of interest. The Antarctic Treaty,¹⁹³ however, prevents any additional claims to the continent being made and signals non-recognition by third states of claims already made.

6. Territorial Sovereignty and Peremptory Norms

The complex question of the effect of breaches of peremptory norms on the validity of interstate transactions is considered in chapter 27. The concern here is the effect of certain rules on the power of alienation.

(A) Transfer by an aggressor

The modern law forbids conquest and regards a treaty of cession imposed by force as a nullity, a logical extension of the prohibition on the use of force contained in Article 2(4) of the UN Charter.¹⁹⁴ Even if—and this is open to considerable doubt—the vice in title can be cured by recognition by third states, the loser is not precluded from challenging any title based on a transfer from the aggressor. The force of a powerful prohibition, the stamp of illegality, operates here rather than the principle *nemo dat quod non habet*. In the event, the Charter era has been attended by far less acquisition of territory by force than periods before it.¹⁹⁵

p. 229 This is reflected in Security Council Resolution 242 (1967),¹⁹⁶ which highlighted the inadmissibility of the acquisition of territory by force, and more emphatically, the Friendly Relations Declaration of 1970.¹⁹⁶ Exceptions could perhaps occur when there is a disposition of territory by the principal powers or some other international procedure valid as against states generally. So far in the modern period, such dispositions have not resulted in an agreed settlement allowing the aggressor to keep the territory seized.

(B) The principle of self-determination and territorial transfers

Is there a rule of law inhibiting the transfer of territory if certain minimum conditions of local consent are not fulfilled?¹⁹⁷ Dispositions by the principal powers, transfers under procedures prescribed by international organizations, and bilateral cessions in the period since 1919 have been expressed to be in accordance with the principle of self-determination. The machinery of the plebiscite is sometimes applied,¹⁹⁸ or affected individuals may be given an option of nationality and/or repatriation.¹⁹⁹

Some argue that transfers of any populated territory must satisfy the principle of self-determination. However, there is insufficient practice to warrant the view that a transfer is invalid simply because there is no sufficient provision for expression of opinion by the inhabitants.²⁰⁰ At present, most claims are made in terms which do not include a condition as to due consultation of the population concerned. Those jurists who insist on the principle refer to exceptions, such as a collective decision of states representing the international community to impose measures on an aggressor,²⁰¹ and the principle of respect for pre-independence administrative divisions following attainment of independence by former colonies (*uti possidetis*).²⁰² In any event, the application of the principle may be difficult in practice. In relation to the British–Argentine dispute over the Falklands/Malvinas, the relevant UN resolutions call for transfer by virtue of a principle of decolonization, while the UK regards transfer without local consent as a breach of the principle of self-determination.²⁰³

7. Conclusion

The predominance accorded to history and the corollary tendency to treat disputes over territorial sovereignty as if they were private law disputes over land, raise questions of consistency with current principles of human rights and self-determination. There is no legal difference between a claim to a few hectares of uninhabited swamp and a claim to a province. But states are historical entities and territorial communities have deep historical roots as well as (often) frayed, fuzzy, or uncertain limits. Modern boundary and territorial disputes have concerned lengthy boundaries potentially cutting across peoples and communities, ranging to disputes over small islands and scraps of land.²⁰⁴ But boundaries must lie somewhere and so far at least the historical approach, dependent on presumptions such as *uti possidetis* and treaty stability, has prevailed.

Notes

- 1 Jennings, *The Acquisition of Territory in International Law* (1963); Blum, *Historic Titles in International Law* (1965); Kaikobad (1983) 54 BY 119; Thirlway (1995) 66 BY 1; Kohen, *Possession contestée et souveraineté territoriale* (1997); Ratner (2006) 100 AJIL 808; Prescott & Triggs, *International Frontiers and Boundaries* (2008); Shaw, *The International Law of Territory* (2012); Duncan (2012) 35 *Boston Col ICLR* 1; Kohen (ed), *Territoriality and International Law* (2016). For acquisition of maritime zones, see chapter 11; for maritime delimitation, chapter 12.
- 2 E.g. *South China Sea Arbitration* (2016) 170 ILR 1; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India)* (2014) 167 ILR 1.
- 3 E.g. *Eritrea-Ethiopia Boundary Delimitation* (2002) 130 ILR 1. Also: *Government of Sudan v Sudan People's Liberation Movement/Army (Abyei Arbitration)* (2009) 144 ILR 348; Daly & Schofield, 'Abyei Arbitration' (2010) *MPEPIL*; Bockenforde (2010) 23 *LJIL* 555.
- 4 Cf *Ure v Commonwealth of Australia* (2016) 173 ILR 624 (Federal Court of Australia) (whether private individuals could acquire proprietary rights over *terra nullius*: held not), distinguishing *Jacobsen v Norwegian Government* (1933) 7 ILR 109 (Supreme Court of Norway).
- 5 In *Minquiers and Ecrehos (France/UK)*, ICJ Reports 1953 p 47, the parties and, to a lesser extent, the Court considered it necessary to investigate legal transactions of the medieval period.
- 6 Fitzmaurice (1955-6) 32 BY 20, 64-6; Schwarzenberger (1957) 51 AJIL 308, 320-2; Castellino & Allen, *Title to Territory in International Law* (2003); Kohen (2004) 108 *RGDIP* 562; Shaw (ed), *Title to Territory* (2005); Ratner (2006) 100 AJIL 808; Yanagihara, *Territorial Title* (2012). See also chapter 8. For linguistic confusion over the term: O'Keefe (2011) 13 *Int Comm LR* 147, 153-4.
- 7 Thus, the objection to British acquisition of the Boer Republics was that it was premature, not that it was intrinsically unlawful: *West Rand Central Gold Mining Co v R* [1905] 2 KB 391. For the development of rules relating to the use of force, see chapter 33.
- 8 On Gibraltar, see Waibel, 'Gibraltar' (2009) *MPEPIL*. On the Senkaku Islands: Lee in Chinkin & Baetens (eds), *Sovereignty, Statehood and State Responsibility* (2015) 126; Ramos-Mrosovsky in Liao, Hara, & Wiegand (eds), *The China-Japan Border Dispute: Islands of Contention in Multidisciplinary Perspective* (2015) 115-40.
- 9 ICJ Reports 1986 p 554, 586-7. The term *uti possidetis (juris)* refers to the presumption that the boundaries of a new state or entity follow those that existed under the previous (usually colonial) regime. Further: Lalonde, *Determining Boundaries in a Conflicted World* (2002); Castellino & Allen (2003) ch 1; Duncan (2012) 12.
- 10 See the ICJ's line of reasoning in *Territorial and Maritime Dispute (Nicaragua v Colombia)*, ICJ Reports 2012 p 624, 651-2. Cf *Frontier Dispute (Burkina Faso/Niger)*, ICJ Reports 2013 p 44.
- 11 I.e. a system of municipal title registration whereby inclusion on the register confers on the holder an indefeasible title. The civil law equivalent is a cadaster.
- 12 ICJ Reports 1953 p 47, 52. See also the special agreement in *Island of Palmas (Netherlands v US)* (1928) 2 RIAA 829.
- 13 Also: *Temple of Preah Vihear (Cambodia v Thailand)*, ICJ Reports 1962 p 6, 72 (Judge Moreno Quintana).
- 14 *Legal Status of Eastern Greenland* (1933) PCIJ Ser A/B No 53. Further: Alfredsson, 'Eastern Greenland Case' (2007) *MPEPIL*.
- 15 Cf Lauterpacht, *Development* (1958) 241. Also: *Clipperton Island* (1931) 2 RIAA 1105.
- 16 *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, ICJ Reports 1959 p 209, 231 (Judge Lauterpacht), 232 (Judge Spiropoulos), 249-51 (Judge Armand-Ugon), where title resting on an ambiguous treaty conflicted with various acts of

- administration. On the interpretation of the term ‘*terra nullius*’ in the context of the Treaty Concerning Spitsbergen, 9 February 1920, 2 LNTS 7: Ulfstein, *The Svalbard Treaty—From Terra Nullius to Norwegian Sovereignty* (1995); Rossi (2016) 15 *Wash U Global SLR* 93.
- 17 Cf French rights as against Mexico in *Clipperton Island* (1931) 2 RIAA 1105.
- 18 *Island of Palmas* (1928) 2 RIAA 831, 870.
- 19 Jennings (1963) 28; Fitzmaurice (1953) 30 *BY* 1, 5; Elias (1980) 74 *AJIL* 285; Thirlway (1995) 66 *BY* 128; Higgins in Makarczyk (ed), *International Law at the Threshold of the 21st Century* (1996) 173; Kotzur, ‘Intertemporal Law’ (2008) *MPEPIL*; Merkouris (2014) 45 *NYIL* 121; Bjorge, *The Evolutionary Interpretation of Treaties* (2014) 142–67; Fry & Loja (2014) 27 *LJIL* 727.
- 20 Fitzmaurice (1953) 30 *BY* 1, 5 (emphasis added).
- 21 *Island of Palmas* (1928) 2 RIAA 829. Further: Jessup (1928) 22 *AJIL* 735; also *Banks of Grisbadarna (Norway v Sweden)* (1909) 11 RIAA 155, 159.
- 22 *Rights of Nationals of the United States of America in Morocco (France v US)*, ICJ Reports 1952 p 176, 189; *Right of Passage over Indian Territory (Portugal v India)*, ICJ Reports 1960 p 6, 37; also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971 p 16, 31; *Aegean Sea Continental Shelf (Greece v Turkey)*, ICJ Reports 1978 p 3, 32.
- 23 E.g. *Eritrea and Yemen* (1998) 114 ILR 1, 46, 115; *Eritrea–Ethiopia Boundary* (2002) 130 ILR 1, 34; *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Reports 2002 p 303, 404–7.
- 24 *Island of Palmas* (1928) 2 RIAA 831, 845.
- 25 Lauterpacht, *Function of Law* (1933, repr 2011) 283–5. See Jessup (1928) 22 *AJIL* 735, 739; Jennings (1963) 28; Jennings (1967) 121 *Hague Recueil* 422.
- 26 This form of the doctrine was applied sensibly in *Minquiers and Ecrehos*, ICJ Reports 1953 p 47, 56; see also *Western Sahara*, ICJ Reports 1975 p 12, 38; *ibid*, 168 (Judge de Castro).
- 27 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, ICJ Reports 2008 p 12.
- 28 Fitzmaurice (1955–6) 32 *BY* 20; Blum (1965) 208; Thirlway (1995) 66 *BY* 31. See also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, ICJ Reports 1992 p 351, 401. For the problems arising in the context of treaties of cession and the rights of successor states, see *Lighthouses (France and Greece)* (1956) 23 ILR 659, 668. On the critical date in the African regime: Ahmed, *Boundaries and Secession in Africa and International Law: Challenging Uti Possedetis* (2015) 136.
- 29 *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 45.
- 30 ICJ Reports 1953 p 47. France relied on the date of the Convention between France and Great Britain for Defining the Limits of Exclusive Fishing Rights, 2 August 1839, 89 CTS 221; the UK on the date of the *compromis* (29 December 1950). See Johnson (1954) 3 *ICLQ* 189, 207–11. Critical dates did not feature in *Temple*, ICJ Reports 1962 p 6. However, the Court treated two dates as material: 1904, the date of a frontier treaty between France and Thailand, and 1954, when Thailand sent military or police forces to occupy the area. See also *Rann of Kutch* (1968) 50 ILR 2, 470.
- 31 (1966) 38 ILR 10, 79–80. Also: *Eritrea and Yemen* (1998) 114 ILR 1, 32; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, ICJ Reports 2002 p 625, 682; *Burkina Faso/Mali*, ICJ Reports 1986 p 554, 586–7; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, ICJ Reports 2007 p 659, 697–701; *Nicaragua v Colombia*, 2012 ICJ Rep p 624, 653; *Burkina Faso/Niger*, ICJ Reports 2013 p 44, 74–5, 77.
- 32 Generally: Andrews (1978) 94 *LQR* 408; Sookyeon (2015) 26 *EJIL* 709. Modern scholarship is focused on its relationship with indigenous rights: Banner (2005) 23 *L & Hist R* 95; Borrows (2015) 48 *UBCLR* 701.
- 33 E.g. *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 44–51; *Western Sahara*, ICJ Reports 1975 p 12, 38–40, 85–6 (Vice-President Ammoun); *Pulau Batu Puteh*, ICJ Reports 2008 p 12, 35–7 ([60]–[69]). See also Kohen (2013) 15 *J Hist IL* 151; Jia in del Castillo (ed), *Law of the Sea, from Grotius to the International Tribunal for the Law of the Sea* (2015) 657.
- 34 Aside from some very small rocks and a small sector of Antarctica (over which in any case no sovereignty may be claimed by virtue of the Antarctic Treaty, 1 December 1959, 402 UNTS 71, Art IV). Also: Shaw in Shaw (2005) 3, 24; Ratner (2006) 100 *AJIL* 808, 811.
- 35 Sookyeon (2015) 26 *EJIL* 709.
- 36 *Western Sahara*, ICJ Reports 1975 p 12, 86.
- 37 *Ibid*, 39–40. See also: Case T-512/12 *Front Polisario v Council*, ECLI:EU:T:2015:953, [60], [113], [247]. For the classification of Australia as *terra nullius*: *Mabo v Queensland (No 2)* (1992) 112 ILR 457, 491–2. In Canada: *Tsilhqot’in Nation v British Columbia* [2014] 2 SCR 256, 292; McNeil (2015) 48 *UBCLR* 821. Generally on the eighteenth–nineteenth century practice: Crawford (2nd edn, 2006) 263–74; Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (2014) 125–71, 215–56.
- 38 Castellino & Allen (2003) ch 2.
- 39 For criticism: Johnson (1955) 13 *CLJ* 215; Jennings (1963) 6–7.
- 40 Thus an ‘original’ mode does not necessarily give a title free of encumbrances: *Right of Passage*, ICJ Reports 1960 p 6.

- 41 Jennings (1963) 7–11. Also: 1 Hyde 390; 1 Hackworth 444–5.
- 42 Crawford (2nd edn, 2006) 664–5; see further chapter 5.
- 43 *Nicaragua v Colombia*, ICJ Rep 2012 p 624, 655.
- 44 *South China Sea Arbitration*, Merits (2016) 170 ILR 1, 290; Kaikobad (1983) 54 *BY* 119, 130–4; Dupuy & Dupuy (2013) 107 *AJIL* 124.
- 45 *Minquiers and Ecrehos*, ICJ Reports 1953 p 47, 53–7, 74–9 (Judge Basdevant); *Rann of Kutch* (1968) 50 ILR 2, 474; *Western Sahara*, ICJ Reports 1975 p 12, 42–3; *El Salvador/Honduras*, ICJ Reports 1992 p 351, 564–5; *Eritrea and Yemen* (1998) 114 ILR 1, 37–45. See also Kohen (2013) 15 *J Hist IL* 151.
- 46 *South China Sea Arbitration*, Merits (2016) 170 ILR 1, 313.
- 47 *Ibid*, 298.
- 48 Waldock (1948) 25 *BY* 311; Fitzmaurice (1955–6) 32 *BY* 20, 49–71; Fitzmaurice (2014) 215–55. For a critique of the doctrine as a means to establish territorial sovereignty over maritime areas: Mirasola (2016) 47 *JMLC* 29; and generally Hu (2016) 15 *Chin JIL* 75.
- 49 (1933) PCIJ Ser A/B No 53, 45–6, 63; *Western Sahara*, ICJ Reports 1975 p 6, 12, 42–3. These criteria were applied in *Caribbean Sea*, ICJ Reports 2007 p 659, 711–21.
- 50 (1998) 114 ILR 1, 69.
- 51 Where a treaty or award has a bearing on the question, it will trump a claim to effective title: *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, ICJ Reports 2015 p 665, 703 ([89]); *Burkina Faso/Niger*, ICJ Reports 2013 p 44, 79, 84.
- 52 *Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Reports 1999 p 1045, 1105–6.
- 53 E.g. *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 45–6; *Qatar v Bahrain*, ICJ Reports 2001 p 40, 100 (and see Kohen (2002) 106 *RGDIP* 295); *Pulau Ligitan/Sipadan*, ICJ Reports 2002 p 625, 682; *Pulau Batu Puteh*, ICJ Reports 2008 p 12, 34–7.
- 54 E.g. *Pulau Batu Puteh*, ICJ Reports 2008 p 12.
- 55 *Minquiers and Ecrehos*, ICJ Reports 1953 p 47, 55–7.
- 56 *Ibid*, 58–9.
- 57 *Ibid*, 67. Cf *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 22, 46.
- 58 See Lindley (1926) ch 8; Goebel, *The Struggle for the Falkland Islands* (1927) 47–119; Waldock (1948) 25 *BY* 311, 322–5; McDougal, Lasswell, & Vlasic, *Law and Public Order in Space* (1963) 829–44; Kohen & Hébié, ‘Territory, Discovery’ (2011) *MPEPIL*.
- 59 Hall, *International Law* (1st edn, 1880) 126.
- 60 Contemporary state practice usually demanded a first taking followed by public and continuous possession evidenced by state activity. See the instructions of Charles V of Spain to his ambassador of 18 December 1523 respecting the Spanish claim to the Moluccas: Goebel (1927) 96–7; 1 Hyde 324; Keller, Lissitzyn, & Mann, *Creation of Rights of Sovereignty through Symbolic Acts, 1400–1800* (1938) 148–9.
- 61 McNair, 1 *Opinions* 285.
- 62 See also *Clipperton Island* (1931) 2 *RIAA* 1105.
- 63 McNair, 1 *Opinions* 285, 287, 320; 1 Hackworth 455.
- 64 1 Hackworth 400, 453, 469, 459 (French view on Adélie Land); Orent & Reinsch (1941) 35 *AJIL* 443.
- 65 1 Hackworth 398–400, 457, 460.
- 66 The term ‘annexation’ commonly describes an official state act signifying an extension of sovereignty. Whether it is legally effective is another matter. See McNair, 1 *Opinions* 285, 289; 1 Hackworth 446–9. On Crimea: Grant (2015) 109 *AJIL* 68; Grant, *Aggression against Ukraine. Territory, Responsibility, and International Law* (2015). See also McDougal et al (1963) 111 *U Penn LR* 521, 543–4, 558–60, 598–611; McNair, 1 *Opinions* 314ff; Marston (1986) 57 *BY* 337.
- 67 See Waldock (1950) 36 *GST* 325. Cf Fitzmaurice (1955–6) 32 *BY* 20, 65.
- 68 On the establishment of British sovereignty over Rockall in 1955: Verzijl, 3 *International Law in Historical Perspective* (1968) 351.
- 69 (1931) 2 *RIAA* 1105, 1110.
- 70 E.g. *Island of Palmas* (1928) 2 *RIAA* 829.
- 71 See Hall, *International Law* (8th edn, 1924) 125. Also: McNair, 1 *Opinions* 291, 315–16.
- 72 Cf *Eritrea-Ethiopia Boundary* (2002) 130 ILR 1, 42.
- 73 *Island of Palmas* (1928) 2 *RIAA* 829.
- 74 (1933) PCIJ Ser A/B No 53, 63.
- 75 ICJ Reports 1953 p 47, 65–6. On acts relating to the Minquiers, see *ibid*, 67–70.
- 76 *Minquiers and Ecrehos*, ICJ Reports 1953 p 47. Further: *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, ICJ Reports 1959 p 209, 228–9, 231–2, 248–50, 251, 255; *Temple*, ICJ Reports 1962 p 6, 12, 29–30, 59–60, 72, 91–6; *Pulau Ligitan/Sipadan*, ICJ Reports 2002 p 625, 678–86.

- 77 ICJ Reports 2012 p 624, 655.
- 78 McNair, 1 *Opinions* 295, 314, 316–19, 323–5. Also: Orent & Reinsch (1941) 35 *AJIL* 443, 450–4.
- 79 E.g. *Qatar v Bahrain*, ICJ Reports 2001 p 40, 99–100 (digging of artesian wells not reflective of sovereignty); *Pulau Ligitan/Sipadan*, ICJ Reports 2002 p 625, 683 (illegal fishing not evidence of sovereign conduct). See also the Court's treatment of the persistent presence of indigenous peoples in the contested territory in *Kasikili/Sedudu Island*, ICJ Reports 1999 p 1045, 1094–5, 1105–6.
- 80 Cf Fitzmaurice (1955–6) 32 *BY* 20, 55–8; *Clipperton Island* (1931) 2 *RIAA* 1105, 1110.
- 81 See *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 83 (Judge Anzilotti, diss).
- 82 Ross, *International Law* (1947) 147.
- 83 Cf *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 45–6.
- 84 Fitzmaurice (1955–6) 32 *BY* 20, 56–8.
- 85 *Pulau Batu Puteh*, ICJ Reports 2008 p 12, 50; *Chagos Marine Protected Area (Mauritius v UK)* (2015) 162 *ILR* 1, 65, 75–6. See also *Franco-Ethiopian Railway Co* (1957) 24 *ILR* 602, 616, 623; *Christian v R* [2006] UKPC 47, [11]. Cf *Certain German Interests in Polish Upper Silesia* (1926) PCIJ Ser A No 7, 30; *Lighthouses in Crete and Samos* (1937) PCIJ Ser A/B No 71, 103; *Maritime Dispute (Peru v Chile)*, ICJ Reports 2014 p 3, 39.
- 86 Some cases of transfer may be better classified as renunciation: *Sorkis v Amed* (1950) 17 *ILR* 101, although the term cession is sometimes used: *German Reparations* (1924) 1 *RIAA* 429, 443. In the Treaty on the Final Settlement with Respect to Germany, 12 September 1990, 1696 *UNTS* 115, Germany confirmed its border with Poland and other territorial changes, without qualifying the transaction as a cession, relinquishment, or confirmation. For the Chagos dispute, see chapter 8.
- 87 *Date of Entry into Force of Versailles Treaty* (1961) 32 *ILR* 339; Treaty of Cession relating to the Kuria Muria Islands, 15 November 1967, 617 *UNTS* 319.
- 88 *Territorial Dispute (Libya/Chad)*, ICJ Reports 1994 p 6, 25.
- 89 The term 'cession' is used to cover a variety of transactions: cf *Différends Sociétés Dufay et Gigandet* (1962) 16 *RIAA* 197, 208–12. Also: *Christian v R* [2006] UKPC 47, [11]. See generally Dörr, 'Cession' (2006) *MPEPIL*. On the possibility of cession by the people of a territory (Malta), see *Sammut v Strickland* [1938] AC 678. On the population of Crimea's attempted cession to Russia: Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian Federation and on Forming New Constituent Entities within the Russian Federation (2014); GA Res 68/262 (2014); Venice Commission, Opinion 762/2014, 21 March 2014; Geiss (2015) 91 *ILS* 425; Grant (2015) 109 *AJIL* 68.
- 90 Consequently, disputes as to title may involve the interpretation of a treaty and nothing more: see *Beagle Channel* (1977) 52 *ILR* 93.
- 91 See McNair, *Law of Treaties* (1961) 656–7; McNair, 1 *Opinions* 287; *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, ICJ Reports 1959 p 209, 226, 231, 256; *Temple*, ICJ Reports 1962 p 6, 16, 52, 67, 73–4, 102–3.
- 92 *Territorial Dispute (Libya/Chad)*, ICJ Reports 1994 p 6, 37; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Preliminary Objections, ICJ Reports 2007 p 832, 861.
- 93 Generally: Crawford (2nd edn, 2006) ch 6; Alfredsson, 'Indigenous Peoples, Treaties with' (2007) *MPEPIL*; Göcke (2013) 5 *Goettingen JIL* 87, 91–6. See also UN Declaration on the Rights of Indigenous Peoples, GA Res 61/295, 13 September 2007, Art 37.
- 94 Generally: Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).
- 95 *Cameroon v Nigeria*, ICJ Reports 2002 p 303, 404. Also: Castellino & Allen (2003) ch 4.
- 96 *Island of Palmas* (1928) 2 *RIAA* 829.
- 97 *Western Sahara*, ICJ Reports 1975 p 12, 39; 123–4 (Judge Dillard). But cf *Cameroon v Nigeria*, ICJ Reports 2002 p 303, 405. Further: Fry & Loja (2014) 27 *LJIL* 727, 738.
- 98 10 September 1884, 163 *CTS* 182.
- 99 *Cameroon v Nigeria*, ICJ Reports 2002 p 303, 404–7.
- 100 *Ibid*, 407.
- 101 E.g. Colombia–United States, Treaty concerning the status of Quita Sueño, Roncador and Serrana, 8 September 1972, 1307 *UNTS* 379, Art 1, discussed in *Nicaragua v Colombia*, ICJ Reports 2012 p 624, 658–9. See also: Treaty of St Germain-en-Laye, 10 September 1919, 226 *CTS* 8, Arts 36, 43, 46–7, 53–4, 59; South Africa–Namibia, Treaty with Respect to Walvis Bay and the Offshore Islands, 28 February 1994, 33 *ILM* 1256, Art 2. Also: *German Reparations* (1924) 1 *RIAA* 429, 442.
- 102 *Lighthouses (France and Greece)* (1956) 23 *ILR* 659, 663–6. On Dutch renunciation of Singapore in 1824: *Pulau Batu Puteh*, ICJ Reports 2008, p 12, 25. On Italian renunciation of all right and title to territories in Africa, see the Treaty of Peace, 10 February 1947, 49 *UNTS* 3, Art 23; *Différends Sociétés Dufay et Gigandet* (1962) 16 *RIAA* 197, 208–12. Also: Treaty of Peace with Japan, 8 September 1951, 136 *UNTS* 45, Art 2. For the former German eastern territories: Treaty on the Final Settlement with Respect to Germany, 12 September 1990, 1696 *UNTS* 115, Art 1. For Turkish renunciation of title to Ottoman territories: Treaty of Lausanne, 24 July 1923, 28 *LNTS* 11, Art 16; *Eritrea v Yemen* (1998) 114 *ILR* 1, 38.

- 103 *Rann of Kutch* (1968) 17 RIAA 1, 531–53, 567–70.
- 104 *Franco-Ethiopian Railway Co* (1957) 24 ILR 602, 605.
- 105 *Minquiers and Ecrehos*, ICJ Reports 1953 p 47, 56; *Brazil–British Guiana Boundary* (1904) 11 RIAA 21. Further Kaikobad, *Interpretation and Revision of International Boundary Decisions* (2007) 3–14.
- 106 Before execution of the award, the successful claimant cannot simply seize the territory: UN Charter, Art 94(2); Mosler & Oellers-Frahm in Simma (ed), *The Charter of the United Nations* (2nd edn, 2002) 1174.
- 107 Generally: 2 Whiteman 1062–84; Fitzmaurice (1955–6) 32 *BY* 20, 31–7; Jennings (1963) 20–3; Blum (1965) 6–37; Thirlway (1995) 66 *BY* 1, 12–14; Lesaffer (2005) 16 *EJIL* 25; Wouters & Verhoeven, ‘Prescription’ (2008) *MPEPIL*; O’Keefe (2011) 13 *Int Comm LR* 147; Duncan (2012) 21–3.
- 108 See Judges Simma and Abraham (diss) in *Pulau Batu Puteh*, ICJ Reports 2008 p 12, 121.
- 109 *Island of Palmas* (1928) 2 RIAA 829; *Burkina Faso/Mali*, ICJ Reports 1986 p 554, 587; *El Salvador/Honduras*, ICJ Reports 1992 p 351, 398, 429; *Kasikili/Sedudu Island*, ICJ Reports 1999 p 1045, 1094–5; *Argentine–Chile Frontier* (1966) 16 RIAA 109, 173; *Nicaragua v Colombia*, ICJ Reports 2012 p 624, 662.
- 110 For references to *Island of Palmas* as an instance of prescription: Beckett (1934) 50 *Hague Recueil* 220, 230; Johnson (1950) 27 *BY* 342, 348. Other cases misleadingly classified in this way include *Brazil–British Guiana Boundary* (1904) 11 RIAA 21; *Grisbadarna (Norway v Sweden)* (1909) 11 RIAA 155; *Guatemala–Honduras Boundary* (1933) 2 RIAA 1322.
- 111 Lauterpacht, *Private Law Sources and Analogies of International Law* (1927) 91; Kohen (1997) 10–48; Lesaffer (2005) 16 *EJIL* 25.
- 112 Johnson (1950) 27 *BY* 343.
- 113 E.g. *Kasikili/Sedudu Island*, ICJ Reports 1999 p 1045, 1103–4; *Pulau Batu Puteh*, ICJ Reports 2008 p 12, 122 (Judges Simma and Abraham, diss).
- 114 *Nicaragua v Colombia*, ICJ Reports 2012 p 624, 655–7.
- 115 *Ibid.*, 657. On the requirement of publicity in the acquisition of sovereign rights short of territorial title: *South China Sea Arbitration*, Merits (2016) 170 ILR 1, 313.
- 116 *Nicaragua v Colombia*, ICJ Reports 2012 p 624, 657.
- 117 E.g. Field, *Outlines of an International Code* (1872) 52 (50 years). The 50-year period specified in Art IV(a) of the arbitration treaty relative to the British Guiana–Venezuela boundary represents an ad hoc rule of thumb: 2 February 1897, 89 *BFSP* 57; *British Guiana–Venezuela Boundary* (1899) 28 RIAA 331, 333–7; *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, ICJ Reports 1959 p 209, 231 (Judge Lauterpacht).
- 118 *Island of Palmas* (1928) 2 RIAA 829.
- 119 McNair, 1 *Opinions* 299–305; Fitzmaurice (1955–6) 32 *BY* 20, 67; Jennings (1963) 36–40; Kaikobad (1983) 54 *BY* 119; Marston (1986) 57 *BY* 337; Marques Antunes & Bradley, *Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement* (2000); Kohen, ‘Abandonment’ (2008) *MPEPIL*; O’Keefe (2011) 13 *Int Comm LR* 147.
- 120 *Eastern Greenland* (1933) PCIL Ser A/B No 53, 73. The better view is that the facts disclosed an agreement rather than a unilateral act, the quid pro quo being Danish recognition of Norwegian sovereignty over Svalbard (Spitzbergen). On unilateral acts generally, see chapter 18.
- 121 ICJ Reports 2008 p 12, 81. Although there is a distinction between sovereignty and ‘ownership’, the Court took them here to be synonymous: *ibid.*, 80.
- 122 Thus, mere protest will be sufficient to prevent the conclusion that title has been abandoned: e.g. *Chamizal* (1911) 11 RIAA 309; *Nicaragua v Colombia*, ICJ Reports 2012 p 624.
- 123 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US)*, ICJ Reports 1984 p 246, 305.
- 124 *Pulau Batu Puteh*, ICJ Reports 2008 p 12, 50–1.
- 125 Tribunals often avoided pronouncing on whether *derelictio* was even possible, preferring instead to find the claim was not made out on the facts: e.g. *Chamizal* (1911) 11 RIAA 309, 328; *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, ICJ Reports 1959 p 209, 227–31; *Kasikili/Sedudu Island*, ICJ Reports 1999 p 1045, 1105.
- 126 ICJ Reports 1986 p 554, 586–7. See also *Argentine–Chile Frontier* (1966) 16 RIAA 109, 173; *Eritrea and Yemen* (1998) 114 ILR 1, 51.
- 127 *Clipperton Island* (1931) 2 RIAA 1105, 1110–11. Cf *Territorial and Maritime Dispute (Nicaragua v Honduras)*, ICJ Reports 2007 p 659, 712; *Nicaragua v Colombia*, ICJ Reports 2012 p 624, 655.
- 128 *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 46–7.
- 129 It did, however, collect taxation from the area: *Cameroon v Nigeria*, ICJ Reports 2002 p 303, 415–16.
- 130 ICJ Reports 2008 p 12, 50–1.
- 131 See Fitzmaurice (1955–6) 32 *BY* 20, 60–2; Bowett (1957) 33 *BY* 176, 196–7.
- 132 See Bowett (1957) 33 *BY* 176; MacGibbon (1958) 7 *ICLQ* 468, 5069; Martin, *L’Estoppel en droit international public* (1979); Thirlway (1989) 60 *BY* 29; Sinclair in Lowe & Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (1996) 104. Generally, see chapter 18.

- 133 *Temple*, ICJ Reports 1962 p 6, 30.
- 134 Ibid, 30–1. On the value of maps in determining sovereignty: *Pulau Batu Puteh*, ICJ Reports 2008, p 12, 95; *Certain Activities (Costa Rica v Nicaragua)*, ICJ Reports 2015 p 665, 702; *Burkina Faso/Mali*, ICJ Reports 1986 p 554, 582; *Nicaragua v Colombia*, ICJ Reports 2012 p 624, 662; *Burkina Faso v Niger*, ICJ Reports 2013 p 44, 76. On the import of the Chinese ‘Nine-Dash Line’ in its map of the South China Sea: *South China Sea Arbitration*, Merits (2016) 170 ILR 1, 261–313; Gao & Jia (2013) 98, 107 *AJIL* 108; Dupuy & Dupuy (2013) 107 *AJIL* 124, 125, 138; Beckman (2013) 107 *AJIL* 142, 154–8.
- 135 See Bowett (1957) 33 *BY* 176, 197–201, 202; and *Temple*, ICJ Reports 1962 p 6, 142–6 (Judge Spender, diss). The dispute returned to the Court, under the guise of a request for interpretation under Art 60 of the Statute: Request for Interpretation of the Judgment of 15 June 1962 (*Cambodia v Thailand*), ICJ Reports 2013 p 281.
- 136 *Pulau Batu Puteh*, ICJ Reports 2008 p 12, 81.
- 137 Jennings (1963) 51.
- 138 See McNair, *Treaties* (1961) 487, referring to *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 68–9.
- 139 Lauterpacht (1950) 27 *BY* 367, 397–8.
- 140 *Nicaragua v Colombia*, ICJ Reports 2012 p 624, 657.
- 141 ICJ Reports 1951 p 116, 130, 138–9.
- 142 ICJ Reports 2012 p 624, 659–60.
- 143 De Visscher, *Theory and Reality in Public International Law* (4th edn, 1970) 226.
- 144 Schwarzenberger (1957) 51 *AJIL* 308, 316–24.
- 145 *Eritrea and Yemen* (1998) 114 ILR 1, 117.
- 146 *Cameroon v Nigeria*, ICJ Reports 2002 p 303, 352.
- 147 Waldock (1948) 25 *BY* 311, 339ff; Lauterpacht (1950) 27 *BY* 376, 423–31; Fitzmaurice (1955–6) 32 *BY* 20, 72–5; McNair, 1 *Opinions* 287–8, 292; Sharma (1997) 51–61; Ratner (2006) 100 *AJIL* 808; Prescott & Triggs (2008).
- 148 ICJ Reports 1992 p 351, 570.
- 149 ICJ Reports 2008 p 12, 95–6 (Pedra Branca), 99 (Middle Rocks), 100–1 (South Ledge).
- 150 *Brazil–British Guiana Boundary* (1904) 11 RIAA 21. See also *Island of Palmas* (1928) 2 RIAA 829, 855; *Minquiers and Ecrehos*, ICJ Reports 1953 p 47, 99.
- 151 (1933) PCIJ Ser A/B No 53, 45–52; also *Western Sahara*, ICJ Reports 1975 p 12, 42–3.
- 152 Lauterpacht, *Development* (1958) 241.
- 153 Shaw (1993) 42 *ICLQ* 929; Lalonde (2002); Abi-Saab in Kohen (2007) 657; Caffi, ‘Boundary Disputes in Latin America’ (2013) *MPEPIL*; Rossi (2014–15) 24 *TLCP* 19, 46–57; Lalonde in Chinkin & Baetens (2015) 248.
- 154 *Burkina Faso/Mali*, ICJ Reports 1986 p 554, 566. Also: *El Salvador/Honduras*, ICJ Reports 1992 p 351, 386–8; *Burkina Faso/Niger*, ICJ Reports 2013 p 44, 73, 84.
- 155 Ratner (1996) 90 *AJIL* 590, 593–5.
- 156 Shaw (1996) 67 *BY* 75, 98–100; Castellino & Allen (2003) ch 3.
- 157 See *Temple*, ICJ Reports 1962 p 6; *Rann of Kutch* (1968) 50 ILR 2.
- 158 Organization of African Unity (OAU) Resolution on Border Disputes, AHG/Res 16(I), 21 July 1964; *Burkina Faso/Mali*, ICJ Reports 1986 p 554, 565–8, 586–7; *Guinea–Guinea (Bissau) Maritime Delimitation* (1985) 77 ILR 636, 657; *Guinea (Bissau)–Senegal Delimitation* (1989) 83 ILR 1, 22; 56–85 (Judge Bedjaoui, diss). Also: *Libya/Chad*, ICJ Reports 1994 p 6, 83–92 (Judge ad hoc Ajibola); *Eritrea and Yemen* (1998) 114 ILR 1, 32–4. On the application of *uti possidetis* in the African context: Ahmed (2015).
- 159 Badinter Commission, *Opinion No 2* (1992) 92 ILR 167; *Opinion No 3* (1992) 92 ILR 170; and see Craven (1995) 66 *BY* 333, 385–90.
- 160 Cf *Croatia v Slovenia*, PCA, 29 June 2017, [256]–[263].
- 161 *El Salvador/Honduras: Nicaragua intervening*, ICJ Reports 1992 p 351, 589; *Nicaragua v Honduras*, ICJ Reports 2007 p 659, 697–701. Cf *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India)* (2014) 167 ILR 1, 53.
- 162 Ratner (1996) 90 *AJIL* 590.
- 163 See *Guatemala–Honduras Boundary* (1933) 2 RIAA 1322. Also: *El Salvador/Honduras*, ICJ Reports 1992 p 351, 386–95; *Frontier Dispute (Benin/Niger)*, ICJ Reports 2005 p 90, 108–10, 133–49; *Nicaragua v Honduras*, ICJ Reports 2007 p 659, 727–9.
- 164 Further: Oduntan, *International Law and Boundary Disputes in Africa* (2015) 20.
- 165 On Somaliland: see Poore (2009) 45 *Stanford JIL* 117; Kreuter (2010) 19 *Minn JIL* 363; Haji-Ali Ahmed in Bereketeb (ed), *Self-Determination and Secession in Africa: The Post-Colonial State* (2015) 119.
- 166 *Opinion No 2* (1992) 92 ILR 167, 168.
- 167 Ratner (1996) 90 *AJIL* 590, 591.
- 168 *Burkina Faso/Mali*, ICJ Reports 1986 p 554, 565. Also: Badinter Commission, *Opinion No 3* (1992) 92 ILR 170, 171–2. Some scholars attribute to it the status of customary international law: Ratner (2006) 100 *AJIL* 808, 811.

- 169 See 1 Hackworth 409–21; 1 Hyde 355; *Island of Palmas* (1928) 2 RIAA 829; Kanska & Manko (2002–3) 26 *Pol YIL* 135.
- 170 UKMIL (1986) 57 *BY* 487, 563.
- 171 1 Hyde 355–6.
- 172 See Kaikobad, *The Shatt-al-Arab Boundary Question* (1988); Schroeter (1992) 38 *AFDI* 948; Prescott & Triggs (2008) ch 7.
- 173 See *Argentine–Chile Frontier* (1966) 38 *ILR* 10, 93; *Kasikili/Sedudu Island*, ICJ Reports 1999 p 1045, 1060–74; *Eritrea–Ethiopia Boundary* (2002) 130 *ILR* 1, 116; *Benin/Niger*, ICJ Reports 2005 p 90, 149–50.
- 174 See *Chamizal* (1911) 11 RIAA 309, 316; *San Lorenzo* (1932) 6 *ILR* 113. Also: Chamizal Convention, 28 August 1963, 505 UNTS 185.
- 175 *Nebraska v Iowa*, 143 US 359 (1892); *Kansas v Missouri*, 322 US 213 (1943); *Georgia v South Carolina*, 497 US 376 (1991); *El Salvador/Honduras*, ICJ Reports 1992 p 351, 546. Note that in *Delimitation of the border between Eritrea and Ethiopia* (2002) 25 RIAA 83, 172, the Commission held that, pending final determination of river boundaries, they should be determined by reference to the main channel identified during the dry season, and that regard should be paid to the customary rights of the local people to have access to the river.
- 176 See *Island of Palmas* (1928) 2 RIAA 829, 839.
- 177 *El Salvador/Honduras*, ICJ Reports 1992 p 351, 546. Also: *Arkansas v Tennessee*, 246 US 158 (1918); *Louisiana v Mississippi*, 282 US 458 (1940); *Georgia v South Carolina*, 497 US 376 (1991).
- 178 *Demarcation of the Eritrea/Ethiopia Boundary Directions* (2002) 25 RIAA 207, 214.
- 179 *Ibid.*
- 180 *Decision regarding delimitation of the border between Eritrea and Ethiopia* (2002) 25 RIAA 83, 172.
- 181 London Agreement, 3 February 1915, 220 CTS 397; Convention on the Delimitation of the Boundary in Lake Geneva, 25 February 1953, reproduced in (1960) 64 *RGDIP* 444.
- 182 Anglo-German Agreement, 1 July 1890, 173 CTS 271, Art 1.
- 183 Keupp in Keupp (ed), *The Northern Sea Route: A Comprehensive Analysis* (2015) 21, 28.
- 184 E.g. Lake Titicaca (between Peru and Bolivia): Janusz-Pawletta, *The Legal Status of the Caspian Sea* (2015) 25.
- 185 See Waldock (1948) 25 *BY* 311, 317–18. The USSR was fond of such claims: see Lakhtine (1930) 24 *AJIL* 703. But given global warming and its impact on ice shelves this is doubtful. On the status of ice in international law, see Joyner (2001) 23; Lalonde & McDorman, *International Law and Politics of the Arctic Ocean* (2015) 7–10, 394. In the Antarctic context, see the New Zealand claim over the Ross Dependency, including the Ross Ice Shelf: Auburn, *The Ross Dependency* (1972); Brady, *The Emerging Politics of Antarctica* (2012) 150.
- 186 On the Antarctic: Kaye in Oude Elferink & Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (2001) 157; Saul & Stephens, *Antarctica in International Law* (2015). On the Arctic: Scott (2009) 20 *Ybk IEL* 3; Hodgson-Johnston (2015) 7 *Ybk Polar L* 556; Byers, *International Law and the Arctic* (2013); McDorman & Schofield in Jensen & Hønneland (eds), *Handbook of the Politics of the Arctic* (2015) 207; Rothwell in Chinkin & Baetens (2015) 110.
- 187 See Wall (1947) 1 *ILQ* 54.
- 188 Rothwell in Jensen & Hønneland (2015) 247, 250.
- 189 No precise declaration was made, but see 1 Hackworth 463; 2 Whiteman 1267. For the Canadian declaration that the sector principle does not apply to the Arctic: (1970) 9 *ILM* 607, 613. On the current status of Canadian Arctic sovereignty: Rothwell in Jensen & Hønneland (2015) 247; Steinberg, Tasch, & Gerhardt, *Contesting the Arctic: Politics and Imaginaries in the Circumpolar North* (2015) 24–25, 30.
- 190 Decree of 15 April 1926, 1 Hackworth 461; Byers (2013) 114, 117.
- 191 1 Hackworth 463–8; 2 Whiteman 1268.
- 192 The Norwegian proclamation of 1939 was accompanied by a minute of the Ministry of Foreign Affairs which recognized the British, New Zealand, Australian, and French claims: *ibid.*, 57–8. Norway does not accept the sector principle as such.
- 193 1 December 1959, 402 UNTS 72, Art IV(2).
- 194 Also: Arts 3 and 4 of the Helsinki Final Act, 1 August 1975, 14 *ILM* 1292; Tancredi in Walter, von Ungern-Sternberg, & Abushov (eds), *Self-Determination and Secession in International Law* (2014) 68.
- 195 Zacher (2001) 55 *Int Org* 215, 223–4; Ratner (2006) 100 *AJIL* 808, 811.
- 196 GA Res 2625(XXV) 2 October 1970. See also SC Res 662 (1990) para 1; VCLT, Art 52; SC Res 242 (1967); GA Res 66/18, 30 November 2011; GA Res 67/19, 4 December 2012; GA Res 69/241, 19 December 2014.
- 197 Walter, von Ungern-Sternberg, & Abushov (2014); Tancredi in Nicolini, Palermo, & Milano (eds), *Law, Territory and Conflict Resolution* (2016) 90; Bereketab (2015); Ahmed (2015) 44–5, 48–51, 133–5.
- 198 For criticism of the referendum to support the transfer of Crimea to Russia: Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law* (2015).
- 199 E.g. India–Bangladesh, Agreement Concerning the Demarcation of the Land Boundary between India and Bangladesh and Related Matters, 16 May 1974, Art 3 and Protocol of 6 September 2011 (Government of India, Ministry of External Affairs, *India & Bangladesh: Land Boundary Agreement*, Annexure III, file no BG74B2547, 36; Annexure V, file no BG11B0577, 42).

- 200 Ratner (2006) 100 *AJIL* 808, 811.
- 201 Cf the debate over the Oder–Neisse frontier established by the Potsdam Declaration (1945) 39 *AJIL Supp* 245; Brownlie, *Use of Force* (1963) 409.
- 202 See *Burkina Faso/Mali*, ICJ Reports 1986 p 554, 566–7; *ibid*, 652–3 (Judge ad hoc Luchaire); Bantekas & Oette, *International Human Rights Law and Practice* (2nd edn, 2016) 415–17; Ahmed (2015) 133.
- 203 See UKMIL (1985) 56 *BY* 402–6, 473–4. Also: Reisman (1983) 93 *Yale LJ* 287; Crawford (2nd edn, 2006) 637–47.
- 204 Intermediate was the Nicaraguan claim to the San Andrés Archipelago (with a population at the time of some 60,000); the Court was able to dismiss the substance of that claim at the preliminary objections stage: *Territorial and Maritime Dispute (Nicaragua v Colombia)*, ICJ Reports 2007 p 832, and the entire insular claim at the merits stage: ICJ Reports 2012 p 624. For Finland’s claim to the Åland Islands (population ca 20,000; claim resolved in Finland’s favour but with minority guarantees), see Crawford (2nd edn, 2006) 108–12.