# PART III

# TECHNICAL RULES IN TERRITORIAL DISPUTES SETTLEMENT

# 11. Time factor and territorial disputes

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> For what is time? Who can easily and briefly explain it? Who even in thought can comprehend it, even to the pronouncing of a word concerning it? But what in speaking do we refer to more familiarly and knowingly than time? And certainly we understand when we speak of it; we understand also when we hear it spoken of by another. What, then, is time? If no one ask of me, I know; if I wish to explain to him who asks, I know not.[1]

## INTRODUCTION

This chapter endeavours to tackle two major issues making up the whole *problématique* of time in connection with territorial disputes. Both relate to the classical dimensions of the time factor in this context and will thus be the focus of this contribution.[2]

A general remark must be made from the outset: As it will be shown hereafter, time is one of the two (factual) dimensions, alongside with space,[3] within which state (and thus human) activity occurs. Consequently, public international law does not recognize time and space as vesting or divesting facts likely *per se* to create, extinguish or modify territorial titles. In other words, certain facts or acts performed by states must be seen against the background of time, since public international law deems them capable of

[1] SAINT AUGUSTINE, THE CONFESSIONS BOOK VII, ch. 14, para. 17 (401). More down to earth, Francis Déak lamented at the beginning of last century as follows: 'This lack of certainty in the definition of time is not a new thing in international law', Francis Déak *Computation of Time in International Law*, 20 AM. J. INT'L L. 502, 502 (1926).

[2] In this connection, one ought to stress that time is relevant in other contexts than those examined here: acquisitive prescription, estoppel, acquiescence, historic titles and so on. These topics will be dealt with elsewhere in this volume. By the way, the choice of these three aspects (or time dimensions) is supported by the same selection made by a leading authority, namely Sir Robert Jennings who, in his seminal short monograph, brilliantly scrutinizes all of the main issues addressed in this volume. It is not then an accident that the former president of the International Court of Justice dwells upon these two aspects of the time factor, yet in an inverted order: ROBERT JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 23–35 (1963). The leading British jurist observed that there are 'two concepts which are closely related to occupation, prescription and all kinds of consolidation: the principle of the intertemporal law and the doctrine of the critical date', at 28.

[3] In light of the aforesaid, it is not at all surprising that, completely reverting the perspective (from the object to the subject), time and space are, according to Kant, the two spectacles through which reality is observed. *De mundi sensibilis atque intelligibilis forma et principiis*, paras. 14.3 and 15. Both of them are, according to the German philosopher, 'intuitions' or *a priori* categories of the mind. IMMANUEL KANT, THE CRITIQUE OF PURE REASON paras. 4.2 and 4.7 (2nd ed., 1787).

extinguishing or modifying titles of territorial sovereignty.[4] Grotius had already vividly grasped the true function of time as one of the dimensions of human thought and activity: 'For though time is the great agent, by whose motion all legal concerns and rights may be measured and determined, yet it has no effectual power of itself to create an express title to any property.'[5]

## I. CRITICAL DATE

### A. The Concept and Differences from other Related Concepts ('Critical Period', 'Periods Immediately Prior and Subsequent to Critical Date' and Uti Possidetis)

The principle of 'critical date' is, as it has been observed not without a sense of wise humour, 'a simple principle'[6] as well as an 'attractive tool of advocacy'.[7] For sure, it plays a preliminary role for the purposes of application of the principle of intertemporal law. By determining the date at which the dispute is definitively 'crystallized' – namely the main effect of critical date – a judicial organ will be able at the same time to set within the framework of intertemporal law, the principles and rules applicable for the settlement of the dispute.[8]

Hardly a territorial dispute,[9] whether it is brought to a judicial organ or settled directly through negotiations by the parties, is not entangled with this well-worn concept of territorial litigation.[10] As a matter of fact, the 'idea is simple, if not indeed

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[4] GIOVANNI DISTEFANO, L'ORDRE INTERNATIONAL ENTRE LÉGALITÉ ET EFFECTIVITÉ: LE TITRE JURIDIQUE DANS LE CONTENTIEUX TERRITORIAL 244–313 (2002); MARCELO KOHEN, POSSESSION CONTESTÉE ET SOUVERAINETÉ TERRITORIALE 127–54 (1997).

[5] HUGO GROTIUS, THE LAW OF WAR AND PEACE bk. 2, ch. IV.I (1648) [translated by A.C. Campbell 1814]. Galileo used to admonish, with regard to the role of determination and measurement played by time: 'Omnia metire quaecumque licet et immensa ad mensuram tempestive redige.'

[6] Daniel Bardonnet, *Les faits postérieurs à la date critique dans les différends territoriaux et frontaliers*, in LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DÉVELOPPEMENT, MÉLANGES EN HOMMAGE À MICHEL VIRALLY 53, 53 (1991).

[7] SIR ROBERT JENNINGS, *General Course on Principles of International Law,* 121 R.C.A.D.I. 327, at 424 (1967-II).

[8] Luis Ignacio Sánchez Rodríguez, *L'uti possidetis et les effectivités dans les conflits territoriaux,* 263 R.C.A.D.I., 281 (1997).

[9] However, one ought to observe that this principle is not exclusive to territorial disputes for it is referred to in general international procedural law, where it is not uncommon to speak of 'crystallization' of dispute as a watershed with regard to the admissibility of evidence. *See*, for instance, Mrs. Elmer Elsworth Mead (Helen O. Mead) (U.S.) v. United Mexican States, Award, 1930 IV R.I.A.A. 653, at 656–7 (29 October). *See also* Border and Transborder Armed Actions (Nicar. v. Hond.), Jurisdiction and Admissibility, 1988 I.C.J. 69, at 95, para. 66 (20 December): 'The critical date for determining the admissibility of an application is the date on which it is filed (*cf. South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 344).'

[10] Professor Jean Salmon, counsel for Qatar in case of *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* before the International Court of Justice,

obvious',[11] for it stems from common sense and from the dictates of justice and fairness. Furthermore, such a rule takes the lion's share in those disputes where the roots of the competing titles plunge in a remote past and hence additional problems of 'intertemporal' may additionally arise (see Section II).

Authors and international tribunals at large maintain that the principle of critical date is a substantive and not a procedural rule.[12] However, the ultimate importance of the principle depends on each specific case.

Although the critical date rule is a jurisprudential tool created in the context of the rules of evidence, it also yields substantive effects with regard to the determination of title to territorial sovereignty.[13] The judge shall then determine which of the two parties possesses *the title* at a given time, the latter being precisely the 'critical date'.[14]

In effect, according to the authoritative *Dictionnaire de la terminologie du droit international*, the critical date is the moment when the material facts of the dispute are definitively fixed so that state conduct which occurs after it cannot be taken into account for the purposes of modifying (thus improving) legal titles put forward by the parties concerned.[15] In other words, the critical date implies a break in the flow[16] of states' acts with regard to the determination of sovereignty over a dispute territory.

The *raison d'être* of this sound norm of international justice lies on the overarching principle of good faith and fairness since a state would be precluded in law to avail itself of a situation carried with the sole purpose of establishing its sovereignty while the latter is precisely and overtly challenged by another state. Law cannot guarantee such a conduct; the disputed character of the territory in question bars these acts from producing any effect on territorial sovereignty.[17]

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employed the widely-used French expression 'serpent de mer' (namely 'recurrent theme') to refer to critical date, *see* Oral submissions for Qatar, Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), 2000 I.C.J. Pleadings, CR2000/5, paras. 28 (29 May).

[11] SIR ROBERT JENNINGS, *supra* note 2, at 31.

[12] *See*, in the same vein, A.L.W. Munkman, *Adjudication and Adjustment: International Judicial Decision and the Settlement of Territorial and Boundary Disputes,* 46 BRIT. Y.B. INT'L L. 1, 73 (1972–73); ROBERT JENNINGS AND ARTHUR WATTS EDS., OPPENHEIM'S INTERNATIONAL LAW 711, para. 273 (9th ed., 2008); Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 169, at 195–6 (18 December) (Dissenting Opinion of Judge Read); Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice,* 1951–54*: Points of Substantive Law Part II*, 32 BRIT. Y.B. INT'L L. 20, 26 (1955–56); Award on the claims of Great Britain and Portugal to certain territories formerly belonging to the Kings of Tembe and Mapoota, on the eastern coast of Africa, including the islands of Inyack and Elephant (Delagoa Bay or Lorenzo Marques) (Gr. Brit./Port.), Award, 1875, XXVIII R.I.A.A. 157–62 (24 July).

[13] Sánchez Rodríguez, *supra* note 8, at 275.

[14] Marcelo Kohen, *L'influence du temps sur les règlements des conflits territoriaux*, in LE DROIT INTERNATIONAL ET LE TEMPS 131, 134 (2001).

[15] DICTIONNAIRE DE LA TERMINOLOGIE DU DROIT INTERNATIONAL 186 (1960). *See*, in the same vein, A.G. ROCHE, THE MINQUIERS AND ÉCREHOS CASE: AN ANALYSIS OF THE DÉCISIONS OF THE INTERNATIONAL COURT OF JUSTICE 88–104 (1959).

[16] *See infra* Sub-section I.C.

[17] In effect, if the critical date is fixed at the time of the birth of the dispute, 'the tribunal would not be allowed to rely on the possession of the disputed territories with a view of addressing the question of their ownership, precisely when the possession in point is subsequent

The credit for the *ex professo* construction of the theory of 'critical date' goes to Sir Gerald Fitzmaurice, Great Britain's legal adviser, in a landmark passage drawn from his speech before the International Court of Justice in the *Minquiers and Ecrehos* case. The relevant excerpt reads as such:

> The theory of the critical date involves (…) that, whatever was the position at the date determined to be the critical date, such is still the position now. *Whatever were the rights of the Parties then, those are still the rights of the Parties now*. If one of them had sovereignty, it has it now, or is deemed to have it. If neither had it then neither has it now (…) The whole point, the whole raison d'être, of the critical date rule is, in effect, *that time is deemed to stop at that date*. *Nothing that happens afterwards can operate to change the situation that then existed*. Whatever that situation was, it is deemed in law still to exist; the rights of the Parties are governed by it.[18]

However, international jurisprudence predates the doctrinal construction of the critical date. Among the cases which are usually recalled in this respect, one shall mention *Clipperton Island,*[19] *Delagoa Bay* case[20] and *Walvis (Walfish) Bay* case.[21] Yet two other cases have undoubtedly helped to consolidate the principle, i.e. *Eastern Greenland* case and the *Island of Palmas/Miangas* cases. In the latter seminal case, Max Huber referred interchangeably to 'critical date'[22] and 'critical moment'[23] as the precise point in the timeline which purpose is 'to indicate the legal situation' with regard to the determination of territorial sovereignty over the disputed island.

In the *Eastern Greenland* case, the Permanent Court of International Justice referred in these terms to the concept of critical date as follows:

> It must be borne in mind, however, that as the critical date is July 10, 1931, it is not necessary that sovereignty over Greenland should have existed throughout the period during which the Danish Government maintains that it was in being … the material submitted to the Court [by Denmark] is sufficient to establish a valid title in the period immediately preceding the occupation.[24]

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to the date of the birth of the dispute', Alexandre Alvarez, *Des occupations de territoires contestés*, 10 R.G.D.I.P. 651, 683 (1903) [our translation]. The critical date will then operate to 'freeze' any territorial title at the moment of the 'crystallization' of the dispute.

[18] *See* oral pleadings of SIR GERALD FITZMAURICE IN Oral submissions for U.K, Minquiers and Ecrehos (Fr. v. U.K.), 1953, II I.C.J. Pleadings, at 64 (17 November).

[19] The date of 17 November 1858 was finally fixed by the arbitrator as the critical date, that is the discovery and formal proclamation of sovereignty made by the French Commissioner. Clipperton Island (Mex./Fr.), Award, 1931, 2 R.I.A.A. 1105, at 1108–9 (28 January).

[20] *See infra* note 94.

[21] Walfish Bay Boundary (Ger./Gr. Brit.), Award, 1911, XI R.I.A.A. 263, at 271–2 (23 May).

[22] Island of Palmas/Miangas (Neth./U.S.), Award, 1928, II R.I.A.A. 829, at 845 and 864 (4 April).

[23] *Id*. 866.

[24] Legal Status of Eastern Greenland (Den. v. Nor.), Judgment 1933 P.C.I.J. (ser. A/B) No. 53, at 45 (5 April).

However, and this explains perhaps the jurisprudential origins of this principle, tribunals have seldom, if ever, tried to construe the concept. In fact, they did not feel the need to.[25] Therefore, the effect of whichever critical date a tribunal determines (or that the parties agree upon),[26] will be to 'freeze' states' respective legal positions, for example in respect of their rights and titles. Speaking generally, the critical date has been set to coincide with the crystallization of the dispute, insofar as the latter has been defined by the Permanent Court of International Justice in another leading case: 'A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.'[27]

In this regard, one may also avail of another definition of international dispute, espoused by the Permanent Court's successor in the *South West Africa* case, which might even fit better to the specificities of territorial conflicts:

> In other words it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a denial of the existence of the dispute proves its nonexistence. Nor is it adequate to show that the interests of the two parties are in conflict. It must be shown that the claim of one party is positively opposed by the other.[28]

After defining the notion of the dispute in the expression 'crystallization of dispute', it is time to define its second term, that is to say, 'crystallization'. The International Court of Justice has construed this concept as indicating the moment when a dispute actually arises, leaving thus no shred of doubt that the two parties' positions are distant enough to substantiate a true dispute between them. Thus, in the *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, the Court was of the view that 'it is from the time of these two incidents that a dispute as to the maritime delimitation could be said to exist'.[29] Further on in the judgement, the Court noted that 'the dispute may be said to have "crystallized" through the various incidents leading to the above-mentioned Note of 3 May 1982'.[30]

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[25] Sánchez Rodríguez, *supra* note 8, at 279.

[26] States parties to a dispute may well be led to do so in order also not to deteriorate their relations. A clear example of this wise conduct is illustrated – even though ultimately the situation worsened and resulted in a brief military confrontation – by the United Kingdom and Saudi Arabia which decided to freeze the legal status of the disputed area pending the (aborted) arbitral settlement (Buraimi's oasis) and their respective rights and obligations therein. *See*, in this regard, Raymond Goy, *L'affaire de l'oasis de Buraimi*, 3 A.F.D.I. 188–205 (1957).

[27] Mavrommatis Palestine Concessions (Greece v. U.K.), Judgment 1924 P.C.I.J. (ser. B) No. 2, at 12 (30 August). Furthermore, in order to make the task for the judicial organ easier, the Parties should have had the opportunity to substantially develop and elaborate their legal arguments. In the same vein, *see also* Dubai-Sharjah Border Arbitration (Dubai/Sharjah), Award, 1981, 91 I.L.R. 91, at 93 (19 October).

[28] South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Preliminary Objections, 1962 I.C.J. 319, at 328 (21 December) [emphasis added].

[29] Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. 659, at 700–701, para. 131 (8 October).

[30] *Id.*, at 737, para. 257.

The rationale of the critical date rule rests upon both the overarching principle of good faith and in the necessity of guaranteeing a physiological minimum of legal security. In fact, as Kelsen noted in the wake of the United Nations (UN) Charter, if on the one hand a state can no longer resort to armed self-help to redress a wrongdoing,[31] on the other hand its legal title is frozen (thus shielded) pending an appropriate pacific settlement of the dispute.[32]

The contours of the concept of critical date needs to be differentiated from other germane concepts that may also find application in territorial disputes. In this connection, I will deal firstly with such notions as 'period of time prior to the critical date' and 'period of time subsequent to the critical date' and, secondly, I will address the question of the relations between *uti possidetis* and critical date.

Professor Sánchez Rodríguez acutely observed that the concepts of 'period of time prior to the critical date' and of 'period of time subsequent to critical date' partake the same *air de famille* (common denominator) with the critical date.[33] In other words, there is a sort of a temporal continuum that international tribunals use in order to 'make their decisions more comfortable and sure'.[34] This temporal continuum thus stretches thus between the periods immediately prior to and after the critical date, in such a way that it is more appropriate to speak of a 'critical period' than of a 'critical date'.[35]

According to this construction, in order to establish the appropriate title to sovereignty, one should – specifically consider the conduct of the parties to the dispute occurring in these two periods. With regard to acts immediately preceding the critical date, scholars often quote the following excerpt from the *Eastern Greenland* case:

> Even if the period from 1921 to July 10th, 1931, is taken by itself and without reference to the preceding periods, the conclusion reached by the Court is that during this time Denmark regarded herself as possessing sovereignty over all Greenland and displayed and exercised her sovereign rights to an extent sufficient to constitute a valid title to sovereignty. When considered in conjunction with the facts of the preceding periods, the case in favour of Denmark is confirmed and strengthened.[36]

In the *Taba* case, where the arbitral tribunal chose a 'critical period' in lieu of a 'critical date', the tribunal affirmed that it 'will consider any relevant evolution with regard to the delimited and demarcated boundary prior to the critical period … merely as an indice among others'.[37]

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[31] 'The delinquent [state] which is in actual possession of the illegal advantage is protected by the Charter against any enforcement action other than that taken by the Security Council', *see* HANS KELSEN, THE LAW OF THE UNITED NATIONS, 269 (1950).

[32] Kohen, *supra* note 14, at 156.

[33] An arbitral tribunal referred to a period of time 'near the time' of the critical date, *see* Honduras Borders (Guat./Hond.), Award, 1930, II R.I.A.A. 1322, at 1327 (16 July).

[34] Sánchez Rodríguez, *supra* note 8, at 292.

[35] *See infra* note 39.

[36] Legal Status of Eastern Greenland (Den. v. Nor.), Judgment 1933 P.C.I.J. (ser. A/B) No. 53, at 63–4 (5 April).

[37] Location of Boundary Markers in Taba between Egypt and Israel (Egypt/Isr.), Award, 1988, XX R.I.A.A. 1, at 45, para. 173 (29 September).

In the same vein, Professor Sánchez Rodríguez rightly insisted on the relevance of the period immediately after the critical date in order to 'corroborate the title of sovereignty'.[38] Likewise, this stance was taken by the tribunal in the aforementioned *Taba* case: 'Events subsequent to the critical period can in principle also be relevant, not in terms of a change of the situation, but only to the extent that they may reveal or illustrate the understanding of the situation as it was during the critical period.'[39]

Leaving aside the question of the usefulness of these two germane notions, their operation will not and cannot blur the distinction between those facts prior to and those after the critical date. Once agreed upon by the parties concerned or, as it is more often the case, determined by an international tribunal, the critical date acts as a juridical watershed so that facts occurring after the critical date may only be taken into account as evidence of a title already constituted, provided that they meet specific requirements to this effect.[40] On the contrary, state conduct accomplished before the critical date are in all regards 'vesting acts' to the extent that they contribute to create, extinguish or modify existing territorial titles.

Still, the concepts of 'period immediately subsequent' or of 'period preceding the critical date' must not be confused with the 'critical period', as for instance the arbitral tribunal in the *Taba* case refers to it.[41] In this construction, 'critical period' is in all respects a substitute for 'critical date'. Therefore, it must not be mixed with periods of time prior or after the 'critical date', since it plays the same role as the latter. Finally, no study on the critical date is complete if it does not address the question of '*uti possidetis*, which has been described as a form of "critical date" with a general application'.[42] This assertion can indeed be hardly refuted.

In the *Frontier dispute (Benin/Niger)* case, the International Court of Justice looked at the relations between the concept of 'critical date' and that of *uti possidetis* from the perspective of the of time factor, when it affirmed that 'the effect of the *uti possidetis* principle is to freeze the territorial title'.[43] Commenting in his dissenting opinion appended to the judgement in the *Benin/Niger* case, Judge Bennouna observed: 'The critical date, which is essential for purposes of applying the *uti possidetis juris* principle, enables the Court to ascertain to what point in time it must refer in order to determine the colonial heritage and rule accordingly on the boundaries of the states in question.'[44] Thus, in a case involving *uti possidetis*, the critical date is the date of the last administrative decision issued by the competent authority,[45] or otherwise a date agreed upon by the two states as that of their 'respective independence' in order to determine 'in the case before it, the boundary that was inherited from the French

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[38] Sánchez Rodríguez, *supra* note 8, at 282.

[39] Location of Boundary Markers in Taba between Egypt and Israel (Egypt/Isr.), Award, 1988, XX R.I.A.A. 1, at 45, para. 175 (29 September).

[40] *See infra* Sub-section I.C.

[41] Location of Boundary Markers in Taba between Egypt and Israel (Egypt/Isr.), Award, 1988, XX R.I.A.A. 1, at 45, para. 172 (29 September).

[42] Munkman, *supra* note 12, at 93, n. 3.

[43] Frontier Dispute (Benin/Niger), Judgment, 2005 I.C.J. 90, 108, para. 25 (12 July).

[44] *Id.*, 154, para. 9 (Dissenting Opinion of Judge Bennouna).

[45] Kohen, *supra* note 14, at 134. *See also* an arbitral tribunal referred to a period of time 'near the time' of the critical date, *see* Honduras Borders (Guat./Hond.), Award, 1930, II

administration'.[46] By way of consequence, the determination of the critical date depends on the previous determination of the date of *uti possidetis*. Therefore, the date of *uti possidetis* shares a consubstantial feature with the critical date insofar as it pushes all the facts after the independence to a mere 'interpretative role'.[47]

### B. Determination of Critical Date and the Scenario of Multiple Critical Dates

Often, several dates stand as candidates[48] for the determination of the single critical date in a territorial dispute. In an article written shortly after the International Court of Justice's judgement in the *Minquiers and Ecrehos* case[49] with regard to the crystallization of a territorial dispute,[50] Sir Gerald Fitzmaurice drafted a list of potential critical dates:

1. Beginning of the dispute[51]
2. Claim of the plaintiff
3. Crystallization of the dispute 'into a definite issue between the parties as to territorial sovereignty'
4. Proposition put forward by the one of the parties aiming at the pacific settlement of the dispute
5. Commencement of a pacific settlement procedure[52]
6. The dispute is brought before an international judicial organ

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R.I.A.A. 1322, at 1327 (16 July); Indo-Pakistan Western Boundary (Rann of Kutch) (India/Pak.), Award, 1968, XVII R.I.A.A. 1, at 527–8 (19 February) (Opinion of the Chairman, Mr Lagergren).

[46] Frontier Dispute (Benin/Niger), Judgment, 2005 I.C.J. 90, 108, para. 24 (12 July).

[47] Kohen, *supra* note 14, at 150.

[48] Bardonnet, *supra* note 6, at 59.

[49] Fitzmaurice, *supra* note 12, at 20 and 23. *See also* Alvarez, *supra* note 17, at 683 and 686.

[50] *See also* SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE COURT 242 (1956).

[51] This could be the case when an 'incident' occurs between states concerned leading thus the latter to lay bare their 'legal cards'. *See*, in this respect, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. 659, 737, para. 257 (8 October).

[52] Thus, in the *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, the Court observed: 'The present dispute crystallized in 1969 in the context of discussions concerning the delimitation of the respective continental shelves of the two states. Following those negotiations a delimitation agreement was reached on 27 October 1969. It entered into force on 7 November 1969. However, it did not cover the area lying to the east of Borneo. In October 1991 the two Parties set up a joint working group to study the situation of the islands of Ligitan and Sipadan. They did not however reach any agreement and the issue was entrusted to special emissaries of the two parties who, in June 1996, recommended by mutual agreement that the dispute should be referred to the International Court of Justice. The Special Agreement was signed on 31 May 1997.' *See* Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), Judgement, 2002 I.C.J. 624, 642, para. 31 (17 December).

This taxonomy of critical dates[53] enables the judge to determine the time at which the territorial titles at stake must be definitively frozen in their development (and reciprocal strengthening). As an arbitral tribunal correctly stressed: 'the notion of the critical date is not a rigid one and that a good deal is left to the appreciation of the Court, and moreover that the critical date is not necessarily the same for all purposes.'[54]

International case law is consonant whether the dispute is territorial, insular or even bears on maritime spaces. The International Court of Justice underlined in a more recent case:

> The Court considers that in cases where there exist two interrelated disputes, as in the present case, there is not necessarily a single critical date and that date may be different in the two disputes. For these reasons, the Court finds it necessary to distinguish two different critical dates which are to be applied to two different circumstances. One critical date concerns the attribution of sovereignty over the islands to one of the two contending states. The other critical date is related to the issue of delimitation of the disputed maritime area.[55]

Whichever critical date is determined by a tribunal among these potential candidates, it will have the (same) effect of freezing in law any territorial modification or, if one prefers, any change in the strength of the competing alleged territorial titles that might favour one of the parties to the dispute. Therefore, any act, fact or situation occurring after this 'critical period'[56] must not be taken into account to ascertain the legal title and thus ultimately to adjudicate the dispute. Facts and situations posterior to the critical date cannot strengthen nor weaken the parties' respective claims to territorial sovereignty. In the same vein, the International Court of Justice wisely maintained that:

> In the context of a maritime delimitation dispute or of a dispute related to sovereignty over land, the significance of a critical date lies in distinguishing between those acts performed à titre de souverain which are in principle relevant for the purpose of assessing and validating effectivités, and those acts occurring after such critical date, which are in general meaningless for that purpose, having been carried out by a state which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims. Thus a critical date will be the dividing line after which the Parties' acts become irrelevant for the purposes of assessing the value of effectivités. As the Court explained in the Indonesia/Malaysia case,
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> > 'it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party

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[53] It may happen sometimes that the determination of the critical date does not arise in any particular dispute between the parties concerned for the former is 'self-evident', as Sánchez Rodríguez wisely observed, *supra* note 8, at 284.

[54] Argentina-Chile Frontier (Arg./Chile), Award, 1966, XVI R.I.A.A. 109, at 167 (9 December).

[55] Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. 659, 699, para. 123 (8 October).

[56] We borrow this expression from Max Huber in Island of Palmas/Miangas (Neth./U.S.), Award, 1928, II R.I.A.A. 829, at 867 (4 April).

> which relies on them' (Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002, p. 682, para. 135)'[57]

Therefore, the concept of 'critical date' finds its *raison d'être* in the distinction between those facts which concur to create or extinguish a territorial title, and those facts which cannot be taken into account to these purposes. At most, they might be availed of in order to shed some light on the legal titles as established before the critical date.

Arguably, this is what the International Court of Justice had in mind when it declared in the 2012 *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case: 'In light of the above, the Court concludes that 12 June 1969, the date of Nicaragua's Note in response to Colombia's Note of 4 June 1969 (see paragraph 69), *is the critical date for appraising* effectivités *in the present case*.'[58]

Ultimately, the main goal of the critical date is to assess the legal status of *effectivités* (before and after the critical date) so that they may be considered alternatively as title-source or title-evidence.[59]

Despite its sound rationale, some judicial decisions have minimized the role of the critical date.[60] For instance, in the *Dubai/Sharjah* case, the arbitral tribunal relativized the actual scope and function of the critical date by affirming that in some territorial disputes, it is merely a procedural rule, likely thus to apply when 'it was necessary to establish exactly and precisely when in the past sovereignty was exercised by a state over a given territory, as in the Island of Palmas and Eastern Greenland cases'.[61]

In other cases, the expression itself does not appear in the text of the judicial decision, although it is implicitly referenced. For example, although the concept of critical date and other related concepts are not mentioned in the *Kasikili/Sedudu Island*

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[57] Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. 659, 697–8, para. 117 (8 October). The Court reproduced this same excerpt in her subsequent judgment in Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624, paras. 67–8 (19 November).

[58] Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624, para. 71 (19 November) [emphasis added].

[59] *See* Sánchez Rodríguez, supra note 8, at 275; Distefano, *supra* note 4, at 393–400.

[60] *See*, for example, Clipperton Island (Mex./Fr.), Award, 1931, 2 R.I.A.A. 1105–11 (28 January); Minquiers and Ecrehos (Fr. v. U.K.), Judgment, 1953 I.C.J. 47 (17 November); Argentina-Chile Frontier (Arg./Chile), Award, 1966, XVI R.I.A.A. 109 (9 December); Dispute between Argentina and Chile Concerning Beagle Channel (Arg./Chile), 1977, XXI R.I.A.A. 53 (18 February).

[61] Dubai-Sharjah Border Arbitration (Dubai/Sharjah), Award, 1981, 91 I.L.R. at 94 (19 October). In this connection, one might also mention: Dispute between Argentina and Chile Concerning Beagle Channel (Arg./Chile), 1977, XXI R.I.A.A. 53, at 175–81, paras. 156–60. (18 February); Indo-Pakistan Western Boundary (Rann of Kutch) (India/Pak.), Award, 1968, XVII R.I.A.A. 1, at 64–5 (19 February); Temple of Preah Vihear (Cambodia v. Thai.), Merits, 1962 I.C.J. 6, at 28–9 (15 June); Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 554, 586 and 597, paras. 30 and 81 (22 December); Location of Boundary Markers in Taba between Egypt and Israel (Egypt/Isr.), Award, 1988, XX R.I.A.A. 1, at 45, para. 173 (29 September); Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening), Judgment, 1992, I.C.J. 351, 401, para. 47 (11 September); Argentina-Chile Frontier (Arg./Chile), Award, 1966, XVI R.I.A.A. 109, at 167 (9 December).

case,[62] it is clear that the Court fixed the critical date in 1914, that is to say, the outbreak of the First World War and thus the beginning of the end of Germany's rule as a colonial power over South-West Africa. In fact, the articulation is subtler, for that year is the 'critical date for determining the subsequent practice of the parties as a means of interpretation of the 1890 Anglo-German Agreement'.[63] Therefore, accuracy dictates that we speak, instead of a critical date, of a 'critical period', extending from 1890 to 1914.

### C. Legal Effects of the Critical Date in Territorial Disputes

The critical date raises a watershed between those facts that can create a title of territorial sovereignty and those that do not have this feature. What is the normative value of those facts that occur after the critical date in territorial disputes? Do arbitral tribunals completely discard facts occurring after the critical date when settling territorial disputes? Or, more realistically, should they be taken into account? This issue must be addressed under the angle of the bifocal concept of legal title, such as title-source and title-evidence. While the critical date freezes states' claim with regard to their titles-source[64] (such as those acts which lead to the creation, extinction, weakening or consolidation), on the other hand international tribunals[65] do often look at facts occurring after the critical date in order to find title evidence which could shed some light on the title-source as it exists before.[66] In brief, acts occurring after the critical date may well be taken into consideration in order to prove a title otherwise

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[62] Kasikili/Sedudu Island (Bots./Namib), Judgment, 1999 I.C.J. 1045 (13 December).

[63] *Id.*, 1227, para. 69 (Dissenting Opinion of Judge Parra-Aranguren).

[64] The Barotseland Boundary Case (Gr. Brit./Port.), Award, 1905, XI R.I.A.A 59, at 68 (30 May).

[65] *See*, for example, Tacna-Arica Question (Chile/Peru), Award, 1925, II R.I.A.A. 921, at 957 (4 March); Award on the claims of Great Britain and Portugal to certain territories formerly belonging to the Kings of Tembe and Mapoota, on the eastern coast of Africa, including the islands of Inyack and Elephant (Delagoa Bay or Lorenzo Marques) (Gr. Brit./Port.), Award, 1875, XXVIII R.I.A.A. 157–62 at 161? (24 July); Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening), Judgment, 1992, I.C.J. 351, 401 and 515–16, paras. 67 and 264–6 (11 September); Honduras Borders (Guat./Hond.), Award, 1930, II R.I.A.A. 1322, at 1325 (16 July).

[66] Island of Palmas/Miangas (Neth./U.S.), Award, 1928, II R.I.A.A. 829, at 866 (4 April); Fitzmaurice, *supra* note 12, at 44; Bardonnet, *supra* note 6, at 70; Luis Ignacio Sanchez Rodriguez, *Fecha critica, contenciosos territoriales y jurisprudencia: Hacia un nuevo orden internacional y europeo* in ESTUDIOS EN HOMENAJE AL PROFESOR DON MANUEL DIEZ DE VELASCO 661–87 (1993); Luis Ignacio Sanchez Rodriguez, *El problema de la fecha critica en los litigios relativos a la atribución de la soberanía territorial del Estado*, 4 ANUARIO DE DERECHO INTERNACIONAL, 53–88 (1977–78); L. Frederick E. Goldie, *The Critical Date*, 12 INT'L COMP. L. Q, 1251–84 (1963); 'Bahrain's ongoing activities in the Hawar Islands are the *consequence* of its earlier title, and not its *source*', Oral submissions for Bahrain, Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), 2000 Verbatim Record, CR2000/5, para. 58 (1 June). In effect, Bahrain maintained that its display of state authority over the Hawar islands carried out after one of the relevant critical dates confirmed the existence of a legal title whose roots lay in its conducts before, of course, the aforementioned critical dates. *See* in this connection Maritime Delimitation and Territorial

established. In this context, the critical date relates to the issue of admissibility of evidence, which requires that some requirements must be met. Bardonnet's seminal work on the relevance of facts occurring after the critical date identifies three conditions under which those facts may fall within the legal compass in the context of a territorial dispute. The first condition requires that there must not be 'essential differences in the relations between the Parties and the disputed territory, before and after the critical date'.[67] The second condition, intimately interwoven with the preceding condition, requires that activities after the critical date 'appear as a "gradual and continuous development" of state acts before the critical date thus go back in this past'.[68] In this case, the critical date marks no rupture in a state's behaviour with regard to a disputed territory. Such conduct is therefore 'neutral' as far the establishment of its sovereignty is concerned. The third condition requires that facts occurring after the critical date shall not be carried out by the state concerned with the 'sole purpose of improving or strengthening its legal position compared to that before the critical date'.[69] *Island of Palmas/Miangas*,[70] *Clipperton*,[71] *Minquiers and Ecrehos*,[72] *Rann of Kutch*[73] and the *Taba*[74] cases are generally referred to in order to illustrate this requirement. In brief, irrespective of their nature, state conduct beyond the critical date may be taken into account in a territorial adjudication if they do not improve[75] a state's

Questions between Qatar and Bahrain (Qatar v. Bahr.), Merits, 2001 I.C.J. 40, 256, para. 24 (16 March) (Separate Opinion of Judge Al Khasawneh).

67 Bardonnet, *supra* note 6, at 63 [our translation]. As Bardonnet pointedly noticed, this very expression appeared in the *Island of Palmas/Miangas* case: 'It is to be noted in the first place that there is no essential difference between the relations between the Dutch authorities and the island of Palmas (or Miangas) before and after the Treaty of Paris', Island of Palmas/Miangas (Neth./U.S.), Award, 1928, II R.I.A.A. 829, at 866 (4 April).

68 Bardonnet, *supra* note 6, at 64.

69 *Id*. at 64 [Our translation].

70 *See* Island of Palmas/Miangas (Neth./U.S.), Award, 1928, II R.I.A.A. 829, at 866 (4 April): 'They are however indirectly of a certain interest, owing to the light they might throw on the period immediately preceding …'

71 Clipperton Island (Mex./Fr.), Award, 1931, 2 R.I.A.A. 1105, at 1110 (28 January).

72 '[I]n view of the special circumstances of the present case, subsequent acts should also be considered by the Court, *unless the measure in question was taken with a view to improving the legal position of the Party concerned*', Minquiers and Ecrehos (Fr. v. U.K.), Judgment, 1953 I.C.J. 47, 59 (17 November) [emphasis added].

73 Indo-Pakistan Western Boundary (Rann of Kutch) (India/Pak.), Award, 1968, XVII R.I.A.A. 1, 554–6 (19 February).

74 '[T]he Tribunal must weigh the claims of the Parties on the basis of the physical, geodesic, cartographic, photographic, documentary, and other evidence of the location of pillars on the ground on the critical date – as against whatever conclusions could be reached on the basis of evidence of the situation prior to the critical date – *and in light of the conduct of relevant parties after the critical date, to the extent that such conduct confirms the understanding reached of what the situation was on the critical date*.' *See* Location of Boundary Markers in Taba between Egypt and Israel (Egypt/Isr.), Award, 1988, XX R.I.A.A. 1, at 33, para. 112 (29 September) [emphasis added].

75 According to D.H.N. Johnson, critical date is indeed: 'the date after which the actions of the parties cannot affect the legal situation', D.H.N. Johnson, *Acquisitive Prescription in International Law*, 27 BRIT. Y.B. INT'L L. 332, at 342, n. 4 (1950). In this connection, it is worth

claim, hence its legal title (title-source). It is also the case for the *effectivités* on condition that it is a title-evidence and not a 'vesting fact', that is, a fact to which the relevant legal order attaches a title;[76] if it is so they may be considered as 'admissible evidence' for the purposes of establishing territorial sovereignty.

In the *Benin/Niger* case, the International Court of Justice made it clear that 'the examination of documents posterior to independence (such as the critical date) cannot lead to any modification of the 'photograph of the territory' at the critical date unless, of course, such documents clearly express the parties' agreement to such a change.[77]

In the *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia.)* case, Sir Elihu Lauterpacht, on behalf of Malaysia, rightly asserted that '[t]he proposition is now well established in international law that it [the critical date] is not concerned with the admissibility of evidence but with the weight to be given to it. There is no automatic cut-off date for the admissibility of evidence.'[78]

Therefore, the critical date does not legally neutralize facts after the critical date, but rather confer upon them a different 'legal weight'. Arguably, it can be maintained in the light of international jurisprudence, briefly sketched earlier, that facts subsequent to the critical date may well possess a confirmatory character of the situation *before*, provided of course they do meet the requirements enunciated by Professor Bardonnet. This is what can also be inferred from Judge Fitzmaurice's individual opinion appended to the International Court of Justice's judgement in the *Temple of Preah Vihear* case: 'A

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reiterating that maps established after the critical date are irrelevant for the purposes of the 'interpretation of a treaty, Judge Parra-Aranguren observed with regard to the '1890 Anglo-German Agreement', *see* Kasikili/Sedudu Island (Bots./Namib), Judgment, 1999 I.C.J. 1045, 1227–8, para. 71 (13 December) (Dissenting Opinion of Judge Parra-Aranguren). On maps, *see* Chapter 11 of this volume.

[76] Sir Jeremy Bentham, Traités de Législation Civile et Pénale, vol. I, ch. XV, 281 (1802).

[77] Frontier Dispute (Benin/Niger), Judgment, 2005 I.C.J. 90, 109, para. 26 (12 July). The telling and penetrating expression 'photograph of the territory' (in original French: 'instantané territorial') is to be found in Judge Abi-Saab's individual opinion, at 660, para. 5. The Court employed the same expression in Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 554, 568, para. 30 (22 December).

[78] Oral submissions for Malaysia, Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), 2002 Verbatim Record, CR2002/30, at 27, para. 4 (6 June): 'Third, and more important, something must be said about the critical date to which both Sir Arthur Watts and Professor Pellet have referred. Sir Arthur said that "the dispute now before the Court crystallized in 1969". In so far as this was meant to suggest that there was something in the nature of a dispute before 1969, which solidified, so to speak, in that year there is no basis for it whatsoever. Before the maritime delimitation discussions in 1969 neither Indonesia nor its predecessors had given any indication of an interest in or claim to the islands. More likely, however, Sir Arthur meant only what he then said next: "For the purpose of admitting and assessing evidence of the exercise of state sovereignty, any conduct after that date is to be disregarded." This was also the argument of Professor Pellet. The contention is, with respect, unsustainable. The proposition is now well established in international law that it is not concerned with the admissibility of evidence but with the weight to be given to it. There is no automatic cut-off date for the admissibility of evidence. All the evidence may be looked at. If, to use Sir Arthur's words, it is "self-serving, designed to strengthen, or even establish, that state's claim to sovereignty" its weight will be correspondingly reduced.'

confirmation only confirms what is; it cannot *per se* alter, add to, or detract from the latter, which must be ascertained *ab extra*.'[79]

*Mutatis mutandis*, one may compare the scission between title-source and title-evidence to the difference between subsequent state practice leading respectively to the modification or interpretation of a treaty. While the former constitutes a title-source, the latter, being merely an evidence of a title, is meant to cast light on it.[80]

In closing this sub-section, it must be stressed that the principle of critical date has a substantive nature with procedural consequences. In other words, on one side, by virtue of its substantive nature, only those facts that occur before the critical date are deemed to create or extinguish a territorial title, unlike those taking place after it. On the other side, such as on the procedural plane, only those facts before the critical date are admissible before an international judicial organ with the purpose of proving a territorial title. Those after the critical date may only be adduced before it with the sole purpose of confirming the title (otherwise established), provided that the aforementioned stringent conditions are met.

## II INTERTEMPORAL LAW

According to Judge Huber, this expression addresses the question of determining 'which of different legal systems prevailing at successive periods is to be applied in a particular case'.[81] As pointed out earlier, time is a quintessential dimension of law and more particularly with regard to the evolution of titles of territorial sovereignty in territorial disputes under international law.

When the interpretation of a fact, or a 'question of fact', is at stake, then it is hard to rebut the 'principle of contemporaneity', that is to determine what is the state of the law 'at that time',[82] either when the treaty was concluded or when their relevant conducts took place. In addition to the critical date, the temporal dimension in territorial disputes encompasses three different issues which are nonetheless intermingled: the evolution of the law (thus extrinsic to the territorial title), the creation and the existence of territorial title (intrinsic to the territorial title) and finally the conflict between competing alleged territorial titles in the lapse of time (both extrinsic and intrinsic to each legal title at dispute). Any territorial dispute must thus be settled by taking into account these three different aspects of the influence of the time factor on the law applicable to territorial disputes.

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[79] Temple of Preah Vihear (Cambodia v. Thai.), Merits, 1962 I.C.J. 6, 62 (15 June).

[80] *See* Bardonnet, *supra* note 6, at 70–77; Giovanni Distefano, *L'interprétation évolutive de la norme internationale,* 115 R.G.D.I.P. 373, at 375–96 (2011).

[81] Island of Palmas/Miangas (Neth./U.S.), Award, 1928, II R.I.A.A. 829, at 845 (4 April).

[82] Kasikili/Sedudu Island (Bots./Namib), Judgment, 1999 I.C.J. 1045, 1162, para. 29 (13 December) (Dissenting Opinion of Judge Weeramantry).

### A. Evolution of the Law

Since public international law does evolve continuously,[83] 'a fruitful application of the rules related to the intertemporal law'[84] is of the utmost importance in the toolbox of the international lawyer dealing with territorial disputes. The famous maxim '*tempus regit actum*', which enshrines a fundamental principle of Roman procedural law, introduces us to the temporal dimension of law, namely the so-called intertemporal law.

Certain facts are deemed to produce pre-determined legal effects in a given legal order and at a given stage of the latter's evolution. In the case in point, certain facts may create, extinguish or modify territorial titles, thanks to the operation of specific rules designed for this purpose. Therefore, in the specific *problématique* of territorial disputes, a title to territorial sovereignty goes through three different stages in its lifetime, namely its creation, its continuing existence[85] and possibly its decline or extinction.[86] Since the life of a legal title does not stop at the instantaneous moment of its creation but is meant to continue, it is therefore appropriate to consider its duration throughout time.

Therefore, a legal fact which admittedly produces some legal effects at a given time (and thus at a corresponding phase of the evolution of the law) must, in order for these effects to continue to exist, fulfil relevant conditions to this effect that the law imposes.[87] Under this angle, one may better savour the construction of the principle of intertemporal law that Judge Huber enunciated in the leading *Palmas/Miangas* case: 'The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.'[88]

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[83] 'Law is a living deed, not a brilliant honours-list of past writers whose work of course compels respect but who cannot, except for a few great minds, be thought to have had such a vision of the future that they could always see beyond their own time', Legal Consequences for states of the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 75 (21 June) Separate Opinion of Judge Ammoun).

[84] Kohen, *supra* note 14, at 160 [our translation].

[85] Fitzmaurice, *supra* note 12, at 66.

[86] *See* SIR JOHN SALMOND, JURISPRUDENCE 476, para. 120 (9th ed., 1937).

[87] International case law has long embraced this requirement, well before the famous Island of Palmas' *ratio decidendi*. *See*, in this respect, the legal opinion of the Pope in the Carolinas and Palaos (Ger./Spain) mediation of 22 October 1885 in HENRI LA FONTAINE, PASICRISIE INTERNATIONALE: HISTOIRE DOCUMENTAIRE DES ARBITRAGES INTERNATIONAUX 285–6 (1902).

[88] Island of Palmas/Miangas (Neth./U.S.), Award, 1928, II R.I.A.A. 829, at 845 (4 April). It might well be that Judge Huber took inspiration from art. 17 (final title, ch. 1: Application of Former and New Law) of the Swiss Civil Code which is so worded: 'Rights in rem existing when this Code comes into force continue to be recognised under the new law …' (para. 1), yet 'the scope of rights of ownership and restricted rights in rem is subject to the new law after this Code …' (para. 2). In sum, this provision aims through its two paragraphs at defining the conditions under which rights in rem are continued after (in spite of) the change of the law related thereto. It's not to bold then to affirm in the light of this provision that for a right in rem to be upheld it needs to be 'updated', while, on the other hand its prior existence (thus its birth) is not affected by the new law.

By way of consequence, from the standpoint of the two-headed principle of intertemporal law, as construed by Judge Huber, one ought to distinguish – with regard to territorial disputes under public international law – between the birth of the title (upon which stands territorial sovereignty) and its continued existence. As much as the creation of a territorial title of sovereignty must take place in conformity with the rules existing at that time, as much its continuing existence is regulated by the new requirements of the law, failing that it might well terminate.[89]

International, municipal[90] jurisprudence as well as doctrine[91] posterior to the *Palmas/Miangas* case are consonant[92] with the rule of intertemporal law. The latter, even though brilliantly enucleated by Judge Huber, germinated[93] well before since its harbingers may be unearthed in the *Delagoa Bay* case: 'In the Sixteenth Century, discovery constituted a title of acquisition. Hence, the validity of a title must be judged according to the legal principles admitted at that time (…) Title of acquisition must be appreciated in the light of the applicable law at the corresponding epoch.'[94]

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[89] *Id.*, at 846.

[90] Reference re the Seabed and Subsoil of the Continental Shelf Offshore of Newfoundland (Supreme Court of Canada), Judgment, 1984, 86 I.L.R., at 622 (8 March); Ownership of the bed of the Strait of Georgia and Related Areas (British Columbia Court of Appeal), Judgment, 1976, 73 I.L.R., at 217–18 (25 June); Campione v. Peti Nitrogenmuvek and Hungarian Republic (Italian Court of Cassation), Judgment, 1972, 65 I.L.R., at 299 (14 November); Miserocchi v. Società Agnesi (Italian Court of Cassation), Judgment, 1971, 71 I.L.R., at 588 (13 December).

[91] As Judge De Castro observed in this regard: 'The rule *tempus regit factum* must also be applied to ascertain the legal force of new facts and their impact on the existing situation. New facts will be subject to the rules of law in force at the time when they occur', Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 169 (16 October) (Dissenting Opinion of Judge De Castro) Likewise, *see* JEAN COMBACU, SERGE SUR, DROIT INTERNATIONAL PUBLIC 408 (1st ed., 1993); SIR ROBERT JENNINGS, *supra* note 2, at 28–31 (1963); ROBERTO AGO, IL REQUISTO DELL'EFFETTIVITA DELL'OCCUPAZIONE IN DIRITTO INTERNAZIONALE 86–96 (1934); ROLANDO QUADRI, INTRODUZIONE AL DIRITTO INTERTEMPORALE 595–676 (1956); Edward McWhinney, *The Time Dimension in International Law, Historical Relativism and Intertemporal Law*, in ESSAYS IN HONOUR OF JUDGE MANFRED LACHS 179, 195–9 (Jerzy Makarczyk ed., 1984); Munkman, *supra* note 12, at 60; ALFRED VERDROSS AND BRUNO SIMMA, UNIVERSELLES VOELKERRECHT. THEORIE UND PRAXIS 415–16 (3rd ed., 1984); Déak, *supra* note 1, at 510–15; KOHEN, *supra* note 4, at 186–7; M.C. La Rose, *Le litige canado-américain au sujet de l'île de Machias Seal*, 2 R.Q.D.I. 305, 319 (1985); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening), Merits, 2002 I.C.J. 303, 471, paras. 4–5 (10 October) (Separate Opinion of Judge Ranjeva).

[92] Clipperton Island (Mex./Fr.), Award, 1931, II R.I.A.A. 1105, at 1110 (28 January); Territorial Sovereignty and Scope of the Dispute (Eri./Yemen) (First Stage of the Proceedings), Award, 1998, XXII R.I.A.A. 209, at 237–8, para. 99 (9 October); Aegean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. 3, para. 76 (19 December); Right of Passage over Indian Territory (Port. v. India), Merits, 1960 I.C.J. 6, 37 (12 April).

[93] CASPAR BLUNTSCHLI, LE DROIT INTERNATIONAL CODIFIE 170, n. 270 (1881) [translated from German].

[94] Award on the claims of Great Britain and Portugal to certain territories formerly belonging to the Kings of Tembe and Mapoota, on the eastern coast of Africa, including the islands of Inyack and Elephant (Delagoa Bay or Lorenzo Marques) (Gr. Brit./Port.), Award, 1875, XXVIII R.I.A.A. 157–62 at 160 (24 July) [our translation]. With regard to this dispute and the subsequent adjudication, *see* SIR EDWARD HERTSLET, THE MAP OF AFRICA BY TREATY VOL.

### B. Creation and Continuation (or Continuing Existence) of Territorial Title

Few authorities have challenged Huber's construction of the principle of intertemporal law on the grounds of an inaccurate interpretation of the major distinction between the creation and the continuing existence of a territorial title. According to Jessup,[95] there would be a great instability in international relations, if conformity with the new applicable law were a requirement for the continued existence of a title of territorial sovereignty. For Jessup, almost no title would withstand the application of the intertemporal principle, leading hence to a blossoming of territorial claims. However, this assertion is refutable for several reasons. In the first place, instead of weakening a title, the relevant conduct of states concerned may over time lead to strengthening it. Secondly, and foremost, the creation and the continued existence of a territorial title must be carefully distinguished. Furthermore, the validity of Huber's formulae has been more recently contested on the basis that any title, established on facts that are prohibited under contemporary international law (such as for instance conquest), would be outright declared null and void, leading thus to paradoxical consequence:

> Nowadays conquest cannot confer title, in the past it could. Do old titles on conquest now become void? If so, the results could be very startling: carried to its logical conclusion, this suggestion would mean that North America would have to be handed back to the Red Indians and the English would have to hand England back to the Welsh.[96]

This excerpt betrays confusion, again, between the creation and the continuing existence of a territorial title. In fact, a title that is originally founded on a 'vesting fact' such as conquest, when the latter was admitted by the law applicable at the time, is henceforth completed by the evolution of public international law. It follows that other 'title-vesting facts' come up adding to the original (and valid) title and hence keep it up to date in conformity with the requirements of the new law.[97] In other words, while the root of the title[98] is constituted by conquest, other facts have since then accrued making ultimately a composite title. Its continued existence does not draw solely from conquest anymore, but from its conformity with the new requirements of the law. In brief, a title based on conquest, or any other fact that is no longer valid under contemporary international law, is not extinguished by the operation of the new law, for its creation was valid at the relevant epoch. Hence, the corollary of the principle of intertemporal law provides that only the rules in force at the time when a given 'title-vesting fact'

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III 991–8 (1909). It is worth stressing in this connection that, especially in the past, a wide majority of territorial disputes relevant to the critical date referred to the legal effects of discovery (or symbolic occupation) and its legal effects towards the establishment of territorial sovereignty. As a matter of fact, Max Huber had precisely to tackle this thorny. In the process, he articulated the germane notion of 'inchoate title'.

[95] Philip C. Jessup, *The Palmas Island Arbitration*, 22 AM. J. INT'L L. 735–54 (1928).

[96] MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 153 (6th ed., 1987). Likewise, *see* P.K. Menon, *Title to Territory: Traditional Modes of Acquisition by states*, 72 REVUE DE DROIT INTERNATIONAL, DE SCIENCES DIPLOMATIQUES ET POLITIQUES 1, 13 (1994). *Contra*, and rightly so, *see* SIR ROBERT JENNINGS, *supra* note 2, at 31.

[97] Minquiers and Ecrehos (Fr. v. U.K.), Judgment, 1953 I.C.J. 47, 124 (17 November).

[98] *See infra* note 102.

occurs may be applied to it. Therefore, the continuing existence of a territorial title cannot be affected as a result of the retroactive[99] application of rules pertaining to the creation of legal titles; otherwise in this case one would mistakenly apply 'today's' rules related regarding the creation of titles of sovereignty to a title created in a completely different legal context.[100] Conversely, in order to continue to exist, the right or competence so acquired will be governed by the application of the new requirements of the law pertaining to the upholding of territorial titles. For instance, the colonial territories that (notably) European powers acquired until the first decades of the twentieth century were considered as valid under the public international law system existing at that time. However, since the emergence of the principle of self-determination in the framework of the UN Charter, their continuing existence is no longer juridically tenable; the principle of self-determination thus undermined irremediably the validity of titles to colonial territories.[101]

In conclusion, one ought to stress that the principle of intertemporal law is based on the paramount distinction between the creation and the continuing existence of the territorial title. The International Court of Justice in the *Minquiers and Ecrehos* case acutely underlined this two-fold dimension of the principle that 'Such an alleged original feudal title of the Kings of France in respect of the Channel Islands could to-day produce no legal effect, unless it has been replaced by another title valid according to the law of the time of replacement'.[102] Conversely, the Court held that 'On the other hand, a title by conquest necessarily retains an element of validity in those cases where the root of present title goes back to the time when title by subjugation was recognised in international law'.[103]

Therefore, and as a general rule, it shall be noted that the need to uphold the title in conformity with the 'legal systems prevailing at successive periods'[104] of time flows from the composite structure of most (if not all) of the territorial titles. Judge Gros arguably had this requirement in mind when he noted:

> First rule: A legal fact must be viewed in the light of the law contemporaneous with it. Second rule: When the legal system by virtue of which the title has been validly created

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[99] *See* SIR ROBERT JENNINGS, *supra* note 2, at 28.

[100] 'A just acquisition in 1066 or 1620 remains a just root of title in 1975', Tony Honoré, *Property, Title and Redistribution,* 10 ARCHIV FÜR RECHTS-UND-SOZIALPHILOSOPHIE 107, 109 (1977).

[101] Art. 34 of the 1885 Treaty of Berlin (on Africa), is another example, although it may be construed as falling between the creation and the continuing existence of a territorial title. It provides that 'Any Power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the Power which assumes a Protectorate there, *shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own*' [emphasis added].

[102] Minquiers and Ecrehos (Fr. v. U.K.), Judgment, 1953 I.C.J. 47, 56 (17 November).

[103] OPPENHEIM'S INTERNATIONAL LAW, *supra* note 12, at 702, para. 267.

[104] Island of Palmas/Miangas (Neth./U.S.), Award, 1928, II R.I.A.A. 829, at 845 (4 April).

> disappears, the right can no longer be claimed under the new legal system unless it conforms to the conditions required by that system.[105]

Besides, in a context other than territorial disputes, the International Court of Justice has often relied on this principle in order to clarify the importance of the legal context applicable to a given instrument. In the *Namibia* advisory opinion, the Court affirmed that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation'.[106] In doing so, the Court was attuned with the 'teachings of the most highly qualified publicists of the various nations' (Article 31(1)(d) of the Statute of the International Court of Justice) for the Institut de droit international 1975 resolution affirms:

> Wherever a provision of a treaty refers to a legal or other concept without defining it, it is appropriate to have recourse to the usual methods of interpretation in order to determine whether the concept concerned is to be interpreted as understood at the time when the provision was drawn up or as understood at the time of its application. Any interpretation of a treaty must take into account all relevant rules of international law which apply between the parties at the time of application.[107]

In conclusion, Judge De Castro put an adamant epitaph on the criticisms aimed at the *Palmas/Miangas*' construction of this principle: 'Huber's dictum has been the subject of observations by commentators who think that excessive weight was given to the new law; but regardless of the merit of their comments on the way in which Huber expressed his thought, it is clear that his arbitral award was just.'[108]

## CONCLUSION

In addition to the concluding remarks that have been put forward above in each specific section, the time has come to provide a general conclusion on the impact of time in the context of territorial disputes and their settlement. In this chapter, we have endeavoured to show that unsurprisingly, time plays a paramount role in the settlement of territorial disputes, as elsewhere in public international law. The concept of critical date (or

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[105] Oral submissions for U.K, Minquiers and Ecrehos (Fr. v. U.K.), 1953, II I.C.J. Pleadings, at 375 (17 November). Likewise, *see* Sir Elihu Lauterpacht's oral pleadings in Oral submissions for Malaysia, Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.), 2002 Verbatim Record, CR2002/30, para. 81 (8 June).

[106] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31, para. 53 (21 June).

[107] Institut de Droit International, Resolution of 11 August 1975 on 'The Intertemporal Problem in Public International Law', para 4 (11 August 1975), http://www.idi-iil.org/app/uploads/2017/06/1975_wies_01_en.pdf. For more on this interpretative method: Distefano, *supra* note 80, at 383–96.

[108] Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 169 (16 October) (Dissenting Opinion of Judge De Castro); SIR ROBERT JENNINGS, *supra* note 2, at 30, qualifies Huber's gloss (especially with respect of the second rule) as being 'reasonable'.

'critical period') is undoubtedly one of the main tools in the legal panoply of the international jurist versed in this field. In French, one would call them *'recettes de cuisine*: recipes and solutions that a jurist avails himself or herself of in order to solve a dispute. Furthermore, international jurisprudence (the 'kitchen room' of public international law), and the community of judges and arbitrators dealing with to specific territorial disputes have consecrated the very concept of critical date in many regards, thus paving the way to its general formulation. In this sense, the concept of critical date is a pragmatic solution found over time by different tribunals to untangle practical problems they recurrently faced. On this account, the concept of critical date requires flexibility in its handling, thus discarding any dogmatic or mechanist approach and reminding us, in the wake of Pascal, that law, and especially public international law, is pervaded by the '*esprit de finesse*' rather than by 'more geometrico'.[109]

With regard to the principle of intertemporal law, one does not have to drag in Heraclitus and the famous aphorism '*Pantha rei*' ('everything flows')[110] to realize its importance. Unlike the concept of critical date, though it has been initially consecrated in jurisprudence, the principle of intertemporal law has provoked harsh (still ongoing) debates within 'the invisible college of international lawyers'. Both the Institut de Droit International and the International Law Commission have, with some (minor) divergences, tackled this *problématique*.[111] However, it must be reaffirmed in this respect that, regardless of the diversity in legal literature, time neither creates nor extinguishes territorial titles. States' relevant acts *over time* may lead, either by treaty or by other means (conduct), to this result. Time is in fact not an agent of law but one of its dimensions. In both of its dimensions, the principle of intertemporal law, like that of critical date, constitutes an unavoidable phase for any international tribunal empowered to settle a territorial dispute the origins of which are more than often rooted in the (sometimes remote) past. Hence, the necessity to distinguish between the creation and the continuing existence on the background of the evolution of public international law in this field: two circles revolving like a rudimentary kaleidoscope.

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[109] PASCAL, PENSÉES, N° 1, THE DIFFERENCE BETWEEN THE MATHEMATICAL AND THE INTUITIVE MIND (1660).

[110] It is widely assumed that this aphorism, attributed to the pre-Socratic Greek philosopher, has, on the basis of the excerpts hitherto discovered, not been formulated as such by Heraclitus. However, quite a few fragments convey the idea of an eternal movement: 'We both step and do not step in the same rivers. We are and are not', HERMANN DIELS AND WALTHER KRANZ, DIE FRAGMENTE DES VORSOKRATIKER 49a (1922).

[111] Since 2008, the International Law Commission has been working, under the guidance of its Special Rapporteur, Professor Georg Nolte, on the topic of 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties', whose former title was even more eloquent: 'Treaties over time'.</fn>