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HAGUE INTERNATIONAL TRIBUNALS

The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law

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Abstract

The present article aims to examine a set of legal constructions related to the concept of legal title in territorial disputes. Any international jurist cannot but strongly feel the need of a theoretical approach and framework explaining the acquisition and loss of territorial sovereignty. This conceptualization will be put to the test in the light of the ICJ's case law, especially, but not exclusively, the most recent ones. To this end, the article is structured in three main parts in addition to introduction: the first will be devoted to the building of a comprehensive concept of territorial title while rejecting the traditional 'modes of acquisition' of territorial sovereignty (part 2). Part 3 will deal with the legal processes through which territorial titles are actually created, extinguished, or modified: roughly speaking, this happens by an international agreements (legal acts) or by virtue of norm-creating facts. Last, but not least, we shall examine – in part 4 – the highly debated and sensitive topic of the relations between effectiveness and formal legal title from the standpoint of the establishment or loss of territorial sovereignty. As we have endeavoured to show in this writing the concept of legal title reunites and resolves the tension between fact (effectiveness) and formal gegal title (law). In this respect four situations will be put under scrutiny in order ultimately to test our construction of a new concept of territorial title.

Key words

abandonment; acquiescence; acquisitive prescription; adverse possession; disputed possession; effectiveness; estoppel; immemorial possession; legal title; modes of acquisition and loss of territorial sovereignty; subsequent practice; territorial sovereignty; territorial title

1. Introduction

This article aims to examine a set of legal constructions related to the concept of legal title in territorial disputes that we have already sketched in a previous monograph.[1] To this effect, the contribution of the International Court of Justice (ICJ) to the determination and interpretation of international law rules related to territorial

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1. G. DiStefano, *L'ordre international entre légalité et effectivité. Le titre juridique dans le contentieux territorial* (2002).

litigation since – notably yet not exclusively – the landmark 1986 *Burkina Faso/Mali* case,[2] will constitute the fruitful background of this exposé.[3] Admittedly, the ICJ has, particularly during the last 20 years, built an impressive body of rules pertaining to territorial disputes. By any measure, the *Burkina Faso/Mali Case* represents the 'cause célèbre'. In many respects, the impact of this judgment, not only on the ICJ's subsequent decisions, but also on international awards, is of paramount importance to scholars in this field. Hence the Court's case law with regard to this essential body of international law deserves a thorough analysis.

Before that, we deem it useful to expend a few words on the structure as well as on the aim of this contribution. In respect to the latter, we are convinced that a rigorous application of the concept of legal title, as inherited from Roman law, could be material in understanding and resolving territorial disputes. To this end, we shall defend a peculiar thesis in the light – notably but not exclusively – of the case law of the Court. Hence section 2 will be devoted to the construction of the concept of legal title applicable to territorial rights (among them, obviously, territorial sovereignty). To this effect we shall refute the theory of 'modes of acquisition' (*pars destruens*) and then, on its ashes, we shall move on to the concept of legal title itself, which will replace the aforementioned modes (*pars construens*). Then we shall examine the processes through which territorial titles are created (section 3); roughly speaking, there are two main ways, namely by legal transaction (section 3.1) and by norm-creating facts (section 3.2). Finally, section 4 of this article will deal with the *vexata quaestio* of the relationship between effectiveness and legality, in the light precisely of our construction of territorial title.

Needless to say, territory is quintessential to the state itself: the first international treaty whose existence has been accurately ascertained – concluded five thousand years ago between two Mesopotamian city-states (Umma and Lagash) – related to the recognition and inviolability of the territorial boundaries between the high contracting parties.[4]

Therefore we can really speak, as does one of the most authoritative French legal thinkers, of a 'territorial obsession'.[5] Hence one can assert that the history of international law, until at least the beginning of the twentieth century, was based on the quest for territory.[6]

Contemporary international law designates with the term 'state territory' those spaces on which the state exercises its full sovereign rights to the exclusion of any other state, or even any other subject of international law. As the sole arbitrator, Max Huber, put it in a very famous, leading award – the *Island of Palmas* case (between

2. *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment of 22 December 1986, [1986] ICJ Rep. 554.
3. Maritime delimitation law will not be dealt with in this article. However, one should not by any means forget the Court's impressive case law from the founding 1969 *North Sea Continental Shelf* cases onwards.
4. See A. Nussbaum, *A Concise History of the Law of Nations* (1947), 7–8.
5. As the French jurist, Georges Scelle, aptly entitled one of his articles. G. Scelle, 'Obsession du territoire. Essai d'étude réaliste de droit international', in F. M. Asbeck et al. (eds.), *Symbolae Verzijl. Présentées au Professeur J.H.W. Verzijl à l'occasion de son lxx-ième anniversaire* (1958), 347.
6. In this respect human beings (and organized groups thereof) do not behave differently from other animals (R. Ardrey, *The Territorial Imperative: A Personal Inquiry into the Animal Origins of Property and Nations* (1970); K. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1974) (notably Ch. III)).

the United States and the Netherlands), 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.'[7] Given the horizontal structure of the international community, international law requires this exercise to be *effective*: '[T]he actual and continuous and peaceful is in case of dispute the sound and natural criterium of territorial sovereignty.'[8]

The effectiveness of the display of state functions is required by the modern (namely since the sixteenth century) structure of the international legal order. As we read in the *Palma* case award,

> Territorial sovereignty . . . has a corollary duty: the obligation to protect within the territory the right of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights each State may claim for its nationals in foreign territory.[9]

In fact, the requirement of effectiveness ensures the empire of law – namely international law – on every square inch of the earth's surface subject to state sovereignty. That is why we can speak of the 'social function' of sovereignty. No parcel of state territory can thus escape from the grasp of law.[10]

Thus territorial sovereignty represents the nexus between the state and its territory. For the scope of this article, we shall not enter into the examination of the different theories which have been elaborated in order to explain the legal relationship between the state and its territory in international law. Hence, having in mind the needs of the present enquiry, we can assume that the 'following indicia of sovereign statehood [are]: the power to declare and wage war;[11] to conclude peace; to maintain diplomatic ties with other sovereigns; to acquire territory[12] . . . and to make international agreements[13] and treaties'.[14]

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7. *Island of Palmas Case (Netherlands/United States)*, award of 4 April 1928, 2 RIAA 838.
8. Ibid., at 840.
9. Ibid., at 839. See also *Land, Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, Judgment of 10 October 2002, [2002] ICJ Rep., paras. 313–19; *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Judgment of 20 October 1924, 1924 PCIJ Reports (Ser. A) No. 2, at 12. For, as it has been rightly put, 'la souveraineté n'est pas un droit, mais une fonction'. J. Touscoz, *Le principe d'effectivité dans l'ordre international* (1964), 228; 'A la base des droits du souverain territorial et spécialement de son droit à être reconnu, il y a les devoirs qui lui incombent; les premiers sont les *moyens mis à disposition par le droit international* pour lui permettre de remplir ses *fonctions*' (J. Basdevant, 'Règles générales du droit de la paix', (1936-IV *58* RCADI 617 (emphasis added); Ch. de Visscher, *Théories et réalités en droit international public* (1960), 405.
10. P. Dupuy, *Droit international public* (1995), 49, para. 69.
11. Nowadays, the power to declare and wage war must be restricted to the lawful use of force, therefore only in situations of legitimate self-defence and on authorization by the Security Council.
12. Cf. *Re The Berubari Union and Exchange of Enclaves* (Supreme Court, India), award delivered 14 March 1960, 53 ILR 201; *American Insurance Co. & al. v. Canter* (US Supreme Court, 1828), in J. Scott, *Cases on International Law Principally Selected from Decisions of English and American Courts* (1922) 189; *Harris and Others v. Minister of the Interior and Another* (Union of South Africa, Supreme Court, Appellate Division), award delivered 20 March 1952, 19 ILR 48.
13. '[T]he fact of signing a Treaty being an acknowledgement of independence', Report of the British Consul at Sarawak, Mr. Ricketts, submitted to the Foreign Office (25 July 1864) regarding the legal status of the Rajah Brooke of Sarawak, in H. Smith, *Great Britain and the Law of Nations*, vol. 1 (1935), 93.
14. *Morgan Guaranty Trust Company of New York and Others v. Republic of Palau* (District Court, Southern District of New York), awards delivered 10 July 1986, 3 April 1987, 29 January 1988, 9 December 1988, 4 February 1991 (Court of Appeals, Second Circuit), 87 ILR 603 (the footnotes to the quotation are added by the author).

Before switching to the analysis of the concept of 'legal title', one has to remember that not only is sovereignty not antithetical to international law, on the contrary, the latter presupposes it. One cannot conceive modern international law without state sovereignty[15]; it suffices to mention Article 2(1) of the UN Charter – in a number of ways the constitution of the international legal community[16] – which states that the 'The Organization is based on the principle of the sovereign equality of all its Members'.

Sovereign equality between states stands as the most important legacy of five hundred years of wars, truces, civil wars, and peaces which have bloodied Europe since the eleventh century. This turbulent process of reorganization of the international society ended with the well-known – and sometimes much abused[17] – Treaty of Westphalia of 1648.

2. The concept of legal title (ontology)

Even the most careless of international law scholars will not fail to notice that 'title' is topical to any legal disputes: the parties strive in order to prove that they have one and furthermore that theirs is better or *heavier* than their opponent's. International tribunals are even more obsessed, since they wish to build their decisions upon rock-solid foundations. As Judge Abi-Saab wisely noted in his separate opinion appended to the Court Judgment in 1986, 'the frantic search for a written "legal title", turning anything and everything into account'.[18] Indeed, as we shall ascertain later on, nearly anything can be taken into account in order to prove (or to build) a territorial title, much as the quest for *opinio juris* in customary international law.

Concerning the etymology of the term 'title', which we shall not discuss here due to the limited scope of this article,[19] it is material to recall that its roots go back to Latin and thus to Roman law, under the term *titulus*.

In the *Burkina Faso/Mali* case, the chamber of the Court aptly affirmed, 'the Parties have used this word ['title'] in different senses. In fact, the concept of title may also, and more generally, comprehend both any evidence which may establish the existence of a right, and the actual source of that right.'[20]

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15. The horizontal structure of the international legal order – albeit with some peaks of international organization – is nevertheless not consubstantial with the concept of public international law, but it corresponds to the current characteristics. It suffices to look at the Middle Ages to discover a pyramidal layout of international (European) society. This *ordination ad unum* – later on prophesied by Kant – was ideally described by Dante in the *De Monarchia libri tres* (ca.1310) who put the pope and the emperor at the top, as the sole foundation of legality (as well as of territorial titles).
16. See, *inter alia*, P. Dupuy, *L'unité de l'ordre juridique international. Cours général de droit international public*, (2002-I) 297 RCADI 218.
17. See P. Haggenmacher, 'Les origines du droit international au début des temps modernes: projections et perspectives', *in 500 anni di solitudine. La conquista dell'America e il diritto internazionale* (1994), 125.
18. *Burkina Faso/ Mali*, *supra* note 2, at 661, para. 13.
19. We have carried out elsewhere extended researches. See DiStefano, *supra* note 1, at 58–65.
20. *Burkina Faso/Mali*, *supra* note 2, at para. 18. See, much earlier, the arbitral award in the *Cravairola Alps* case between Switzerland and Italy, where a clear-cut distinction had been made in this respect (*Recueil des arbitrages internationaux*, III, 500). Later on, in 1992, the chamber of the ICJ would restate this conceptual construction and would accordingly root its reasoning. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening)*, Judgment of 11 September 1992, [1992] ICJ Rep., para. 45.

Thus, according to the most authoritative texts of public international law (PIL), 'title' has a twofold meaning:

1. it refers to any fact, act or situation which may give rise to a right;
2. it refers also to the document or any other deeds of any kind which can prove and establishes the existence of such a right.[21]

Hence, we can call the first *title-source* and the second *title-proof*.[22] In order to explain the difference it could be useful to evoke cartography and its legal relevance in territorial litigation. Quite often, if not always, parties to a territorial dispute cite maps or other geographical evidence to prove that title is vested in them. Now, what is the legal status of maps or, put plainly, does a map merely prove a title or can it *be itself* a title? Judge Huber correctly held, in an oft-cited passage of the *Palmas* case, that 'a map affords only an indication – and that a very indirect one – and, except when annexed to a legal instrument, has not the value of such an instrument, *involving recognition or abandonment of rights*'.[23]

All the difference between the two meanings (or elements) of legal title can be found in this *locus classicus* of case law. Therefore a map will be a *title-source* if it is annexed to a treaty for pictorial illustration of the will of states. Likewise, a map will have the same legal value if it represents the outcome of the parties' behaviour amounting to a 'legal fact' (see *infra*) modifying or extinguishing a title otherwise established.[24] If, instead, the map is not annexed to a treaty or if it does not amount to the 'visual representation'[25] of states' behaviour modifying or extinguishing a legal title, it then must be appreciated at most as a *title-proof*. In other words, it can prove a title, but it does not give rise to any.[26] Now it would be useful again to turn our attention to the *Burkina Faso/Mali* case, for the Court maintains that

> Whether in frontier delimitations or in international territorial conflicts, maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part.[27]

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21. See J. Salmon, *Dictionnaire de la terminologie du droit international* (2001), 1084.
22. By the former we mean 'title as source' and by the latter we refer to 'title as proof'.
23. *Island of Palmas Case*, *supra* note 7, at 853–4 (emphasis added).
24. As happened in the *Temple of Preah Vihear Case (Cambodia v. Thailand)*, Judgment of 15 June 1962, [1962] ICJ Rep. 33.
25. *Land, Island and Maritime Frontier Dispute*, *supra* note 20, at para. 316.
26. Ibid., at para. 316.
27. *Burkina Faso/Mali*, *supra* note 2, at para. 53. In the most recent frontier dispute case, *Benin/Niger*, the chamber of the Court religiously stuck to the practice of adding no further commentaries to what the previous chamber had systemized in 1986 ([2005] ICJ Rep., paras. 44, 81).

Thus we have to differentiate between the intrinsic value of cartography and its extrinsic value. The former varies according to its 'accuracy',[28] its source (private or governmental)[29] – as well as the latter's neutrality[30] – and, third, its 'publicity' or 'dissemination'.[31] Contrariwise, the extrinsic legal value of a map cannot be measured by its inherent features but depends on whether it crystallizes the will of concerned states or their relevant behaviour.

Now, leaving aside the legal value of maps in territorial disputes and reverting to the concept of territorial title, we can conclude that one has to distinguish between 'title as a root of a right' and 'title as proof of the existence of a right'.[32] We can label this distinction the phenomenological dichotomy of title, namely as it appears before the observer, be it the judge or the international lawyer.

Due to constraints of space we shall have to make numberless shortcuts, but we cannot avoid plunging ourselves into the realm of Roman law in order to elaborate the concept of legal title as it is (and not as it appears to the judge). Before that, we have to make it clear that reference to Roman law is not made – as the Pandectists did – out of the awareness that it was positive law, but merely as evidence of *ratio scripta*.[33] In other words, we do not import rules from Roman law but we borrow categories of legal thinking which will enable us to grasp some social phenomena. This seems important, especially in the light of the critics we shall address later as to the 'modes of acquisition' (section 2.1).

Roman jurisprudence used to distinguish between *titulus adquisitionis* and *modus adquisitionis* concerning the way in which property – movable things or land – could be transferred between Roman citizens. *Modus adquisitionis* meant the effectiveness of the possession: the physical apprehension of land or a movable object. Instead,

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28. *Burkina Faso/Mali*, supra note 2, at para. 54; *Island of Palmas Case*, supra note 7, at 853; *Indo-Pakistan Western Boundary (Rann of Kutch) Case (India v. Pakistan)*, award delivered 30 June 1965, 17 RIAA 566.
29. 'Maps published by private persons must, of course, be received with caution, as such persons depend to a large extent upon information obtained from *general and authoritative sources*; but from a *map issued or accepted by a public authority*, and especially by an authority connected with one of the governments concerned an inference may improperly be drawn.' *Re Labrador*, Judicial Committee of the Privy Council (1927), *International Law through the Cases* (1978), 468–9 (emphasis added).
30. *Burkina Faso/Mali*, supra note 2, at para. 56.
31. *Temple Case, supra* note 24, at 23; 'wider circulation, greater degree of authority', *Case Concerning the Indo-Pakistan Western Boundary, supra* note 28, at 541. In the *Award of Yemen and Eritrea Territorial and Island Dispute*, award delivered 9 October 1998, available at http://pca-cpa.org/PDF/EY%20Phase%20I.PDF, the arbitral tribunal referred to 'general recognition and repute' (paras. 381, 388).
32. See, for a favourable attitude vis-à-vis this dichotomy: L. Sanchez Rodriguez, 'L'*uti possidetis* et les effectivités dans les contentieux territoriaux et frontaliers', (1997) 263 RCADI 168.
33. '[L']attuale giurisprudenza internazionale . . . non di rado ha ricercato e continua a ricercare la prova dell'esistenza di principi e regole di diritto internazionale non scritto attualmente vigente anche attraverso il richiamo al diritto romano. Riferimenti ad istituti romanistici servono ancora a precisare concetti giuridici di finezza particolare, difficilmente determinabili al lume della meno evoluta esperienza di vari istituti.', G. Barile, 'Il metodo logico-storico di rilevazione del diritto internazionale non scritto e le sue radici giusnaturalistiche', (1989) 72 *Revue de droit international* 19; 'Del resto, il richiamo alla *ratio scripta* costituita dal diritto romano trovava e trova la sua giustificazione storica anche, se non solo, in quella idea di evoluzione e non di rivoluzione che lega, a nostro avviso, la realtà giuridica costituita dallo *ius commune*, basata per l'appunto specialmente sul diritto romano, a quella propria al diritto internazionale moderno', G. Barile, *Lezioni di diritto internazionale* (1983), 89. Phillimore refers to Roman law as '*Recta ratio enim iuris gentium*' (R. Phillimore, *Commentaries upon International Law*, (1882–9), para. 25); 'Corollario: il diritto romano antico fu un serioso poema e l'antica giurisprudenza fu una severa poesia, dentro la quale si truovano i primi dirozzamenti della legal metafisica, e come a' greci dalle leggi uscí la filosofia.', G. Vico, *Principi di Scienza nuova* (1976 [1744]), Ch.II, Corollary, Sect. XIV, 1028.

by *titulus adquisitionis* Roman civil law referred to the compliance of the transfer of property with the law. Therefore *modus* refers to the effectiveness of the transfer while *titulus* refers to the legal condition necessary to the transfer of property. In other words, and if we put it on a higher level, fact (effectiveness) and law (compliance of the transfer with the Law). For the transfer of property to be effective in law, a Roman citizen needed both the *titulus* (the right to acquire) and the *modus* (the effectiveness, namely the possession). Thus, in jurisprudence, a legal title is deemed to be complete when both the *titulus* and the *modus* are vested with the same subject of law, be it a state or a person. As one can easily presume, the majority of territorial disputes arise between a state, pretending to possess a *titulus*, and another state, having – or pretending to have – the *modus*, that is the effective possession of the disputed land.[34]

As a US municipal court aptly declared at the beginning of the twentieth century, '[T]o complete the right of property, the right to the thing, and the possession of the thing itself, should be united'.[35]

Or, in the marvellous pen of Blackstone, '[A title is thus defined]: *titulus est iusta causa possidendi quod nostrum est*; or, it is the *means whereby* the owner of lands hath the *just* possession of his property.'[36]

By 'just' the eminent English jurist meant – in accordance with Latin etymology[37] – something which is in conformity with the law or the relevant rules. Thus when one says that a state possesses a 'title of (or to) territorial sovereignty',[38] it means that the former is *entitled* to exercise state functions over the territory 'covered' by the title.

Before going through the different ways by which a legal title is created, one cannot but expend a few words on one of the improper uses of this term. Not infrequently, 'legal title' is used to denote the very same right to which it gives rise, and not just its legal foundation, namely the '*iusta causa*'. In fact, properly speaking, the latter should be labelled 'title-entitlement' and the former 'title-right'. In other words, we should not confuse the right and its legal basis. For instance, we have to differentiate between the *title of (or to) territorial sovereignty* and sovereignty itself. Thus we are not going to speculate here on the content of the right, that is sovereignty; we shall just deal with the different ways through which a *title of (or to) territorial sovereignty* is created according to the PIL rules.

2.1. Modes of acquisition (their refutation)

The great British philosopher David Hume found the soundness of the so-called modes of acquisition somewhat dubious, when he stated that 'I suspect that these rules [i.e. those which determine property] are principally fix'd by the imagination or the more frivolous of our thought and conception.'[39] According to those authors

34. With regard to these Roman concepts and their inspiring application in international law, see DiStefano, *supra* note 1, at 66-75.
35. *The Fama* case, High Court of Admiralty (1804), in Scott, *supra* note 12, at 183.
36. W. Blackstone, *Commentaries on the Laws of England* (1978 [1765–9]), I, 195 (emphasis added).
37. Cf. *Lexicon Totius Latinitatis*, ab. Aegidio Forcellini, Vol. 2 (1940), 972.
38. *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, [1999] ICJ Rep., para. 94.
39. D. Hume, *A Treatise of Human Nature* (1739–40), Book II, Part II, Section III, 504, fn. 1.

who uphold their controversial existence, these modes are public international law rules by virtue of which sovereignty over a determined territory – or title to territory, or even title to territorial sovereignty (there is a lot of confusion) – is acquired.

Yet even among those scholars and authors who strongly advocate their existence, there is not a strong consensus as to what a list of these modes of acquisition should contain. Depending on the author, we can enumerate discovery, occupation, prescription, accretion, cession, and subjugation or conquest (in the past). The real critique with which we have to address the so-called theory of modes lies in its normative and actual inadequacy to explain and found the acquisition and loss of territory. In the words of Brownlie,

> Many of the standard textbooks, and particularly those in English, classify the modes of acquisition in a stereotyped way which reflects the preoccupation of writers in the period before the First World War. According to this analysis (if the term is deserved) there are five modes of acquisition . . . Labels are never a substitute for analysis . . . A tribunal will concern itself with proof of the exercise of sovereignty at the critical date or dates, and in doing so will not apply the orthodox analysis to describe its process of decision . . . The orthodox analysis does not prepare the student for the interaction of principles of acquiescence and recognition with the other rules.[40]

International tribunals faced with territorial disputes – as well as municipal courts – have never relied or even mentioned these modes of acquisition.[41] Their reasoning is based on rules of PIL and not on these empty shells. At most, these modes of acquisition are used as descriptive models for teaching purposes, but, as Brownlie wisely affirmed, they can never hide the normative reality from the students, not to mention those who are teaching. In other words, these modes are not rules or prescriptive models, they are mere descriptive images to represent something.[42] As a matter of fact, the positivity of law[43] requires a rule to be valid in a specific legal order, to comply with (other) rules governing their existence.[44] The latter can tentatively be found, as regards public international law, in Article 38(1)(a)–(c) of the Statute of the Court. Roughly speaking, and without touching on the countless doctrinal questions related to this provision, we can risk saying that in the international legal order there are three main sources: will (unilateral, bilateral, multilateral), custom, and general principles of law. These can be considered as the processes through which rules are created, and thus, for now, are the sole three 'normative conversion filters' of fact into law. In respect of the rules related to the acquisition and loss of territorial sovereignty, one must determine notably whether municipal law can exert influence – and, if so, what kind – on international normativity. One can assume that 'general principles

40. I. Brownlie, *Principles of Public International Law* (1990), 131–2.
41. See, among others, *Minquiers and Ecrehos Case (United Kingdom/France)*, Judgment of 17 November 1953 (Merits): [1953] ICJ Rep. 47; *Frontière entre la Guyane britannique et le Brésil (Brazil v. United Kingdom)*, award of June 6th 1904, 11 RIAA 68; *Island of Palmas Case*, *supra* note 7, at 829; *Frontière entre la Galicie et la Hongrie près du lac dit de 'Meerauge'* (*Austria/Hungary*), award of 13 September 1902, in *Recueil international des traités du XXème siècle* (1902), 730–52.
42. Cf. H. Kelsen, *Théorie pure du droit*, ed. H. Thévénaz (1988), 51. Earlier, the distinction between prescriptive rules and descriptive rules was introduced by John Stuart Mill. J. S. Mill, *Three Essays on Religion* (1874), 11–15.
43. See H. Kelsen, *General Theory of Law and State*, trans. Andreas Wedberg (1949), 113–14.
44. See H. L. A. Hart, *The Concept of Law* (1961), 97–107, and his 'rule of recognition' (one of the three secondary rules in addition to that of adjudication and creation).

of law' (Art. 38(1)(c)) do play the role of gateways between municipal law systems and public international law. In other words, they are the filters through which these principles should pass in order to exist in the international legal order. Until now we have not been able to verify their positivity since such 'normative conversion' has not (yet) taken place. As long as this does not happen, the 'modes of acquisition' represent at best a mere image and sometimes a concise denomination familiar to the lawyer (more) accustomed to domestic systems.

The change of sovereignty, instead, takes place differently, namely on the basis of relevant PIL rules. Hence we shall show that all kinds of territorial disputes can be explained by – and are based on – well-established public international law rules.[45] The latter will allow us to verify whether a legal title – which consists of *titulus* and *modus* – has been created and is vested in a particular state.

2.2. A new concept of legal title applied to territorial sovereignty

Because the so-called theory of modes of acquisition has to be discarded from positive law, we need a conceptual framework according to which territorial disputes or territorial changes can be legally appraised. This framework can only give rise to a new construction of *legal title* by taking into account the observations we have just made with respect to *titulus* and *modus adquisitionis*. A legal title is then made up, according to what we have just affirmed, of these two elements. Once it is vested in a subject of law, namely a state in public international law, it is said that the latter has obtained a perfect legal title to occupy the territory to which the title relates. Why, then, is a title so important in the attempt to determine which state is vested with sovereignty over a given territory? As Austin has written, 'A right which is annexed by a law to a mediate or intervening fact, may be said to originate in a *title*.'[46]

Therefore, each right, such as for instance the right of sovereignty over a territory or over a territorial sea, or even over the continental shelf, *must originate in a title*. The title is then the root, the legal justification[47] of the right. Henceforth we shall use the term 'territorial title' to designate that kind of title which yields a right which is of territorial content; that is, not only territorial sovereignty – by far the paramount territorial right – but also title to territorial sea, title to continental shelf, 'minor' territorial titles, and so on.

How, then, is a title created? In other words, when can we say that title – from which a right arises – exists? Here again Austin comes to our aid: 'I apply the term *title* to every fact whatever, *through* which the law confers or extinguishes a right, or imposes and exonerates from a duty.'[48]

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45. 'The analysis of the problem in historical perspective puts the emphasis on consolidation of title as a process. Moreover, it underlines the two typical characteristics of titles to territory. It brings out their initial relativity and the growing multiplicity of their constituent elements in their movement towards absolute operation. Such an historical analysis also explains the unsatisfactory character of any attempt to put the operative rules into the strait jacket of private law analogies', G. Schwarzenberger, 'Titles to Territory: Response to a Challenge', in L. Gross (ed.), *International Law in the Twentieth Century* (1969), 290.
46. J. Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, rev. R. Campbell (1885), Lecture LV, 875 (emphasis added).
47. By 'justification' we refer to something which 'complies with the law'; see *supra* note 37.
48. Austin, *supra* note 46, at 880 (emphasis added).

Facts lie at the commencement of titles, but not any facts whatsoever; only those facts which law (PIL) deems suitable to bring about this effect. In other words, international law recognizes some facts or acts as fit for creating the title, which, in its turn, constitutes the basis of the right (to territorial sovereignty). Accordingly, some facts in specific circumstances are considered by international law as becoming titles, thus becoming transubstantiated in their essence.

Therefore under international law there are some facts or acts through which a legal title to sovereignty is created or extinguished. Legal title then plays a paramount role insofar as it allows one to ascertain – in any given situation and according to the law – which fact among others is apt to engender a right. That is why certain facts and not others are selected in the light of the legal title in order to yield a right. Legal title thus represents the prisms through which a bundle of territorial rights – flowing from the law – reach their titular, that is to say the holder of the legal title.[49]

Hence any right or any obligation must have a legal title upon which it depends and to which it is linked. Title, then, is the justification of the right or of the obligation. The motive, the appurtenance of the right to the legal person (i.e. the titular) is rightly called 'entitlement'. This close kinship between the facts, the title and the right (which flows from it), has been aptly stressed by Salmond: 'every right involves a title or a source from which it is derived. The title is *de facto* antecedent, of which the right is *de iure* consequent.'[50]

Therefore the soundness of a legal claim rests on the strength of the title which is invoked. The chances of success for a state which is party to a territorial dispute – whether or not it is brought to an international judicial body – depend on the strength, or more accurately stated, on the completeness of its title. That's why we talk of *absolute title*, *better title*, and *inchoate title*. The more the title is absolute – the better it is, we would rather say – the higher the chances of success, the firmer is its right over the territory concerned. Therefore one must assume that each title is characterized by a degree of strength. An absolute title to territorial sovereignty means that not only is it not disputed, but also that litigation in its regard is hardly to be foreseen.

Due to the horizontal structure of the international legal order, the completeness of the title also depends on the participation and the attitude of other states and other subjects (notably international and regional organizations). In other words, the greater the recognition or approval from which a state's title benefits, the better the title is; contrariwise, the less recognition or approval a state's title receives, the

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49. As has been rightly observed: 'Titles are necessary, because the law, in conferring and imposing rights and duties, and in divesting them, necessarily proceeds on general principles and maxims. It confers and imposes on, or divests from, persons, not as being specifically determined, but as belonging to certain classes. *And the title determines the person to the class.*' Ibid., at 881 (emphasis added). Cf. J. Salmond, *Jurisprudence* (1937), 473, para. 120: 'If the law confers a right upon one man which it does not confer upon another, the reason is that certain facts are true of him which are not true of the other, and *these facts are the title of the rights*' (emphasis added).

50. Salmond, *supra* note 49, at 473, para. 120,.

weaker it is.[51] Furthermore, there are some kinds of fact which can only yield a lesser or relative title. This kind of title is quite rightly denominated an inchoate title (from the Latin word *inchoare*, that is to say 'initiate, begin, commence'), namely a title which must be *completed*. Under the entry 'inchoate', *Black's Law Dictionary* defines such a title as one which is 'imperfect; partial; unfinished; *begun but not completed*'.[52] In the *Palmas* case, sole arbitrator Huber enunciated an inchoate title as being 'a *ius ad rem*, to be completed eventually by an actual and durable taking of possession within a reasonable time'.[53]

For instance, in the past, a mere discovery of an uninhabited land could only give the state an inchoate title; the state benefited thus from the law of a certain priority in its attempt to establish an effective occupation of the territory, but if it failed, its priority (granted by its inchoate title) could lapse and another state could easily proceed to the occupation. That is why Balladore Pallieri wisely denominated such a title as a '*Vorokkupationsrecht*'.[54] However, due to its intrinsic deficiency, 'an inchoate title . . . cannot prevail over a definitive title founded on continuous and peaceful display of sovereignty'.[55] In plain language, not only must an inchoate title yield to a complete (or better) title, but moreover if an actual occupation does not follow its establishment, the inchoate will eventually lapse, thus extinguishing a state's right of priority.

Nearly all the territorial disputes are finally resolved on the relative strength of titles invoked and put forward by the parties,[56] because, again quoting Judge Huber in the *Palmas* case,

> If a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title – cession, conquest, occupation, etc. – superior to that which the other State might possibly bring forward against it.[57]

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51. '[T]he more absolute a title becomes, the more it rests on multiple foundations', Schwarzenberger, *supra* note 45, at 290.
52. *Black's Law Dictionary* (1990), 761 (emphasis added).
53. *Island of Palmas Case*, *supra* note 7, at 845. The expression 'jus ad rem' attached to the 'inchoate title' is nevertheless not correct, since the latter refers to a source of a right which is rooted in a territory 'nullius'. On the contrary, 'ad rem' means a right which a state invokes towards another state regarding a territory that is not 'nullius'. In other words, from the standpoint of our construction of legal title, a 'jus ad rem' can be instead neared to 'titulus adquisitionis'.
54. G. Balladore Pallieri, *Diritto internazionale pubblico* (1962), 455.
55. *Island of Palmas Case*, *supra* note 7, at 869.
56. '[T]he concept of title employed to solve disputes approximates to the notion of the better right to possess familiar in common law.' Brownlie, *supra* note 40, at 124.
57. *Island of Palmas Case*, supra note 7, at 838–9. International case law offers numberless examples of the application of this concept: *Affaire de la Délimitation de frontière (United States v. Great Britain)*, arbitral award delivered 10 January 1831, in *Pasicrisie internationale. Histoire des arbitrages internationaux (1793–1900)* (1902), 14; *Case concerning the Indo-Pakistan Western Boundary*, *supra* note 28, at 528: 'a judgement has to be rendered on the relative strength of the cases made out by two parties'; *Temple Case*, *supra* note 24, at 30; *Affaire du Partage des Etats de Seyid-Saïd (Muscat v. Zanzibar)*, award delivered 2 April 1861, in *Recueil des arbitrages internationaux*, Vol. 2, 68; *Eritrea–Yemen Arbitration Case*, *supra* note 31, at paras. 455, 496, 509; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment of 16 March 2001, [2001] ICJ Rep., para. 203 (even though the Court declined to apply this concept *in specie*).

3. The creation of titles (the physiology of title)

Since we have denied any legal relevance to the so-called theory of modes of acquisition, we have to look elsewhere in order to find out how legal titles, namely territorial titles, are created and extinguished.

The means and processes through which territorial titles are created and extinguished are to be found in the relevant PIL rules. Therefore every phenomenon pertaining to territorial litigation can be examined in the light of the latter. In other words, territorial titles are created and extinguished, as we have said earlier, either through a legal transaction (juristic act) – for example a treaty – or through a legal fact. In the light of the aforementioned construction of territorial title, we can then say that *titulus adquisitionis* (i.e. the right to possess) is transferred through either a legal transaction (section 3.1) or a legal fact (section 3.2). In both cases, the *modus*, which will accompany the *titulus*, is always the same, namely the effectiveness of the territorial occupation.[58] Hence we shall show that all these would-be modes of acquisition refer to specific factual situations which can be explained by more appropriate legal tools. For instance, no one can contend that cession (or sale) is no other than a transfer of *titulus* through a legal transaction (section 3.1); that prescriptive acquisition can be explained without resorting to this label (section 4.4); that actual and effective occupation of uninhabited territories can fit into our construction (section 4.1); that, in general, non-voluntary states' conduct will find their legal meanings thanks to admitted categories of law (this section), and so on.

3.1. The creation and extinction of territorial titles through legal transaction (international treaty)

Because common law does not contemplate such a notion as *acte juridique* (legal transaction), one has to make some preliminary remarks about the aforementioned concept. First of all, and in the authoritative footsteps of Kelsen, who bridged the two legal systems (Roman and common law), the following definition of the juristic act can be given:

> The legal transaction [juristic act] is an act by which the individuals authorized by the legal order regulate certain relations legally. *It is a law-creating fact, for it produces legal duties and rights for the parties who enter the transaction.* . . . By a legal transaction, *individual and sometimes even general norms are created* regulating the mutual behaviour of the parties . . . The typical legal transaction of civil law is the contract. *It consists of identical declarations of will of two or more individuals. The declarations of the contracting parties are directed towards a certain behaviour of these parties.*[59]

Without digging further into this notion, we shall recall that its roots lie deep in the well-known Roman law category of *negotium juris*, namely an expression of wills by which legal effects were created not by the law itself, but by the contracting parties. Nevertheless, Roman jurisprudents did not formulate an organic theory of this

58. Seen from another perspective we could venture that, by analogy with the determination of customary international law rules, the *modus* represents the evidence or the proof of *titulus*, much as the practice of states constitutes the factual evidence of their *opinio juris*.
59. Kelsen, *supra* note 42, at 137, 140 (emphasis added).

concept; they limited themselves to specific types of *negotia* without then subsuming them into a general category. Thus the general notion is after all quite recent – two centuries old – the first to use it being the German scholar Nettebladt (1749) to mean the activity of man in the legal sphere.[60] Later on, Savigny and the German school of the Pandect polished it until it reached its final form. According to Windscheid, then, *negotium juris* (*Rechtsgeschäft*) is an expression of will (*Willenserklärung*) which aims to create some specific legal effects.[61] The ultimate goal is the creation, modification, or termination of subjective rights. The legal transaction represents then a practical instrument envisaged by the law through which any legal person, possessing this capacity, can engender some predetermined legal effects.

Admittedly, a territorial treaty is a legal transaction through which states transfer the *titulus adquisitionis*, which will be completed by the *modus*, namely the effectiveness of the occupation of territory. In the light of this concept the territorial treaty represents the means by which the territorial title is conveyed from one state to another, while the actual possession (usually) following the conclusion of the treaty completes the legal title which is then deemed to be absolute. Generally speaking, a territorial treaty is highly appreciated by the Court, as well as by international tribunals, for they can avoid several difficulties linked to the vagueness of states' behaviour and, instead, rely on a text which is at the same time 'title-source' and 'title-proof'. Thus most of the time judges and arbitrators will satisfy themselves by interpreting those texts in order to discern the contracting parties' will in respect of the transfer and spatial scope of the territorial title.[62] To this effect, resort is made to the general (primary and subsidiary) rules of interpretation codified in the 1969 Vienna Convention on the Law of Treaties (VCLT). However, the territorial treaty is characterized by some peculiarities which indeed pertain to the specificity of its object and purpose.

1. The first feature which must be highlighted is the longevity of its effects. In other words, a territorial treaty can be terminated, but this will not harm or impair its effects, namely, for instance, the boundary which it has defined. As the Court declared,

> A boundary established by a treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary . . . . [W]hen a boundary has been the subject of an agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed.[63]

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60. *Systema elementare universae jurisprudentiae positivae*, tom. 1, section 1, tit. V, paras. 63–70. This reference has been retrieved from F. Calasso, *Il negozio giuridico. Lezioni di storia del diritto italiano* (1959), 340–2.
61. B. Windscheid, *Lehrbuch des Pandektenrechts* (1862), I, 3.
62. *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 13 February 1994, [1994] ICJ Rep., paras. 51–6.
63. Ibid., at para. 73. In this regard, the distinction between *negotium* and *instrumentum* must be introduced. According to the well-established dichotomy, the former relates to the substance, the *causa*, the legal justification, while the latter is but its proof, its evidence. Thus the Court refers quite rightly to the *instrumentum* as 'the "envelope" containing international law rules, which are consequently the "negotium"'. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep., para. 69. Hence the *negotium*, in our case the boundary line decided by the parties, does not by any means disappear when the *instrumentum* is terminated. It entails that we have to distinguish between the treaty as *negotium* and the

It goes without saying that the Court's finding is perfectly consistent with the law of treaties, as codified by the VCLT, whose Article 70(1)(b) recites,

> Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> (a) . . .
> (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. In the same vein, *uti possidetis* must be evoked.[64] The principle of *uti possidetis* emerged in Latin America during the decolonization of Spain

> [when] it became indispensably necessary to agree on a general principle of demarcation, since there was a universal desire to avoid resort to force, and the principle adopted was the colonial *uti possidetis*; the preservation of the demarcations under the colonial regimes corresponding to each of the colonial entities that was constituted as a State.[65]

By virtue of this principle, the administrative frontiers of colonial powers became the international boundaries of new states. The goal of this principle was to solve the inevitable boundary disputes between new states, by providing a clear criterion of delimitation[66] without resorting to force, and to declare at the same time that no part of the territory of Latin America was without a master or a sovereign[67] and thus open to occupation from third states.[68]

The principle of *uti possidetis* was henceforth applied universally, since it was formally recognized as a rule of international law in Africa as well as in Europe (where the division of the Federal Republic of Yugoslavia (FRY) from 1991 onward constitutes a prime example).[69] In this regard, one cannot but underline the contribution of the

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treaty as *instrumentum*, in the same way as title-source must be differentiated from title-proof. The former survives the latter and is then not affected by its termination.

64. In the ubiquitous *Burkina Faso/Mali* case, the Court itself stressed the congenital link between the principle of stability and intangibility of international boundaries and *uti possidetis*, both of them pursuing the same goal. *Burkina Faso/Mali*, supra note 2, at para. 20.

65. Don Segismundo Moret y Prendergast and Don Vicente Santamaria de Paredes, in *Opinion concerning the Question of Boundaries between the Republics of Costa Rica and Panama*, Washington (1913), 164 (quoted in C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1945), 499, para. 151C n. 3.

66. In the *Burkina Faso/Mali* case, the Court had the opportunity to distinguish between 'delimitation' and 'demarcation.' *Burkina Faso/Mali*, supra note 2, at para. 56. The same distinction was restated in the *Cameroon/Nigeria* case, *supra* note 9, at para. 84.

67. '[T]he principle of *uti possidetis juris* is concerned as much with title to territory as with the location of boundaries; certainly a key aspect of the principle is the denial of possibility of *terra nullius*' (*Land, Island and Maritime Frontier Dispute, supra* note 20, at para. 42). See M. Kohen, 'Le problème des frontières en cas de dissolution et séparation d'Etats: quelles alternatives?', in O. Corten, B. Delcourt, P. Klein, and N. Levrat (eds.), *Démembrements d'Etats et délimitations territoriales: L'uti possidetis en question(s)* (1999), 365–401.

68. European states were at that time more than eager to invade and reoccupy Latin America, since they intended to apply to that rebel continent the principle of legitimacy which had directed their foreign policies since the Vienna Congress of 1815. Furthermore, the principle of *uti possidetis* aimed to batter US foreign policy based on the so-called 'Monroe Doctrine', according to which Latin America was the United States' backyard. Cf. Judge Abi-Saab's Separate Opinion appended to the ICJ Judgment in *Burkina Faso/Mali*, supra note 2, at 661, para. 13.

69. The application of this principle to the dismemberment of the FRY is even more striking, since the situation was not that of decolonization. See *Burkina Faso/Mali*, supra note 2, at para. 23. Hence we can maintain that this principle is of an overall application and not merely circumscribed to the historical situation of colonization.

International Court of Justice, first to the universality and then to the strengthening of this principle. Indeed, it is thanks to one of its chambers, in the epochal *Burkina Faso/Mali* case, that the principle of *uti possidetis*, originally regional, was declared as being of universal application, and hence applicable to African boundaries. In this case, the two parties asked the Court to settle the dispute between them on the basis of this principle, which, until then, had but a limited regional application.[70] The Court thus declared that

> In this connection it should be noted that the principle of *uti possidetis* seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization [*ante litteram*] involving the formation of a number of sovereign States on territory formerly belonging to a single metropolitan State. Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power . . . *Uti possidetis*, as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs.[71]

It was then a deliberate choice of the newly independent African states to adopt it among the 'old' public international law rules. Yet the Court did not hesitate to raise the apparent 'contradiction' of this principle with another paramount 'new norm' of modern public international law, that is to say the 'right of peoples to self-determination'. The relationship between these two principles does not nevertheless amount to a clash, because, as we read in the Judgment,

> The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.[72]

Later on, in the *Qatar* v. *Bahrain* case,[73] the latter invoked *uti possidetis*. Qatar challenged the application of this principle, rightly arguing that it presupposed the division of an established state or a separation from colonial rule. In fact, Bahrain and Qatar were not British colonies, but 'protected states' and thus there was no separation at all.[74] The Court readily agreed and refused to consider Bahrain's argument. Yet, as judges Bedjaoui, Koroma, and Ranjeva affirmed in their joint dissenting opinion,

> We believe that the Court was correct in refusing to apply the principle of *uti possidetis juris* to the present case. We are in full agreement with the Court's analysis in this

70. Ibid., at para. 20.
71. Ibid., at paras. 20, 23.
72. Ibid., at para. 25.
73. *Supra* note 57. Earlier, in *Land, Island and Maritime Frontier Dispute*, *supra* note 20, the chamber of the Court religiously reaffirmed the credo of the Court in the *Burkina Faso/Mali* case, *supra* note 2, at para. 42.
74. See *Qatar v. Bahrain Case*, *supra* note 57, Separate Opinion of Judge Al-Khasawneh (para. 9) and Dissenting Opinion of Judge Torres-Bernardez (paras. 425–7).

> regard. And yet, as representatives of the various legal systems of the continent of Africa, we are committed to that principle and have never lost sight of its importance for the post-colonial phase of State development in Africa under conditions of stability and peace.[75]

We cannot but agree with the three dissenting judges, noting moreover that a restatement, as an *obiter dictum*, of the principle, especially in a different (cultural and legal) region such as the Persian Gulf, would have strengthened it.

In the most recent case brought before the Court, *Benin/Niger* (2005), the latter devoted several paragraphs to the principle of *uti possidetis*, which, according to Article 6 of the Compromis, formed an essential part of the applicable law. Not surprisingly, the chamber of the Court reaffirmed its credo to this effect, as expounded in the 1986 *Burkina Faso/Mali* case. Among different aspects related to the construction of *uti possidetis*, the Chamber

> observes that, in any event, the Parties agree that the course of their common boundary should be determined, in accordance with the *uti possidetis juris* principle, by reference to the physical situation to which French colonial law was applied, as that situation existed at the dates of independence.[76]

The Court adopted in this regard what the Arbitral Tribunal affirmed in the *Honduras Borders* case, namely that one cannot disregard the actual application of the colonial law in order to determine administrative boundaries.[77]

3. The territorial treaty itself is different from other treaties in a number of respects; in fact, it is not subject at all to what is called the *fundamental change of circumstances* as a ground for the termination of international treaties. Article 62(2)(a) of the VCLT provides that

> 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
>
> (a) if the treaty establishes a boundary . . .

Hence, one of the territorial treaty's peculiarities has to be sought in the specific protection conferred on it by international law. In this respect, the Court introduced the principle of the stability and finality of boundaries: 'In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality'.[78]

This principle has found an application in another field of international law, that of succession among states. Indeed, the Vienna Convention on Succession of States in respect of Treaties goes even further than the VCLT, since, according to this convention, state succession does not affect '(a) a boundary established by a treaty'

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75. Ibid., Joint Dissenting Opinion, para. 213.
76. *Benin/Niger*, *supra* note 27, at para. 25.
77. 'The concept of "*uti possidetis* of 1821" thus necessarily refers to an administrative control which rested with the will of the Spanish Crown. For the purpose of drawing the line of "*uti possidetis* of 1821" we must look to the existence of that administrative control . . . Administrative control so exercised by the civil authorities at the time of independence must be deemed to constitute *possession* by the colonial entity in the sense in which the expression *uti possidetis* is used in the Treaty of 1930.' *Honduras Borders Case (Guatemala v. Honduras)*, Award of 23 January 1933, 2 RIAA, at 1324, 1343.
78. *Temple Case*, *supra* note 24, at 34.

or '(b) obligations and rights' flowing out of this regime (Art. 11). But, likewise, the change of state sovereignty over the concerned territory does not prejudice other (minor) territorial regimes (Art. 12). In other words, this Convention expands substantively the scope of the principle of stability and finality of international boundaries.

4. Another among the main features of a territorial treaty is commanded by common sense, namely that no state can transfer more rights to another than it has itself (*nemo plus juris ad alium transferre, quam ipse haberet*). In the *Palmas* case, the sole arbitrator affirmed that 'It is evident that Spain could not transfer more rights than she herself possessed.'[79]

Therefore, if a state transfers some rights which are not vested in it, the treaty is simply invalid and cannot convey any title at all.[80] Indeed, third states' rights are consequently not impaired in accordance with Articles 34 and 35 of the VCLT. Again in the *Palmas* case, we read that

> the cessionary Power never envisaged that the cession, in spite of the sweeping terms of Article III, should comprise territories on which Spain had not a valid title, though falling within the limits traced by the Treaty. *It is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers.*[81]

5. In conclusion, it is not useless to discuss whether agreements with local chieftains or tribes are international agreements legally suitable for the transfer of *titulus adquisitionis*. In other words, were they in this respect worthless agreements like the shoddy gifts which were offered to the local chieftains in exchange for their consent, or were they genuine agreements producing international legal effects? Scholars have debated at great length and – especially in the past – considered these agreements largely as mere *chiffon de papier*. For the last fifty years, however, they have begun to be considered – especially when the other alternative was the effective suzerain – as real international agreements fit for the transfer of territorial title.[82] In any event, whatever the conceptual construction we opt for, such an agreement possesses at least indirectly a legacy in so far as it shows the effective exercise, by the colonial (Western) power, of state functions. In other words, this agreement can be considered at any rate as a display of the effectiveness of the occupation. In the light of the aforementioned construction of legal title, we can say that if one denies to these types of agreement the capacity to transfer territorial title, one must reckon nevertheless that these agreements did constitute direct evidence of *modus*, that is of the colonial power's actual occupation and control. In other words, if they cannot be considered as *titulus*, they undoubtedly score among its proofs, that is to say evidence of the *modus* (actual and effective occupation).

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79. *Island of Palmas Case*, supra note 7, at 857.
80. *Cameroon/Nigeria Case*, supra note 9, at para. 194.
81. *Island of Palmas Case*, *supra* note 7, at 857 (emphasis added).
82. *Western Sahara Case*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 39, para. 80; *Cameroon/Nigeria Case*, supra note 9, at para. 205.

3.2. The creation and extinction of territorial titles through norm-creating facts

On a preliminary basis we shall have to distinguish between facts of nature and human facts. The former refer to natural facts such as, for instance, the emerging of an island in the territorial sea, the diversion of a river along which the state boundary runs, or the phenomenon of accretion (i.e. the addition of portions of soil, by gradual deposition, to that already in possession of the riparian state).

International law attributes some legal consequences to these events – which do not emanate from human will – in the form of territorial rights.[83] In all these situations, title is then conferred by the operation of the law (*ope legis*), since some natural events have occurred and have affected the state concerned. We shall not analyse this type of norm-creating fact and we shall focus instead on the other group, that is human facts.

Human facts are different from natural facts insofar as human behaviour is at stake. Of course, they differ from legal transactions to the extent that they do not convey any specific will aiming to create legal effects. Therefore we deal here with a state's behaviour, attitudes, conduct, or representations which do not amount to and cannot be assimilated to an expression of will. These facts must be distinguished from 'legal transactions' insofar as the latter are posited by the state's will, purporting to create rights and obligations, while the former do not embody any such will. Nevertheless, international law attributes some consequences to the occurrence of some facts, that is territorial titles. In order to understand why and how these facts engender territorial titles, it is material to see how the law apprehends them.

International law contains several tools which allow the lawyer to confer legal relevance to those facts. These tools or legal categories are familiar to every lawyer, so that we can say they represent 'general principles of law' according to Article 38(1)(c) of the Court's Statute; in other words we find them, even if under different labels, in any system of law.

These different legal categories allow us to determine whether or not a state's conduct has fulfilled the conveyance of *titulus adquisitionis*, since the *modus* – as we already know – is made up of the effective display of sovereign functions. The Court itself invoked this way of creating rights and obligations when, in the *Gulf of Maine* case, it asked itself

> whether, as between the Parties, any other factors have intervened which might, independently of any formal act creating rules or instituting relations under special international law, nevertheless give rise to an obligation of this kind. The question, which the Parties have argued at length during the present case, is whether the conduct of the Parties over a given period of their relationship constituted acquiescence by one of them in the application to the delimitation of a specific method by the other Party, or precluded it from opposing such action, or whether such conduct might have resulted in a *modus vivendi*, respected in fact, with regard to a line corresponding to such an application.[84]

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83. *Libya/Chad*, supra note 62, at para. 45.
84. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States)*, Judgment of 12 October 1984, [1984] ICJ Rep. 246, para. 126.

In this vein, and before briefly reviewing some of them, we should like to quote what the arbitral tribunal said in its Award on the *Dubai/Sharjah* case (1981):

> [W]hen one State engages in activity, by means of which it seeks to acquire a right or change an existing situation, a lack of reaction by another State at whose expense such activity is carried out, will result in the latter forfeiting the rights which it could have claimed.[85]

Hence states' behaviour or conduct does engender legal effects or, more accurately, public international law confers on the 'facts' the ability to convey a *titulus adquisitionis*.

3.2.1. Acquiescence

International tribunals – and national courts[86] – often rely on acquiescence in order to ascertain the existence of a title and its strength. Normally, if a state, in certain circumstances, does not react within a reasonable period of time, to positive, affirmative actions of another state – which can be considered as a display of state functions – its title might be impaired, lessened, and even extinguished.[87] In front of it, another state's title will conversely acquire new strength and could become a *better title*. A state, faced with any act, conduct, representation, or behaviour whatsoever emanating from another state – which could claim a title – must react immediately in order to safeguard and reaffirm its title.[88] Acquiescence, nevertheless, does not mean any silence or any lack of protest, but it does refer to a silence *in specific circumstances*: it is the French *silence circonstancié* or the German *qualifiertes Stillschweigen*.[89] A state has to react in order to hinder the process of the erosion or weakening of its title and thus, conversely, the strengthening of the adverse one. Whether a state has to take a firm stance to shield its title depends, then, on the circumstances which require such a reaction. In the *Temple* case, the Court had to take into account Thailand's objection regarding its lack of reaction. In 1904 Thailand (then known as Siam) and France (at that time the colonial power of the future Cambodia) concluded a treaty establishing the general character of the frontier between the two states. The exact delimitation of the boundary was left to a Franco–Siamese mixed commission which surveyed in the field. The preparation of maps was the task of French authorities due to the lack of Siamese technical expertise. These maps – which did not correspond to the principle enshrined in the treaty – were then officially communicated to the Siamese government, which did not react to the errors contained. Even if these maps possessed no legal value, the Court saw acquiescence in the conduct of Siam:

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85. *Dubai-Sharjah Border Arbitration (Dubai/Sharjah)*, award delivered 19 October 1981, 91 ILR 567, para. 153.
86. 'Georgia further asserts that the State asserting the claim must make a showing of acquiescence by the neighbouring State. *Inaction, in and of itself, is of no great importance*; what it is legally significant is silence in *the face of circumstances that warrant a response*.', *Georgia v. South Carolina* (US Supreme Court), award delivered 25 June 1990, 91 ILR, at 449 (emphasis added).
87. See *infra* note 90.
88. 'The conduct of Honduras vis-à-vis earlier *effectivités* reveals an admission, recognition, acquiescence or other form of tacit consent to the situation', *Land, Island and Maritime Frontier Dispute*, *supra* note 20, at para. 364.
89. *Canton of Valais v. Canton of Tessin*, Swiss Federal Tribunal, award delivered 2 July 1980, (1981) 37 *Annuaire suisse de droit international*, at 232.

> It has been contended on behalf of Thailand that this communication of maps by the French authorities was, so to speak, *ex parte*, and that no formal acknowledgement of it was either requested of, or given by, Thailand. In fact, as will be seen presently, an acknowledgement by conduct was undoubtedly made in a very definite way; but even if it were otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any questions to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*[90]

The verb *debuisset* (should have) refers to the circumstances requiring a state to react, since its subjective right (its territorial title) is at stake, while *potuisset* (could have) hints at the circumstances by which the state is aware (knowledge) that a competing claim is undermining its own title and thus it has to react. Regarding the latter point, in fact, there can be no acquiescence without 'knowledge'; to put it plainly a state can acquiesce only to what it knows.[91] And in the *Temple* case, the Court concluded that Thailand could not but be aware that Cambodia, profiting from a cartographical error (shown in the map annexed to the treaty and transmitted to Thailand) was displaying state functions in the disputed area.

As the Court maintained in the *Burkina Faso/Mali* case, 'acquiescence' embodies a principle of law according to which 'a State cannot disclaim in a particular instance rules and principles to which it has acquiesced in comparable circumstances, when their operation becomes disadvantageous to itself'.[92]

In this respect, Mali argued that Burkina Faso had acquiesced in 'principles of delimitation approved by the Legal Sub-Commission of the Organization of African Unity Mediation Commission'.[93] The Court had no need to investigate further into the legal meaning of Burkina Faso's conduct, since, whatever the latter had been, the principles at stake were applicable in the relations between the two parties. In fact, those principles were already binding on them 'as elements of law'.[94]

It goes without saying that not any practice whatsoever may be considered in order to prove that a state has acquiesced in another state's attitude or claim. First of all, and *ratione materiae*, the practice must be 'clear, sustained and consistent to constitute acquiescence'.[95] Second, and *ratione personae*, the organ(s) effectuating the practice of the state must be high-ranking officials, although not necessarily one of those state representatives vested with the treaty-making power according to Article 7(2) VCLT. In the *Gulf of Maine* case, the chamber of the Court confronted this problem regarding the 'Hoffman letter'.[96] Therefore a state ought to react promptly

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90. *Temple Case*, supra note 24, at 23.
91. See *Cameroon/Nigeria Case*, supra note 9, at paras. 223–4.
92. *Burkina Faso/Mali*, supra note 2, at para. 41.
93. Ibid.,
94. Ibid., at para. 42.
95. *Gulf of Maine Case, supra* note 84, at para. 146.
96. Ibid., at para. 139 (in general paras. 131–9). Canada tried to demonstrate before the Court that the United States had acquiesced to its claims regarding the median line in the Gulf of Maine. To this effect, Canada produced before the ICJ correspondence between the 'Bureau of Land Management of the United States Department of the Interior' and its 'Department of Northern Affairs and National Resources', in which the former enquired 'as to the location of two Canadian offshore permits with reference to the median line referred to in Article 6

and effectively if it intends to prevent the application of this principle detrimental to its legal interests, namely its territorial title(s). Its reaction must go even further than mere diplomatic protest ('paper protest'), and the state must endeavour to exhaust all those means of pacific settlement of disputes that are enunciated – though not exhaustively – by Article 33 of the UN Charter. In this respect we ought to remind ourselves of one of the fundamental principles of the UN Charter, embodied in Article 2(3), according to which member states are obliged to settle pacifically their international disputes.

If necessary, and if the situation poses a threat to peace, the state 'may bring . . . [the] dispute to the attention of the Security Council or of the General Assembly' (Art. 35). The Security Council, on determination of the situation under Article 39 of the Charter, could decide on any measure involving the use of force in order to avert the threat or establish peace and security in the region. The state must also exhaust any other available means to settle pacifically the dispute which pertain to regional organizations (according to their constitutive charters and Chapter VIII of the UN Charter).

3.2.2. Estoppel

Etymology – as it often happens – is of great avail to us. Estoppel derives from Norman French *estoupail* (from the verb *estopper*):[97] a state is *stopped* from retracting in a situation which it has already accepted or in which it has *acquiesced*.[98] In other words, as has been authoritatively affirmed,

> [Estoppel by representation] arises when one by acts, representations, admissions, or silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and

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of the Geneva Convention on the Continental Shelf. The Canadian Department replied by sending it documents showing the areas for which the permits had been issued. By a letter dated 14 May 1965, known as the "Hoffman letter" from the name of its signatory, the Bureau of Land Management acknowledged receipt of the documents and mentioned, *inter alia*, the question of the exact position of a median line, and the Department of Northern Affairs replied on 16 June 1965 that the median line used was constructed in accordance with Article 6 of the [Geneva] Convention on the Continental Shelf. This was followed by correspondence', but at no time did the United States raise any objections or protest about the median line and its location (ibid., para. 132). Canada strove to interpret the United States' lack of reaction as an *acquiescence* in its claims. Even though the attitude of the United States revealed 'uncertainties and a fair degree of inconsistency' (para. 138), the Court could not follow the Canadian argumentation since the 'Hoffman letter' could not be 'invoked against the United States Government' (para. 139). In fact, the Court added, 'Mr Hoffman, like his Canadian counterpart, was acting within the limits of his technical responsibilities and did not seem aware that the question of principle which the subject of the correspondence might imply had not been settled and that the technical arrangements he was to make with his Canadian correspondents should not prejudge his country's position in subsequent negotiations between governments. This situation, however, being a matter of United States internal administration, does not authorize Canada to rely [estoppel?] on the contents of a letter from an official of the Bureau of Land Management of the Department of the Interior, which concerns a technical matter, as though it were an official declaration of the United States Government on that country's international maritime boundaries' (para. 139). No acquiescence could then be shown from the 'Hoffman letter' and subsequent diplomatic correspondence.

97. *Webster's New Universal Dictionary* (1983), 626.

98. "Estoppel" means that a party is *prevented* by his own acts from claiming a right to *detriment* of other party who was entitled to *rely* on such conduct and has acted *accordingly*.' *Black's Law Dictionary*, *supra* note 52, at 551 (emphasis added).

> acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.[99]

While the estoppel operates through recognition[100] (thus an act of will), its legal basis rests within good faith (reliance). The effect of the combined conduct of the states is that a state cannot go back on its recognition or appraisal of the territorial situation if the other state has relied on it and if the latter would suffer prejudice from this change of representation.[101]

The Court has been faced in several territorial cases with argumentation founded, either on a primary or subsidiary basis, on estoppel.[102] In a recent case, the Court, admitting implicitly the existence of such a legal category in public international law, maintained that estoppel refers to a situation in which a state is prevented by the law from changing its conduct if another state has previously relied on its former conduct and would suffer prejudice if such change were to be allowed. Indeed, in the *Cameroon/Nigeria* case, the Court affirmed that

> Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice.[103]

Thus the Court opted, among different constructions of estoppel, for the more stringent one requiring, in addition to other conditions, the existence of 'prejudice'.[104] The Court, in the *Gulf of Maine* case, declared that

> [T]he concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, . . . follow from the fundamental principles of good faith and equity. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion.[105]

A motto is often evoked with regard to estoppel: 'One cannot blow hot and cold at the same time.' So it is the first blow which counts if other states have relied on it.[106]

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99. Ibid., at 1301.
100. According to the Court, 'To recognise a frontier is essentially to "accept" that frontier, that is, to draw legal consequences from its existence, to respect it and to renounce the right to contest it in future'. *Libya/Chad*, supra note 62, at para. 42
101. Without naming it, the Court expressed this concept in the *Temple Case* (1962), when it affirmed that Thailand could not – while benefiting from the territorial settlement and alleging that it had never given its consent to it – invoke its nullity. Such a change of representation, had it been admitted, would have been detrimental to Cambodia, which had constantly relied on it. *Temple Case*, supra note 24, at 32.
102. E.g. (territorial cases only): *Temple Case* (1962), *North Sea Continental Shelf* (1969), *Gulf of Maine* (1984), *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras; Nicaragua intervening)* (1992), *Cameroon/Nigeria* (1998).
103. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Judgment of 11 June 1998 (preliminary objections), [1998] ICJ Rep., para. 57.
104. *Gulf of Maine Case*, supra note 84, at para. 145.
105. Ibid., at para. 130.
106. Note Judge Alfaro's Separate Opinion appended to the ICJ's Judgment in the *Temple Case*: 'Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is inadmissible . . . Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its

Estoppel is thus in certain circumstances closely intertwined with acquiescence: if state A acquiesces in state B's claim, it can no longer change its mind and make a protestation, since state B has relied on its (state A's) representation. A change of conduct by state A would accordingly be detrimental to state B's interests.[107] In this respect, estoppel reinforces what we have said earlier about acquiescence: states must react *in all circumstances* in order to maintain their title, especially if another title could be invoked by another state.

Estoppel engenders in this respect a procedural aspect again closely interlinked with acquiescence and thus with good faith. Indeed, it would appear that 'according to one view[,] preclusion is in fact the procedural aspect and estoppel the substantive aspect of the same principle'.[108]

3.2.3. Practice subsequent to a territorial treaty

In order to illustrate the situation under scrutiny here, we have to think of a territorial treaty – conveying thus the *titulus adquisitionis* – which happens to be tacitly modified by the parties' conduct during its implementation.[109]

As we read in the Arbitral Award in the *Case concerning the Interpretation of the Air Transport Services (USA/France)*, state conduct might be 'a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the legal situation of the Parties and on the rights that each of them could properly claim'.[110] International Law Commission Draft Articles to the Law of Treaties, which represented the basis of negotiations for the Vienna Diplomatic Conference in 1968–9, included quite rightly a provision according to which 'A Treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.'[111]

In the view of the International Law Commission, this provision mirrored by all means international customary law. Yet, as we shall see, this provision was eventually left aside by the majority of states participating at the Vienna Conference in 1969 and thus did not find a place in the VCLT. Numerous reasons – which will be hereafter expounded – lead us to think that this decision was unfortunate.[112] In fact, should one infer, from the simple deletion of draft Article 38 of the Draft, that this principle disappeared from the body of international law rules relating

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silence has maintained *an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right* (*venire contra factum proprium non valet*)'. *Temple Case*, supra note 24, at 40 (emphasis added).

107. See *supra* note 99.

108. *Gulf of Maine Case*, supra note 84, at para. 130.

109. Of course, subsequent practice related to the application of a territorial treaty can be used as a means of interpreting it, as Art. 31(3)(b) of the VCLT clearly states. The Court has often availed itself of this main rule of treaty interpretation; see e.g. *Kasikili/Sedudu*, *supra* note 38, at paras. 49–51.

110. *Case concerning the Interpretation of the Air Transport Services Agreement between the United States of America and France*, Award delivered 22 December 1963, 16 RIAA, 63 (see in general 62–7).

111. Art. 38. See Report of the ILC on the work of its 18th session on the law of treaties (draft articles), Geneva 04.05/19.07 1966, (1966) 2 ACDI, Part. II.

112. See G. DiStefano, 'La pratique subséquente des Etats parties à un traité', (1994) 40 *Annuaire français de droit international* 41.

to the law of treaties? Maybe a hint can be found in the VCLT itself, whose preamble – instrumental to the interpretation of treaties according to Article 31(1) of the VCLT – declares very prudently that 'the rules of customary international law will continue to govern questions not regulated by the provisions of the present convention'.

In the *Temple* case (1962), the Court relied on the principle embodied in draft Article 38 in order to determine that the territorial treaty between France (Cambodia) and Thailand (Siam) was tacitly modified by the high contracting parties' conduct in its application. The Court affirmed that it considered 'that the acceptance of the Annex I map by the Parties caused the map to enter the treaty settlement and to become an integral part of it'.[113]

In this same case, Judge Fitzmaurice wrote in his separate opinion,

> '[T]he conduct of each Party, over what was an important matter of common concern to both, was . . . evidence of, [and] amount[ed] to, a mutual agreement to accept a certain line as the frontier line. [The English Judge then added that] in the legal sense [this conduct does not amount to] a departure from the treaty provisions, but [to] the mutual acceptance of a certain result as being its actual outcome, irrespective of the precise conformity of that outcome with the treaty criterion.[114]

In the light of the construction *negotium/instrumentum*, one can say that the parties' conduct in the application of the treaty represents the *instrumentum* – the proof – of their changed will, namely the *negotium*. We can designate this informal agreement as being mutual dissension or mutual abandonment. Several international awards and judgments could be cited to confirm this process of modification of treaties, but would be immaterial to the scope and purposes of the present contribution.[115]

Therefore, as far as we are concerned, we can conclude that a treaty conveying territorial title can be modified or even terminated by subsequent state conduct, shifting the title to a state other than that which is entitled by the treaty. As Judge Torres Bernardez affirmed in his separate opinion appended to the ICJ's judgment in the 1992 *Land, Island and Maritime Frontier Dispute*, 'The interplay of the two elements [namely (i) El Salvador's state manifestation; (ii) Honduras's inappropriate reaction] modified at a certain moment the legal situation in Meanguera in favour of El Salvador's claim on that island.'[116]

Recalling the way in which legal title is constructed, we can say that territorial title is conveyed by states' subsequent practice during the application of the treaty. The mutual abandonment or mutual dissension carries out and corroborates the parties' intention to depart from treaty stipulations and opt for a solution other than that enshrined in the formal agreement.

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113. *Temple Case*, supra note 24, at 33.
114. Ibid., at 56 (Separate Opinion of Judge Sir Gerald Fitzmaurice).
115. See Distefano, *supra* note 1, at 211–30.
116. *Land, Island and Maritime Frontier Dispute*, supra note 20, at 708, para. 168.

3.2.4. Abandonment

The leading case in this respect is the *Clipperton* case between France and Mexico.[117] The question submitted to the sole arbitrator was whether France, which had occupied the island and declared sovereignty over it, had subsequently abandoned it by not displaying any more state functions. Indeed, Mexico, whose officials had disembarked on the island in 1897, claimed that no signs of previous state sovereignty were apparent at that time and thus the island had to be considered *terra nullius* – a territory which is free for acquisition since it is subject to no sovereign. In other words, Mexico claimed that France's abandonment constituted the *titulus adquisitionis*, conveying to it the territory. Therefore Mexico, by its own account, could proceed to the occupation of the island since it had a valid legal title.

The arbitrator was unable to follow Mexico's reasoning and claim, since he considered that France had not abandoned Clipperton Island; France maintained and displayed a sufficient degree of sovereign functions considering the characteristics of the territory, that is distant, small, and barely inhabited.[118] In other words, France showed no sign of abandonment of the island, or, as we say in an old-fashioned way, France showed no *animus derelinquendi*. Therefore, the island was not, as Mexico had claimed, *terra nullius* and thus was not fit for effective occupation by another state. One has also to recall that abandonment – being the conduct of a state – cannot be presumed but must be proved by the state which alleges it. Hence the burden of proof lies on the latter (as happened for Mexico in the aforementioned case). The ground of this decision was henceforth widely accepted by international jurisprudence.

3.2.5. The creation of title as a 'complex fact'

We should like to end here the enumeration of the legal categories, only to say that in all these situations several elements contribute to the determination (or the establishment) of territorial titles. These are different, and not exclusive, perspectives or theoretical frameworks which help us to determine whether the concerned states, by their conduct, transferred the territorial title. In fact, ultimately territorial titles are created and extinguished through what we can call 'a complex fact', which designates a bundle of single and indivisible facts combined into a collective whole. The latter can convey a territorial title; the efficacy of this bundle of facts depends on the circumstances. As we read in one of the most authoritative handbooks, *Oppenheim's International Law*, whose most recent editor is the late Professor Robert Jennings, a 'complex fact' can

> Include continued and effective occupation and administration, acquiescence and/or protest, the relative strength or weakness of any rival claim, the effects of the intertemporal law, the principle of stability in territorial title and boundaries, regional principles such as *uti possidetis*, geographical and historical factors, the attitudes of the international community, and the possible requirements of self-determination, and also indeed the possibly unlawful origin of the original taking of possession, and that subjugation is no longer per se a recognisable title. The weight to be given to

117. *Island of Clipperton Case (Mexico v. France)*, Award delivered 28 January 1931, 2 RIAA, 1110.
118. See *infra* section 4.1, at 1069.

> these factors and considerations, in the assessment of the total result in terms of a consolidated title, will vary with particular cases.[119]

Akin to the creation and termination of territorial titles through a 'complex fact' is what has been called the doctrine the 'historical consolidation of title'. This expression has been forged in the wake of the Court's judgment in the *Norwegian Fisheries* case, where it declared,

> Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign states. Since, moreover, these Decrees constitute, as has been shown above, the application of a well-defined and uniform system, it is indeed this system itself 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.[120]

This theory – which purports to explain how territorial titles can evolve through time in the light of states' behaviour – was positively received by doctrine[121] and by subsequent case law alike.[122] Quite obviously, the fascination exerted by this construction – notably its versatility and its flexibility – represents the flip-side of the coin for its detractors. Indeed, even those authors who do not refute its soundness feel the need to underline its (minor) inconvenience. Sir Robert Jennings wrote, 'Historical consolidation is also a *voracious* concept, and it should be kept within bounds',[123] while Brownlie maintained,

> However, it is probably confusing to overemphasise, and to lump together, this *penumbra of equities* by discovering the concept of consolidation. Apart from the concept of consolidation, the rate of social, economic, and other 'non-legal' considerations in the application by tribunals of the more orthodox legal principles is not to be denied.[124]

The Court's ultimate statement in this regard is, however, less adamantine. In fact, on the one hand it declared, in order to reject Nigeria's argument based on 'historical consolidation', that the latter 'has never been used as a basis of title in other territorial disputes, whether in its own or in other case law'.[125] On the other hand, and immediately afterwards, it declared that

> [N]othing in the *Fisheries* Judgment suggests that the 'historical consolidation' referred to, in connection with the external boundaries of the territorial sea, allows land occupation to prevail over an established treaty title. Moreover, the facts and circumstances put forward by Nigeria with respect to the Lake Chad villages concern a period of some

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119. L. Oppenheim, *Oppenheim's International Law*, ed. R. Jennings and A. Watts (1992), 716, para. 275.
120. *Fisheries Case (United Kingdom v. Norway)*, Judgment of 18 December 1951, [1951] ICJ Rep. 116, at 138.
121. See, e.g., *Oppenheim's International Law*, *supra* note 119, at para. 272; R. Jennings, *The Acquisition of Territory in International Law* (1963), 25; Schwarzenberger, *supra* note 45, at 290.
122. Cf., e.g., *Civil Aeronautics Board et al. v. Island Airlines Inc.*, *District Court (Hawaii)*, Judgment of 8 October 1964, 35 ILR 74, at 79; *Re Ownership of the Bed of the Strait of Georgia and Related Areas*, British Columbia Court of Appeal, Judgment of 25 June 1976, ILR, vol. 73, p. 202; *Raptis and Son v. State of South Australia* (High Court), Judgment of 27 June 1977, 69 ILR 66 (Stephen J).
123. Jennings, *supra* note 121, at 27 (emphasis added).
124. Brownlie, *supra* note 40, at 166 (emphasis added).
125. *Cameroon/Nigeria*, *supra* note 9, at para. 65.

> 20 years, which is in any event far too short, even according to the theory relied on by it.[126]

Indeed, even those who support this theory admit that it cannot prevail 'over an established treaty title', since, as we have just underlined, the latter has primacy over sheer effectiveness. On the contrary, this 'theory' or 'doctrine' does have to play its full role in the cases where a competing title has not been proved or where it has been eroded or weakened due to the titular state's acquiescence or failure to react in a timely fashion. Ultimately, we do not think – unlike other eminent authors[127] – that the Court has completely and definitively wiped this theory from the tools of the international lawyer in the matter of territorial disputes. Less drastically, the Court has specified this theory's operative scope and notably its relation vis-à-vis a legal title otherwise established. In so doing, we do not think it has departed from what the same Court had said in the 1951 *Fisheries* case.[128] Once again, then, the Court seized on this occasion to elucidate its thought regarding one of the most intriguing and yet elaborated theories to which it has ever referred.[129]

4. The apparent dilemma between effectiveness and legal title

Almost any writing devoted to the acquisition of territory deals extensively with this subject matter. One is accustomed to the effectiveness of the occupation of a territory being argued in opposition to the legal title. In such situations – very common in international litigation – two states invoke different grounds in order to win their case: title, on one hand, and effectiveness, on the other. Put differently, and at a higher level, we could oppose law and fact. Two Latin maxims express elegantly this dilemma: *ex facto jus oritur* (law arises from facts) and *ex iniuria jus non oritur* (no right, no law can arise from unlawfulness). We shall not of course dig deeper into this topic, but merely wish to stress what is perhaps the paramount question in legal science. Indeed, international litigation too is haunted by this problem. Leaving aside this ontological question we shall ask what 'effectiveness' is in public international law.

Is it a principle, a rule, a general requirement of the law, a criterion? Innumerable proposals have been put forward, and we should like to quote what Cassese wrote in his handbook:

> International law is a realistic legal system. It takes account of existing power relationships and endeavours to translate them into legal rules. It is largely based on the principle of effectiveness, that is to say, it provides that only those claims and situations which are effective can produce legal consequences. A situation is effective if it

126. Ibid.
127. M. Kohen, 'La relation titres/effectivités dans le contentieux territorial à la lumière de la jurisprudence récente', (2004) 108 RGDIP 561.
128. See in this regard para. 220 of the Court's Judgment in the *Cameroon/Nigeria Case*, supra note 9, where it does not seem that the Court straightforwardly refuted the theory of historical consolidation.
129. In this respect, the Court's developments in the *Kasikili/Sedudu Case*, *supra* note 38, appear to be less clear-cut than those enunciated in the *Cameroon/Nigeria Case*, supra note 9, at para. 71 and ff.

> is solidly implanted in real life. . . . The principle of effectiveness permeates the whole body of rules making up international law. Under traditional law one of its corollaries has for long been that legal fictions had no place on the international scene.[130]

We shall now briefly review four different territorial situations characterized by the clash between title and effectiveness. In each of these situations, *titulus* and *modus adquisitionis* are thus not vested with the same state. Legal title, then, is not completed until *titulus* and *modus* are reunited within the same state. As we shall see, PIL normally requires this merger to take place within the state which holds the *titulus* at the expense of the state which merely possesses effectiveness. This requirement is, of course, not at odds with what legal common sense would suggest, as the chamber of the Court said in the *Burkina Faso/Mali* case:

> Where the act corresponds exactly to law . . . 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 coexist 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 *effectivités* can then play an essential role in showing how the title is interpreted in practice.[131]

4.1. Effective occupation

This brief review will begin with a situation which cannot with any rigour be considered as a true schism between *titulus* and *modus*. Indeed, here we are faced with a state that carries the effective occupation of a *terra nullius*; hence, by definition there is no other state in which the title is vested. Nevertheless, the state which brings about the effective occupation does not hold the title. So where does the *titulus* lie? It lies precisely in the legal status of the territory, namely, as the French-speaking put it very elegantly, *territoire sans maître*. Therefore, once the occupation is effectively fulfilled, the state will reunite both the *titulus* and the *modus*. In order to be considered as effective and valid, the merger of the two constitutive elements of the legal title must satisfy some requirements. As the PCIJ stated in the *Legal Status of Eastern Greenland* case,

> [I]t may be well to state that a claim 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 [*animus occupandi*], and some actual exercise or display of such authority [*corpus*].[132]

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130. A. Cassese, *International Law* (2001), 12–13.
131. *Burkina Faso/Mali, supra* note 2, at para. 63. The stance of the Court with regard to the legal relationship between *effectivité* and legal title has not changed henceforth, so that it can be considered as its credo. See also *Land, Island and Maritime Frontier Dispute*, supra note 20, at para. 62 and ff.; *Benin/Niger Case*, *supra* note 27, at para. 77; *Cameroon/Nigeria Case*, supra note 9, at para. 68.
132. *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment of 5 April 1933, 1933 PCIJ (Ser. A/B) No. 53, at 45–6. See also *Legal Status of Western Sahara*, *supra* note 82, at para. 162; *Benin/Niger Case*, *supra* note 27, at para. 102.

By the word *animus* we refer to the will to occupy a parcel of the earth's territory *à titre de souverain*. This comprises at the same time the knowledge of this fact (*intellectus possidendi*) and the concrete will to carry out the occupation. Without digging further, the ultimate test of the effectiveness of this occupation stands in actual 'peaceful and continuous display of state authority'[133] over the territory concerned. Thus the occupation must be actual, uninterrupted, and permanent; the state must establish there 'une organisation capable de faire respecter ses droits',[134] and, above all, it must be 'in sufficient strength to enable [the state] to maintain order, protect foreigners, and control the natives'.[135] Therefore, if these requirements are met – in addition to the *res nullius* character of the territory – then the state is legally entitled to display its sovereignty over the territory. Generally speaking, the occupation of territory *sans maître* is not an instantaneous act but is an event unfolding in time, and thus it requires some efforts by the state concerned. Furthermore, there is no absolute threshold of effectiveness of occupation which must be attained in order to conclude that a state has acquired sovereignty over a given territory. Instead, this evaluation must necessarily take into account intrinsic (remoteness, uninhabited, soil resources or economic and strategic value, etc.)[136] and extrinsic (lack or presence of adverse claims) characteristics of the territory.

4.2. Immemorial possession

The Scottish philosopher David Hume – albeit with reference to ownership between individuals – said of this situation, 'the title of first possession becomes obscure thro' time; and that 'tis impossible to determine many controversies, which may rise concerning it'.[137]

Hence by the term 'immemorial possession' we refer to a possession of territory so ancient that the adverse evidence cannot be established. In other words, it is thus admitted that no living human being has ever heard that the situation was different from that which now exists.

The possession goes back to a period so distant in time that it is impossible to prove that the state did not hold the *titulus*, if ever there were any. If this possession is undisputed, even though it could be argued that the possession was not accompanied at the beginning by a valid *titulus*, it is nevertheless considered to be in conformity with public international law. There is a strong – yet rebuttable in law – presumption in favour of this state's sovereignty. Hence, the two elements are deemed to be united by the state which holds the territory. As Vattel wrote three centuries ago,

> Une longue possession, non-contredite, établit le droit des Nations; autrement il n'y auroit point de paix, ni rien de stable entr'elles; & les faits notoires doivent prouver la

133. *Island of Palmas Case*, supra note 7, at 867.
134. *Island of Clipperton Case (Mexico v. France)*, supra note 117.
135. Diplomatic dispatch sent 2 August 1887 by Lord Salisbury to the Portuguese Minister, Petre, concerning the alleged effective Portuguese occupation in the vicinity of Zambezi river. H. Smith, *supra* note 13, at 9.
136. *Kasikili/Sedudu, supra* note 38, at para. 74.
137. Hume, *supra* note 39, at Sect. III, 507–8.

> possession. Ainsi, lorsque depuis un *temps immémorial*, une Nation exerce sans contradiction les droits de Souveraineté sur un fleuve qui lui sert de limites, personne ne peut lui en disputer l'empire.[138]

Later on, a German municipal court affirmed in 1928 with regard to some territorial rights pertaining to the city of Lübeck, '*This immemorial possession justifies the presumption of its legality* as well as the attribution to Lübeck of these rights for the future.'[139]

Immemorial possession explains quite well the phenomenon of the emergence of ancient states as well as the undisputed occupation of (some parts of) state territory, notably states' primeval territory.

4.3. Disputed possession

This scenario must be at once distinguished from that of 'adverse possession', which will be dealt with further on.[140] Instead, by the expression 'disputed possession' we mean an effective occupation of territory which, as soon as it has become well known, has been sharply contested by one or more states. Additionally, it must be made clear that this encroachment or occupation of territory has not been carried out by the use or threat of force, but instead was put into effect by pacific means. In fact, the situation where use or threat of force could hypothetically engender a territorial title is radically and qualitatively different from the present one and thus would deserve a separate – and quite extended – analysis.[141] Here we are dealing only with state conduct which is pacific in nature and does not amount to use of force, be it unlawful or not.

As the adjective 'disputed' clearly indicates, the titular state's prompt reaction of protest is intended to prevent the validation of 'the adverse occupation', by obstructing the merger of the two constitutive elements of title. Hence the lack of recognition or acquiescence (or any other attitude proving the abandonment of title by the state who has or claims a title over the disputed territory) will inevitably undermine the effectiveness of the territorial situation, namely the encroachment by the other state. The '(complex) fact' that should generate the legal title of the latter state cannot thus be established and accordingly this state will not be entitled to *titulus adquisitionis*, which will remain vested in the titular state. Therefore one can argue that, from the point of view of the effectiveness itself, the validity of a legal title imperilled by a claim based on mere possession cannot be extinguished through the operation of the latter. Indeed, since the requisite of any territorial title

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138. E. de Vattel, *Le droit des gens ou principes de la loi naturelle* (1758), Livre 1, Ch. XXII, para. 266 (emphasis added).
139. *Lübeck v. Mecklenburg–Schwerin*, German Staatsgerichtshof, award delivered 6–7 July 1928, 4 ILR, at 115–16 (emphasis added).
140. By the expression 'adverse possession', we refer to 'A method of acquisition of title to real property by possession for a statutory period under certain conditions . . . In order to establish title in this manner, there must be proof of nonpermissive use which is actual, open, notorious, exclusive and adverse for the statutorily prescribed period [; adverse possession] also embodies the idea that the owner of or persons interested in the property have knowledge of the assertion of ownership by the occupant'. *Black's Law Dictionary*, supra note 52, at 53. See *infra* C.4.
141. The author tentatively explored this scenario elsewhere. G. DiStefano, *supra* note 1, at 314–75.

lies in its effectiveness, the legal order will protect only those situations which are characterized by a *minimum* of effectiveness and legality. Now, in the case which is now under scrutiny, this threshold cannot be attained in the absence of the other state's consent. The latter's protestations will then jeopardize the validity of the title of the possessor state, whose opposability is consequently not *erga omnes*. Hence the territorial situation is not effective in law and accordingly no transfer of title can be established as long as the other state's consent has not been proved. That is why scholars aptly define the legal title as being a 'sword' with which the dispossessed state, while continuing to affirm its *animo domini*, can retain its *titulus adquisitionis* and thus impede, at least for a certain lapse of time, the consolidation of the adverse title. As a US court declared, in the wake of the *El Chamizal* case,

> Whatever possession, if any, Mexico had on the banco[142] after the Treaty was signed [1905] was of necessity a de facto possession, and a de facto possession in itself cannot confer the power of disposing of title.[143]

Hence, the mere possession of territory cannot by itself convey the *titulus adquisitionis*, as had been authoritatively stated: 'la possession ne saurait être censée déroger au droit'.[144]

We have already dealt with the extent, modalities, and forms of state protests and attitudes that have the purpose of disrupting the consolidation of adverse titles and the weakening (and even the extinction) of its own. It ought nevertheless to be remembered that protest as a 'state fact' must be effective if the state wishes to attain its ends. Thus the state has to exhaust all pacific means of settlement of disputes without then resorting to war or to measures implying it or its threat. In short, the concerned state must by no means concur in consolidating or strengthening another state's title(s) and at the same time can even avail itself of (pacific) countermeasures. With the emergence of the rule prohibiting the use (and threat) of force, 'courts must now be precluded from requiring, as *additional measures of self-help*, that protests should now be supported by force or a show of force'.[145]

In conclusion, only a dispossessed state's consent (expressed either tacitly or explicitly) or its well-established will of abandonment can legally convey the *titulus adquisitionis*. Of course, the question whether protest in itelf, even if continued over time, can disrupt the process of the strengthening of adverse title founded on possession, remains largely open. What, in fact, will happen if the situation goes

142. 'A small tract of land on opposite side of river from country to which it belongs, and so existing by virtue of an avulsive change in the river', *Black's Law Dictionary*, *supra* note 52, at 144 (quoting this very case itself (n. 143)).
143. *San Lorenzo Title & Improvement Co. v. City Mortgage* (Court of Civil Appeals of Texas), award delivered the 27 February 1932, 66 ILR 115.
144. *Affaire de la Délimitation de frontière (Etats-Unis d'Amérique c. Royaume-Uni)*, arbitral award delivered 10 January 1831, in *Pasicrisie internationale*, *supra* note 57, at 12.
145. I. McGibbon, 'Some Observations on the Part of Protest in International Law', (1953) 30 BYIL 293–310, at 310 (emphasis added).

on for several decades and even centuries?[146] In this regard, we have to suspend judgement for the time being.

4.4. Acquisitive prescription in international law

This theme counts among the most controversial topics related to the acquisition of territorial sovereignty. From the outset we ought to start by recalling the contribution of Roman law, which goes under the name of *usucapio*. According to Roman law, property over movables and land could be acquired by uninterrupted possession throughout a fixed period of time, which of course varied depending on the legal nature of the thing concerned. Without having to go more deeply into detail, one can say that classical Roman law provided five conditions in order for this mode of acquisition to fulfil its legal effects: appropriateness of the thing (*res habilis*), title, good faith, possession, and time.[147] These are the five elements which constitute acquisitive prescription; if one of them is lacking one can no longer speak of acquisitive prescription. Before verifying whether *usucapio* (or acquisitive prescription) has its *locus standi* in international law, we have to add that a legal process analogous to *usucapio* is clearly envisaged in common law under the label 'adverse possession' or, more plainly, 'prescription':

> [The title by adverse possession] is the right which a possessor acquires to property by reason of his adverse possession during a *period of time fixed by the law*. The elements of title by prescription are *open, visible and continuous use under a claim of right, adverse to and with knowledge of owner*.[148]

Unmistakably, adverse possession shares with Roman *usucapio* all the conditions except good faith and legal title.[149] Indeed, both of them unsurprisingly pursue the same goals via the effectiveness which 'determines the process by which, through the influence of time, possession without title ripens into ownership, and ownership without possession withers away and dies'.[150]

Now, if we have to admit this institution of municipal law into international law, we have to demonstrate that it has penetrated as such into the latter through one of the three gates which are commonly known as the recognized sources of international law: treaty law, customary international law, or general principles of

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146. In this regard, the *most striking historical situation* is definitively that between Argentina and the United Kingdom concerning sovereignty over Malvinas/Falkland Islands. P. Beck, *The Falkland Islands as an International Problem* (1988); G. Cohen-Jonathan, 'Les îles Falkland', (1972) 18 AFDI 253; Fifth Report of the Foreign Affairs Committee of the House of Commons, Sessions 1983–1984, H.C. Papers 268-I, Vol. I, XIV–XVII, 'Report on the Falklands Islands', in D. Harris, *Cases and Materials on International Law* (1998), 213–17; J. Goebel, *The Struggle for the Falkland Islands. A Study in the Legal and Diplomatic* (1927); S. Viejobueno, 'Self-Determination v. Territorial Integrity: The Falkland/Malvinas Dispute with Reference to Recent Cases in the United Nations', (1990–1) 16 *South African Yearbook of International Law* 1.

147. 'Usucapionis requisita sunt: res habilis, titulus, fides, possessio, tempus' (Codex, Book VII, 26-40 [Constitution of Justinian, 531], D(igest) 41.2.6.

148. *Black's Law Dictionary, supra* note 52, at 1486 (emphasis added).

149. 'According to this doctrine [*usucapio*], the possessor, *justo titulo et bona fide*, during two years of land, and during one year of movables, which had not previously belonged to him, acquired a property in it or them.' R. Phillimore, *Commentaries upon International Law* (1879), Volume 1, Part II, 354.

150. J. Salmond, *supra* note 49, at Appendix V para. 105, p. 406.

law (Art. 38(1)(a)–(c) of the ICJ's Statute).[151] In this vein, we shall briefly review the legal conditions, so to say the constitutive elements of, acquisitive prescription.

First, the appropriateness of the thing (or *res habilis*) is clearly not required by international law since the latter, unlike Roman law, does not make any distinction between different categories of land or territory. Second, title must be shown, namely a legal act (unilateral or bilateral) *justifying* the possession. Thus the possessor must hold what is called a *justa causa possessionis*, or a 'valid cause of possession'. In international law, the latter could arise from the behaviour of the titular state (its inaction, acquiescence, or more vaguely lack of protest). Third, good faith must be proved by the possessor. In international law doctrine is far from being unanimous concerning this condition.[152] Furthermore, no conclusion at all can be drawn from case-law, since it is absolutely silent in this respect. The Court itself, in the *Kasikili/Sedudu* case, when it described the Namibian thesis,[153] did not mention 'good faith'.[154] Fourth, the possession of the thing (or the occupation of the land) must be demonstrated in order to acquire property through a prescriptive process. Last, but absolutely not least, a period of time (*tempus ad præscriptionem*) must be fixed by the law. Nowadays, in all national laws, the length of time necessary for the completion of the prescriptive process is fixed according to the specific circumstances strictly defined by the law (movables or land, lack of a legal title, etc.). In this regard, one ought to remember that *usucapio* represents, within modern civil law, a 'mode of acquisition' *ope legis*, namely an acquisition of ownership through the operation of the law. Indeed, the precise and tight setting of time is then one of the constitutive elements of acquisitive prescription, hence the need felt by the lawmaker to fix it accurately. Now the greater part of the doctrine which rebuts the existence of acquisitive prescription in international law corroborates its stand by invoking the lack of the prescriptive period through which the extinction or modification of territorial titles takes place by operation of the law. This would entail that, strictly speaking, there is no *usucapio* in international law due to the lack of a fixed prescriptive period of time. For 'la notion de la prescription acquisitive est inséparable de la détermination du délai qui entraîne l'acquisition de la souveraineté territoriale'.[155]

In the *El Chamizal* case, a leading case pertaining to the matter of territorial disputes, the arbitral Commission maintained that

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151. See *supra*, Section 2.1, at 1048.
152. The majority of the authors refute its necessity; see for instance P. Fauchille, *Traité de droit international public* (1922–6), I, part 2, at 758, para. 557-7. Fewer are those who maintain that good faith is required by acquisitive prescription in international law. J. Bentz, 'Le silence comme manifestation de volonté en droit international public', (1963) 67 RGDIP, 89.
153. 'Namibia . . . claims title to Kasikili/Sedudu Island, not only on the basis of the 1890 Treaty but also, in the alternative, on the basis of the doctrine of prescription. Namibia argues that "by virtue of continuous and exclusive occupation and use of Kasikili Island and exercise of sovereign jurisdiction over it from the beginning of the century, with full knowledge, acceptance and acquiescence by the governing authorities in Bechuanaland and Botswana, Namibia has prescriptive title to the Island".' *Kasikili/Sedudu*, *supra* note 38, at para. 90. According to Namibia's thesis in the matter of acquisitive prescription, four conditions must be fulfilled to enable possession by a State to mature into a prescriptive title: '1. The possession of the . . . state must be exercised à titre de souverain. 2. The possession must be peaceful and uninterrupted. 3. The possession must be public. 4. The possession must endure for a certain length of time.' Ibid., at para. 94.
154. Ibid., at para. 94.
155. A. Cavaglieri, 'Règles générales du droit de la paix', (1929-I) 26 RCADI 406.

> the very controversial question as to whether the right of prescription invoked by United States is an accepted principle of the law of nations, *in the absence of any convention establishing a term of prescription*, the commissioners are *unanimous* in coming to the conclusion that the possession of the United States in the present case was not of such as to found a prescriptive title.[156]

Therefore one can sustain that acquisitive prescription does not represent a valid 'mode' or, better speaking, a 'legal fact' apt to transfer territorial titles in international law. However, it has been invoked and sometimes applied, *but not under this denomination*, by international tribunals. In fact, if we look closer, one cannot but find that, when this has happened, the latter merely borrowed from the Roman law paraphernalia a *synthetic denomination*[157] by which they meant any 'fact', beside occupation, cession, or conquest, apt to transfer territorial titles. Therefore, they referred to a 'legal complex fact' which was labelled, for convenience purposes, 'acquisitive prescription'.[158] Hence, what they ultimately made recourse to was not *usucapio* but more prosaically a conglomerate of elements such as a peaceful uninterrupted occupation of territory (by the possessor state) and inaction or acquiescence (by the dispossessed state) during a certain period of time. We could label that situation a *non-disputed possession* or an *adverse possession long-time tolerated* (or *acquiesced to*). In other words, we are faced with a territorial situation which is diametrically opposed to the disputed possession (see *supra* Section 4.3). According to the most recent edition of the authoritative *Oppenheim's International Law*,

> In short, prescription is not so much now a singular mode of acquisition, or loss, of territorial sovereignty, as *a convenient term for one group of elements* ['legal complex fact'] *which go together to make or break a title.*[159]

5. Epilogue

In conclusion, one must observe the richness of the subject matter as regards the concept of territorial title and its creation or extinction. In this regard, a concise review of some of the Court, as well as arbitral, case law should show the soundness of the thesis which has been here expounded. In fact, for each of the different features related to border disputes we have endeavoured to put our theory to the test of the Court's case law. We hope that we have convinced the reader not necessarily of the soundness of our conception but at least of its 'falsifiability' according to Sir Karl Popper and his criterion of scientificity.[160]

Additionally, what appears from this fragmented overview of the Court's contribution to the law of territorial disputes is the irrefutable proof of its demiurgic role in the system of international law sources. Indeed, international case law, and

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156. *El Chamizal Case (United States/Mexico)*, Award delivered 15 June 1911, 9 RIAA, at 328 (emphasis added).
157. M. Giuliano, T. Scovazzi, and T. Treves, *Diritto internazionale pubblico* (1983), II, 55.
158. In this respect, one cannot let pass in silence the fact that a pernicious confusion has been made between 'immemorial possession' (or *praescriptio longissimi temporis*), with which we have dealt earlier, with *usucapio*. In fact, quite often international tribunals meant the latter by employing the former denomination. See Grotius, *De iure belli ac pacis* (1648), Book II, Ch. IV para. 1, 9; Vattel, *supra* note 138, at Book II, Ch. XI para. 140.
159. *Oppenheim's International Law, supra* note 119, at 708, para. 270 (emphasis added).
160. K. Popper, *The Logic of Scientific Discovery* (1968), 78–92.

a fortiori the Court's, does not limit itself to 'a subsidiary means for the determination of rules of law' (Art. 38(1)(d) of the Statute),[161] but represents a powerful driving force for the evolution of international law itself. In fact, a judicial award, even a courageous one, can exert a strong influence on states' *opinio juris*, as to the determination and the interpretation of international law rules. In this regard the Court's successive judgments certainly accrue to the body of international law rules related to territorial disputes. In consideration of this we should like to conclude with the Court's most recent finding in the matter of customary international law rules related to territorial disputes. In the *Benin/Niger* case, the Court had to draw the international boundary line between the two states in the case of bridges over international watercourses. The Court observed that

> in the absence of an agreement between the Parties, the solution is to extend vertically the line of the boundary on the watercourse. This solution accords with the general theory that a boundary represents the line of separation between areas of State sovereignty, not only on the earth's surface but also in the subsoil and in the superjacent column of air. Moreover, the solution consisting of the vertical extension of the boundary line on the watercourse avoids the difficulties which could be engendered by having two different boundaries on geometrical planes situated in close proximity to one another.[162]

The Court's line of reasoning regarding what can be considered a minor problem pertaining to territorial disputes reveals why the Court's contribution to this body of law is of paramount importance in terms of the 'progressive development of international law and its codification' (Art. 13 of the UN Charter). Indeed, it seems easy to discern in this piece the Court's pragmatic logic and wise approach to the settlement of territorial disputes, which are often deeply serious and susceptible to deterioration into open, armed conflict. In fact the Court, faced with a quite original phenomenon, managed to reconcile the requirements of the law with the concrete needs arising from the existence of a river boundary. In so doing, not only was the line clearly drawn, but the Court laid the foundations of future co-operation between the two states.

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161. '[L]a juridiction de la Cour contient des éléments importants de la codification progressive du droit international et . . ., par conséquent, tous ceux qui s'occupent du droit international sont obligés d'en tenir compte. En outre, l'article 38 du Statut renvoie à la jurisprudence des tribunaux en tant que source de droit international. Il est donc évident que la jurisprudence de la Cour est une source éminente du droit international. Ainsi, toute décision de la haute Cour sort des limites que lui pose l'article 59 du Statut.' Reply of Mr. Koukal (Czechoslovakia) submitted to the Permanent Court of International Justice in the *Peter Pazmani University Case* (*CPJI Recueil* C 73 (1933), p. 1219).

162. *Benin/Niger*, *supra* note 27, at para. 124.