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Title to Territory in the Post-Colonial Era: Original Title and Terra Nullius *in the ICJ Judgments on Cases Concerning* Ligitan/Sipadan *(2002) and* Pedra Branca *(2008)*

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Abstract

This article approaches two International Court of Justice judgments on the cases concerning Ligitan/Sipadan *(2002) and* Pedra Branca *(2008) from the perspective of the law of territory in the post-colonial context, showing that the Court managed to free the concepts of 'original title' from* 'terra nullius'*. It is prefatorily explained that the concepts of 'original title' and* 'terra nullius'*, which operate in combination, had both functioned as bases for the traditional law of territory and as unilateral justification for colonization by European powers. By contrast, analysis of the two recent judgments illustrates that the Court contrived to separate the two concepts from the context of colonialism by avoiding the determination of the islands as* 'terra nullius' *and expanding the concept of 'original title' while preserving the existing framework of law of territory. The problem is presented with a caveat, however; overemphasizing the significance of 'original title' in the post-colonial context might lead to disregard for the foundations of title to territory, that is effective control of territory and its legitimizing logic, on which the territorial order of today's international society is based.*

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1 Introduction

The International Court of Justice (ICJ) delivered two opposing decisions regarding territorial sovereignty over certain islands in Southeast Asia in 2002 and 2008. The situations in these two cases were quite similar: Malaysia was a party in both cases; both disputes involved the attribution of title to small islands and, finally, each party in both cases claimed the original title of the sultans. Furthermore, there was little evidence that the sultans or their successor states actually exercised sovereignty over the islands. Despite these similarities, the ICJ drew different conclusions in the 2002 and 2008 judgments. In the 2002 judgment regarding sovereignty over Pulau Ligitan and Pulau Sipadan (Malaysia/Indonesia), the ICJ denied that title to the islands belonged to the Sultan of Sulu.[1] In 2008, the ICJ determined that the Sultan of Johor had the original title to an island called Pedra Branca/Pulau Batu Puteh.[2] It also declared that the Sultanate of Johor had established itself 'as a sovereign State with a certain territorial domain under its sovereignty' since 1512,[3] despite the Treaties of Westphalia, which offered the prototype for the notion of territorial sovereignty upon their conclusion in 1648.[4]

The question is why there is a difference between these two cases. In both cases, parties claimed the original title of the sultanate over the islands, which were not fully supported by evidence of actual control over the territory. However, the ICJ reached differing conclusions. This article will evaluate the opposing results of these two decisions from the perspective of the instability of the law of territory in the post-colonial era, focusing on the concept of 'original title'.

What is the instability of the law of territory? The instability was caused by the loss of historical and political foundations. As is well known, the law of territory developed alongside European colonization. Precisely speaking, 'the law of territory', which is used today as a legal framework for states to acquire title to territorial sovereignty – that is, the law of acquisition of title to territorial sovereignty – did not exist before colonization. In the 15th century, there were no specific rules for acquiring territory; the territorial order among European states was settled through legal systems similar to those used to transfer property – that is, inheritance, marriage, cession, or peace treaty.[5] Territories were conveyed among kings and nobles as properties (*patrimonium*).[6] The 'expansion of Europe', which started in the middle of the 15th century, presented completely new situations for Europe; European states faced a new type of

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[1] *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)* (*Ligitan Sipadan* case), Judgment, 17 December 2002, ICJ Reports (2002) 625.

[2] *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks, and South Ledge (Malaysia/Singapore)* (*Pedra Branca* case), Judgment, 23 May 2008, ICJ Reports (2008) 12, paras 60–69. This article focuses on Pedra Branca. The argument for Pedra Branca can also be applied to the dispute over original title to Middle Rocks and South Ledge.

[3] *Ibid.*, paras 53–59.

[4] Treaties of Westphalia 1648, 1 Parry 271.

[5] N. Hill, *Claims to Territory in International Law and Relations* (1945), at 143; J.H.W. Verzijl, *International Law in Historical Perspective*, Part III: *State Territory* (reprinted, 1970), at 298–325.

[6] See generally H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), at vii, 37, 91.

territorial order – that is, the legal relationship between the 'colonizer' and the 'colonized', which could not be regulated by the existing rules in Europe.[7] Subsequently, European powers sought specific legal disciplines in order to regulate and justify colonization and their rights and powers over colonies. This was the origin of 'the law of territory' as an independent legal discipline, separate from the law of property.[8]

It is difficult to imagine that, given its origins, the law of territory could be sustained intact today since colonization as a practice has been rejected. In fact, the principle of intertemporal law requires that the legal effect of acquisition of title to territory should be determined in the light of the law as it stood at the time.[9] However, even with the operation of intertemporal law, the impact of decolonization on the law of territory is significant.[10] Although the same rule of the past is applied, its interpretation is not necessarily the same; the law is always interpreted and applied with reference to its justification of, or rationale for, legal persuasiveness.[11] James Crawford also stated that intertemporal law 'does not require that one set of doctrinal or ideological justifications be preferred to another where these are not clearly incorporated in the transaction or practice in question'.[12] Even if the terms of the law of territory can be employed in the post-colonial era as it was during the colonial period, the question remains: how does the different context affect the interpretation and application of the law of territory?

The ICJ's approach to this question has thus far seemed to be to avoid it. As its primary task is to solve disputes between the parties, the Court does not necessarily apply the whole of the law of territory squarely. The application of the concepts *a la carte* suffices the task of the Court. However, one can easily imagine that using concepts without considering their original justifications, rationales and contexts might alter the concepts themselves. The ICJ's avoidance takes several forms. One of these is to

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7 Greig, 'Sovereignty, Territory and the International Lawyer's Dilemma', 26 *Osgoode Hall Law Journal* (1988) 127.

8 M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), at 98–178; Fisch, 'The Role of International Law in the Territorial Expansion of Europe, 16th–20th Centuries', 3 *International Centre for Comparative Law and Politics Review* (2000) 7, at 7–8; Greig, *supra* note 7, at 140. It has also been noted that the notion of 'sovereignty', like the law of territory, was developed through the encounters with non-Europeans that occurred through colonization. See Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', 40 *Harvard International Law Journal* (1999) 1, at 1.

9 For a description of the principle of intertemporal law, see *Island of Palmas Case (Netherlands and United States)* (*Palmas* case), Decision of 4 April 1928, reprinted in UNRIAA, vol. 2, 831, at 845. Arbitrator Huber also contended that the existence of rights should be assessed in accordance with the development of the law during the existence of said rights. See also R.Y. Jennings, *The Acquisition of Territory in International Law* (1963), at 29; Elias, 'The Doctrine of Intertemporal Law', 74 *American Journal of International Law* (*AJIL*) (1980) 285.

10 Munkman, 'Adjudication and Adjustment: International Judicial Decision and the Settlement of Territorial and Boundary Disputes', 46 *British Yearbook of International Law* (*BYIL*) (1975) 1, at 20; S.P. Sharma, *Territorial Acquisition, Disputes and International Law* (1997), at 161–163; O'Connell, 'International Law and Boundary Disputes', 54 *Proceedings of the American Society of International Law* (1960) 78, at 78.

11 Cf. Koskenniemi, 'New Epilogue', in M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006) 562, at 568.

12 J. Crawford, *The Creation of States in International Law* (2nd edn, 2006), at 271.

exclude the application of a traditional concept by introducing a legal principle such as *uti possidetis*.[13] Although it will not be discussed in detail in this article, this principle converts the nature of disputes, allowing the ICJ to focus on the location of the boundaries of colonial administrative units rather than on the attribution of actual title to a territory. In essence, this principle excuses the Court from considering the legal status of the territory in question.[14] Another means of avoidance is to exclude a problematic concept by expanding the meaning of another problematic concept, as the Court did in the two aforementioned cases. The 2002 and 2008 judgments avoided assessing whether the territory in question was *terra nullius* by expanding the meaning of 'original title'.

The purpose of the article is to illustrate how expanding the concept of original title connects with excluding the concept of *terra nullius* by analysing two particular cases. It is important to bear in mind the question of what the Court avoided by expanding the idea of original title and excluding *terra nullius*. It is more than the reluctance to apply the legacies of colonialism. The Court avoided assessing the quality of territorial control by states, which is at the heart of the difficulties of the law of territory in the post-colonial era. Before examining this question, it should be mentioned that the term 'the law of territory' will be used in this article, which is broader than 'the law of acquisition of territorial sovereignty'. The law of territory in the post-colonial era should not be confined necessarily to the narrow meaning of the law of acquisition of title to territory but may also imply the law of territorial control.[15]

The article is structured as follows. First, the two concepts, *terra nullius* and original title, will be prefatorily observed in their traditional settings. This examination will illustrate the fundamental emphasis on the factor of territorial control (so-called 'effective possession' or 'the display of sovereignty') in the doctrine of the law of territory and will introduce the two conceptions of original title. Second, the concepts of original title and *terra nullius* in the two judgments will be examined. It will be demonstrated that assessing territorial control is extremely difficult in the post-colonial era within the framework of the traditional law of territory. Finally, in concluding remarks comparing the foregoing to the advisory opinion of *Western Sahara* (1975),[16] the difference between the law of territory in the colonial and post-colonial eras, expounded in the two judgments, will be briefly explored.

[13] Cases that have recently applied the principle of *uti possidetis* include: *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, 22 December 1986, ICJ Reports (1986) 554; *Case Concerning the Land, Island and Maritime Frontier Dispute*, Judgment, 11 September 1992, ICJ Reports (1992) 351; *Frontier Dispute (Benin/Niger)*, Judgment, 12 July 2005, ICJ Reports (2005) 90; *Frontier Dispute (Burkina Faso/Niger)*, Judgment 16 April 2013, ICJ Reports (2013) 44.

[14] *Burkina Faso and Mali* case, *supra* note 13, at 566, para. 23. For a detailed analysis, see Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today', 1997 *BYIL* (1997) 75; Sorel and Mehdi, 'L'*Uti Possidetis* entre la consecration juridique et la pratique: essai de réactualisation', 40 *Annuaire français de droit international* (1994) 11.

[15] For the broader connotation of 'the law of territory', see S. Huh, *Ryoiki Kengen Ron* [*The Acquisition of Territory in International Law*] (2011) (in Japanese), which gives a detailed analysis of the points mentioned here and divides the concept of title into two tiered foundations (legitimizing foundation and material foundation).

[16] *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports (1975) 12.

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2 Original Title and *Terra Nullius*

A *Foundations of Title to Territory*

Before examining 'original title', it is necessary to define 'title'. The concept of 'title' is used in public international law to show that a territory belongs to a state. Title to territory is usually defined as 'a vestitive fact of territorial sovereignty' or 'a source of territorial sovereignty'.[17] A state acquiring such title is vested with sovereignty that is opposable *erga omnes*.[18] In other words, when a state has title to a certain territory, that state's control over the territory in question is legally justified and other states must respect that state's control over said territory. At the same time, territorial control without title is never accepted as legitimate.[19]

However, the definition of title to territory as a 'vestitive fact' does not itself indicate what facts can constitute a right. Many commentators have endeavoured to establish the concrete contents of title to territory based on authoritative works and state practices.[20] One such endeavour seeks to formulate the *modes* of acquiring title to territory rather than articulating the *definition* of title to territory itself. Textbooks often enumerate the following five modes of acquiring title: occupation, accession or accretion, prescription, cession and subjugation.[21] Alternatively, the *Palmas* case, the leading case on the law of territory, found that all modes of acquiring title are based on 'an act of effective apprehension'. *Palmas* advanced this famous finding: '[S]o true is this, that practice, as well as doctrine, recognizes – though under different legal formulae and with certain differences as to the conditions required – that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title.'[22] Arbitrator Max Huber thus presented the content of title as 'the continuous and peaceful display of territorial sovereignty' (also called 'effective possession'). This 'display of sovereignty' formula from the *Palmas* case has been employed as the standard of deciding territorial disputes in many cases, including the

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17 Jennings, *supra* note 9, at 4; Verzijl, *supra* note 5, at 297; Brownlie, *Principles of Public International Law* (6th edn, 2003), at 129. However, Brownlie doubted the existence of the abstract notion of 'title to territory' in public international law from a programmatic perspective.

18 Jennings, *supra* note 9; Brownlie, *supra* note 17.

19 E.g., the Iraqi invasion of Kuwait was never considered to entail the acquisition of title, even though Iraq took control of the territory, SC Res. 660 (1990). Cf. E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (2006); Distefano, 'The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law', 19 *Leiden Journal of International Law* (2006) 1041, at 1067–1074.

20 M.G. Kohen, *Possession contestée et souveraineté territoriale* (1997), at 127–154; M. Shaw, *Title to Territory in Africa: International Legal Issues* (1986), at 16; Distefano, 'La notion de titre juridique et les différends territoriaux dans l'ordre international', *Revue Générale de Droit International Public* (1995) 335, at 336–338.

21 E.g., Lauterpacht, *supra* note 6, at 91; P. Malanczuk (ed.), *Akehurst's Modern Introduction to International Law* (7th edn, 1997), at 147–154; D. Alland (ed.), *Droit international public* (2000), at 128–130; P.-M. Dupuy, *Droit international public* (2nd edn, 1993), at 24–29; N.Q. Dinh *et al.*, *Droit International Public* (1999), at 524–532; Verzijl, *supra* note 5, at 347.

22 *Palmas* case, *supra* note 9, at 839.

aforementioned South Asian cases. Many researchers also deem it to be the modern law of territory.[23]

Disregarding the question of whether Huber's understanding is true or not, it is undeniable that territorial control is an essential element of the law of territory. Answering the question of how a territory should be controlled with regard to deserving title to it is problematic because it requires assessing the quality of this control, which is alien to a decentralized society consisting of equal sovereigns. Although this question has not been settled, it remains abandoned even today. One reason for this abandonment is that the law of territory was applied mainly in the context of colonialism. This does not mean that the law of territory was relevant only to relations between European and non-European states (political entities). Rather, it was stipulated in a universal manner and was applicable to all states, that is, colonizers and colonized. However, the law of territory succeeded in obliterating the question of assessing territorial control by combining it with the unwritten assumption of colonialism: the teleology of civilization.[24] Its tools were 'original title' and '*terra nullius*'. The next section will explain the mechanism of this obliteration.

B *Original Title and* Terra Nullius

Original title can be understood literally as 'a title that is originally acquired'. However, this explanation is a complete tautology unless one elaborates the meaning of the words 'originally acquired'. Original acquisition is usually understood as the new acquisition of a territory that has never belonged to any state or of a territory that has been abandoned. Original acquisition is sometimes explained as the acquisition of *terra nullius*. On the contrary, derivative acquisition is usually understood to mean the act of obtaining title by virtue of certain legal facts or through legal acts by another state. In applying the distinction to the five modes of acquisition of title to territory, *occupation* and *accession* are both classified as original acquisition, while *cession* is a classic example of derivative acquisition.[25] The classifications of *subjugation* and *prescription* have not yet been resolved. They might be classified as derivative acquisition because they involve a former title holder, while they might be considered to constitute original acquisition because the acquisition occurs irrespective of the will of the former title holder.[26]

Some commentators discard this classification, reasoning that it only invites controversy and confusion with no practical merit.[27] Nevertheless, the question of whether there is an original title holder of a disputed territory is decisive. If title to the territory in question has never existed, control of that territory does not prejudice another's

[23] For an eminent example, see R. Jennings and A. Watts, *Oppenheim's International Law*, vol. 1: *Peace* (Parts 2–4) (9th edn, 1996), at 715.

[24] Fisch, *supra* note 8, at 7–8; Koskenniemi, *supra* note 8, at 98–178.

[25] J. Combacau and S. Sur, *Droit international public* (2001), at 409.

[26] See, e.g., T.J. Lawrence, *The Principle of International Law* (3rd edn, 1900), s. 74; Jennings and Watts, *supra* note 23, at 498.

[27] Johnson, 'Consolidation As a Root of Title in International Law', 13(2) *Cambridge Law Journal* (1955) 215, at 217.

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right. Such a right is legitimate in origin. On the other hand, if the title in question is derivative, which is presupposed as the existence of a (former) owner, territorial control by another state is illegitimate unless the owner has consented to the transfer. The importance of the owner's will is clear, considering the rationale for prescription. If the condition of prescription – indisputable possession *à titre de souverain* over a period of time – is fulfilled, the former owner's acquiescence will be presumed, as it will not prejudice anyone's rights.[28] Thus, the category of original and derivative title is significant from the perspectives of legality and legitimacy; if the acquired territory was *terra nullius*, such acquisition is by definition legitimate because it does not prejudice anyone's rights.

Being *terra nullius* is not only a negative justification, as in it does no harm to others; it could justify the acquisition positively when combined with the teleology of civilization. The doctrine based on the teleology of civilization might be called a 'doctrine of ownerless sovereignty'[29] or 'doctrine of dominance'[30] – that is, the idea that a territory of no master (*terra nullius*) should be occupied and utilized effectively. In its original form ('doctrine of occupation'), this doctrine in international law is very simple: the first state to occupy an ownerless territory has title to it.[31] It was transformed from the original conception of the idea, wherein, in the process of colonization, it implied the assumption that non-European states were not qualified to acquire title to, or sovereignty over, a territory because they could not utilize such territory effectively due to their lack of civilization.[32] Consequently, non-European territory was treated as a land of no master, open to occupation by any other state, as long as the state was a civilized state. Furthermore, Europeans asserted that it would be a greater advantage to the whole world to acquire *terrae nullius* and utilize such territories as European colonies rather than leaving them unoccupied. Such appropriation of territory was always considered justified because the occupation of *terrae nullius* comprised an original title, which was legitimate in origin, requiring no will from a transferor.[33]

This legal framework was very 'useful' because the standard of *terra nullius* could never be objective. For example, Mohammed Bedjaoui, using the concept of *terra nullius*, explained the history of excluding non-European states from the law of territory:

28 Jennings, *supra* note 9, at 23.

29 For a more detailed discussion, see Fisch, 'International Law in the Expansion of Europe', 34 *Law and States: A Biannual Collection of Recent German Contributions to These Fields* (1986) 7.

30 Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery, Doc. E/C.19/2010/13, 4 February 2010.

31 This 'doctrine of occupation' of international law should not be considered as stemming fully from Roman law, although it was adapted from it. For a detailed discussion, see G. Distefano, *L'ordre international entre légalité et effectivité; Le titre juridique dans le contentieux territorial* (2002), at 74.

32 For a typical argument for European supremacy, see J. Westlake, *Chapters on the Principles of International Law* (1894), 131–142; W.E. Hall, *A Treatise on International Law* (8th edn, 1924), at 125, 127; Lawrence, *supra* note 26, at 146–149; C.G. Fenwick, *International Law* (2nd edn, 1934), at 251.

33 Unlike other empires, the Europeans tried hard to legitimize their actions rather than simply invoking the right of conquest. For details, see Huh, *supra* note 15; Fisch, *supra* note 29, at 7; J. Fisch, *Die europaische Expansion und das Volkerrecht* (1984); S. Korman, *The Right of Conquest* (1996); W.G. Grewe, *The Epochs of International Law* (2000), at 122.

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> Dans l'Antiquité romaine, est *nullius* tout territoire qui n'est pas romain. A l'époque des grandes découvertes des XVe et XVIe siècles, est *nullius* tout territoire qui n'appartient pas à un souverain chrétien. Au XIXe siècle, est *nullius* tout territoire qui n'appartient pas à un Etat civilisé.[34]

In this quote, *romain*, *un souverain chrétien* and *un Etat civilisé* were taken as the standards for determining which subjects could exercise sovereignty effectively. Needless to say, these standards were arbitrary, especially for the colonized. In this setting, any territories could be *terra nullius* when European powers considered them 'ineffectively utilized' or 'uncivilized', thus leaving them open to original acquisition. In addition, the manipulable concepts of original title and *terra nullius* enabled European powers to deprive the nature of international legal norm of the agreements concluded between European powers and local rulers. In fact, European powers concluded numerous agreements with local rulers during the process of colonization.[35] These European powers used the governing ability of local rulers via various agreements such as agreements of protection and of suzerainty (so-called 'indirect empire') to advance their own aims. Contrary to these common practices, the doctrine upheld the position that colonized territories had been *terra nullius*, local rulers could not be sovereigns and agreements with those who were not sovereigns had no legal effect.[36] As a result, the legality and legitimacy of activities conducted by European powers while colonizing were always assured, irrespective of the existence of numerous agreements with local rulers.[37]

Thus, European unilateral justification with the use of original title and *terra nullius* finally led to the nullification of the binding force of international agreements. However, this 'success' lost its foundation after the Second World War in a wave of decolonization movements. What happened to the basic concepts of the law of territory, such as original title and *terra nullius*, when faced with post-colonialism? Recalling the negative answer in the *Western Sahara* opinion to the question '[W]as Western Sahara at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?', it is easy to understand the problematic character of the concept of *terra nullius*, which treats indigenous people as 'nothing' (*nullius*). In answering this question, it should be kept in mind that the concept of original title was stipulated in general terms, had universal territorial validity and was therefore applicable not only to relationships between European and non-European states but also universally. This is the reason that the concept of original title survived and expanded in the post-colonial world, while *terra nullius* did not.

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[34] *Western Sahara*, ICJ Pleadings (1975), vol. IV, 445, at 448 (exposé oral de M. Bedjaoui).

[35] Fisch, 'Africa as *terra nullius*: The Berlin Conference and International Law', in S. Föster, W.J. Mommsen and R. Robinson (eds), *Bismarck, Europe, and Africa: The Berlin Africa Conference 1884–1885 and the Onset of Partition* (1988) 347; W.R. Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (1973); A. Porter, *European Imperialism, 1860–1914* (1994); Fieldhouse, *The Colonial Empires: A Comparative Survey from the 18th Century* (1966). See also C.H. Alexandrowicz, *The European-African Confrontation: A Study in Treaty Making* (1973); E. Hertslet, *The Map of Africa by Treaty*, Cass Library of African Studies no. 45 (3rd edn, 1968).

[36] Fisch, *supra* note 35, at 365; Johnston, *supra* note 35, at 326.

[37] To explain these protectorate agreements, the novel notion of the 'colonial protectorate' was contrived in the 19th century. For details on this notion and the commentators involved, see Fisch, *supra* note 35.

C *Two Conceptions of Original Title?*

To explain the two conceptions of original title, this section will explore the question faced by the traditional law of territory after decolonization: whether a new state has title to territory at the time of its independence.[38] A newly independent state is supposed to have title to its territory since a state without territory is paradoxical by definition. However, the question arises: when and how does a new state acquire title? Before it acquires title to its territory, its statehood is not yet established. In the framework of the traditional law of territory, as discussed earlier, only a state can acquire title to territory. Regarding this impasse, Lassa Oppenheim claimed: '[T]he acquisition of territory by an existing State and member of international community must not be confused … with the foundation of a new State.'[39] According to Oppenheim, the foundation of a new state is a question of fact, not of law, until the new state becomes a subject of international law via the procedure of recognition.[40] Robert Jennings admitted that the law provides only the modes for acquiring new title and transfer of valid title from an existing state. He also pointed out that the law not only fails to provide any modes for territorial change coincident with the birth of a new state but appears to actually be indifferent as to how the acquisition is accomplished.[41]

Regardless of 'indifference', international law should provide an explanatory framework for the formation of title to territory which is coincident to the birth of a state. Some ideas can be found in case law to explain this form of acquisition of title to territory.[42] One is to expand the concept of original title; some use original title to mean the very first title, irrespective of whether an existing state acquired title from occupation of *terra nullius*. This usage can be seen as expanding the concept of original title. Such an example can be found in the *Qatar/Bahrain* case (2001).[43] Both parties claimed 'original title' to a territory, but they did not claim that they acquired it by occupation of *terra nullius*.[44] In the words of Judge Santiago Torres Bernárdez, who wrote the dissenting opinion in this judgment, both parties based their claims on the idea that the disputed territories had belonged to them 'as from their very origin as individual political entities or States'.[45] Judge Torres Bernárdez advanced the theory of original

[38] Jennings, *supra* note 9, at 7; Starke, 'The Acquisition of Title to Territory by Newly Emerged States', 41 *BYIL* (1965) 411, at 411–413.

[39] L. Oppenheim, *International Law: A Treatise*, vol. 1: Peace (1905), at 264.

[40] *Ibid.*, at 108–110, 264.

[41] Jennings, *supra* note 9, at 8–11.

[42] Other ideas for newly independent states' title to territory were 'ancient title' (*The Minquiers and Ecrehos* case), 'immemorial possession' and 'historical title'. See Y.Z. Blum, *Historic Titles in International Law* (1965); Kohen, 'Original Title in the Light of the ICJ Judgment on Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge', 4 *Youngto Haeyang Youngoo* [*Territory and Seas*] (2012) 6, at 8–11 (in Korean); Kohen, 'Original Title in the Light of the ICJ Judgement on Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge', 15 *Journal of the History of International Law* (2013) 151, at 153–156.

[43] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment, 16 March 2001, ICJ Reports (2001) 40.

[44] *Ibid.*, at 40, 70, para. 99.

[45] *Ibid.*, at 282, para. 64 (dissenting opinion of Judge Torres Bernárdez).

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title in his dissent, pointing out that the definition of original title implied 'a constitutive element' linked to the very birth of the political entity or state concerned *qua* a territorially independent or separate unit.[46] In other words, he presented 'original title' as title that incoming and new states or political entities had been establishing from their beginning. From this point of view, emphasizing a constitutive element in original titles, it is neither original title nor original acquisition, even when an existing state or political entity acquires a title by occupation of *terra nullius*. In this case, a state that has acquired title has gained additional territory beyond its existing territory (*terra firma*) rather than forming its territory *ab origine*.

To take another example, Malcolm Shaw classified the acquisition of title to territory as two categories: the acquisition of newly independent states and additional acquisitions by existing states.[47] This illustrates that, in terms of the classification of acquisition of title to territory, whether an existing state or a new state acquires title to territory is much more significant than whether a territory was *terra nullius* at the time of acquisition. Thus, the concept of 'original title' encompasses two conceptions: one acquired by occupation of *terra nullius* and one established with the birth of state. These two conceptions show the opposing directions. While the former was a tool of choice for colonizers, the latter exists independently of the concept of *terra nullius*, a legacy of colonization. Moreover, the latter conception of original title is a response to decolonization movements in terms of having the potential to justify title to territories of newly independent or non-European 'indigenous' states.

3 Original Title in Judgments

A *The* Ligitan/Sipadan *Case (2002)*

The islands of Ligitan and Sipadan are small islets in the Sulawesi Sea (the Celebes Sea). In negotiations over the delimitations of the continental shelf between Indonesia and Malaysia, beginning in 1969, both states became aware of the importance of the islets for future delimitation. After the tensions of the previous two decades, the parties finally decided to refer the dispute to the ICJ in 1998.[48]

The historical background of the Sulawesi Sea is complex. In the beginning of the judgment, the Court cited quite a number of protectorate agreements with local rulers and treaties of the sphere of influence, explaining that Spain, the Netherlands

[46] *Ibid.*, at 281, para. 60.

[47] M.N. Shaw, *International Law* (5th edn, 2003), at 414–443.

[48] The tensions between the two states were much wider and deeper than the dispute over these islets. For background on the dispute, see R. Haller-Trost, *The Contested Maritime and Territorial Boundaries of Malyasia: An International Law Perspective* (1998), at 227–260; Salleh, 'Dispute Resolution through Third Party Mediation: Malaysia and Indonesia', 15 *Intellectual Discourse* (2007) 155; Salleh *et al.*, 'Malaysia's Policy towards Its 1963–2008 Territorial Disputes', 1 *Journal of Law and Conflict Resolution* (2009) 107. For political analysis of the referral to the International Court of Justice (ICJ), see Butcher, 'The International Court of Justice and the Territorial Dispute between Indonesia and Malaysia in the Sulawesi Sea'. Workshop on New Actors and the State: Addressing Maritime Security Threats in Southeast Asia, Griffith University, Brisbane, 2010 (unpublished).

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and Great Britain had sought hegemony in the area.[49] Among the legal documents, Indonesia relied on the 1891 Convention between Great Britain and the Netherlands, one of the treaties concerning the spheres of influence.[50] On the other hand, Malaysia contended, *inter alia*, that its title was based on succession from the Sultan of Sulu, the original title holder, furthered by a series of alleged transfers of that title to Spain, the USA, and Great Britain (later the United Kingdom), arguing that the 1891 convention did not stipulate anything about maritime features.[51]

As a result, observing that the relevant documents submitted by the parties provided no answer to the question of to whom the islands belonged, the ICJ relied on activities related to the islands and concluded that Malaysia had title to Ligitan and Sipadan. Although the application of the concept of *effectivités* and its citation of paragraph 63 of the judgment of the *Frontier Dispute Case (Burkina Faso/Mali)* are not unquestionable,[52] this article will focus on original title and *terra nullius* in this judgment. In relation to original title, the Court examined whether Ligitan and Sipadan were possessions of the Sultan of Sulu. First, the Court confirmed that these islands do not geographically belong to the Sulu Archipelago proper, which was not contested by the parties. Second, the Court observed that there was no specific reference to the islands in any of the relevant documents, including the agreements between the European powers and the Sultan of Sulu as well as the treaties of the sphere of influence among the European powers. Finally, turning to the possession of the islands, the Court did not accept Malaysia's argument that the Sultan of Sulu possessed the islands through the ties of allegiance between the sultan and the Bajau Laut, who inhabited the islands off the coast of North Borneo and who may have often made use of the two uninhabited islands. The Court maintained that such ties may have existed but were insufficient evidence of the Sultan of Sulu's title to the islands, and, therefore, it concluded that there was no evidence that the Sultan actually exercised authority over Ligitan and Sipadan.[53]

Although the ICJ denied that title belonged to the Sultan of Sulu, it also appeared to exclude the possibility of the islands being *terrae nullius*: '[T]he Court observes that, while the Parties both maintain that the islands of Ligitan and Sipadan were not *terrae nullius* during the period in question in the present case, they do so on the basis of diametrically opposed reasoning, each of them claiming to hold title to those islands.'[54] This quote suggests that the Court concluded that the islands were not *terrae nullius* due to the contention of the parties rather than by looking into the status of the actual control of the islands. Some might point out that the Court was merely 'taking note' of the contention of the parties on *terra nullius.* However, this 'taking note' seemed to affect the findings of the Court. Although this is not the place for a detailed discussion

[49] *Ligitan/Sipadan* case, *supra* note 1, at 634–642, paras 15–31.

[50] Convention between Great Britain and The Netherlands Defining Their Boundaries in Borneo 1891, reprinted in 83 *British and Foreign State Paper* (1892) 41.

[51] *Ligitan/Sipadan* case, *supra* note 1, paras 32–33.

[52] For details, see Huh, *supra* note 15; Distefano, *supra* note 20. *Burkina Faso and Mali* case, *supra* note 13.

[53] *Ligitan/Sipadan* case, *supra* note 1, paras. 109–110.

[54] *Ibid.*, para. 108.

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of the matter, the Court attributed title to Malaysia, relying on the intention *á titre de souverain* of the parties regarding subtle administrative activities such as turtle egg harvesting and the administration of a bird sanctuary, which Judge Franck satirically described as light as 'a handful of feathers or grass'.[55] The Court was able to reach its conclusion on these minor activities of territorial control because the parties seemed to maintain that the islands were not *terrae nullius*.

B *The* Pedra Branca *Case (2008)*

Pedra Branca is an island located at the eastern entrance to the Straits of Singapore from the South China Sea. The origin of the dispute between Malaysia and Singapore was Singapore's protest of a map of Malaysia that designated Pedra Branca as Malay territory. After negotiations, both states signed a *compromis* in 2003.[56] Malaysia claimed the original title of the Sultan of Johor, its predecessor, while Singapore claimed that the construction and commission of the Horsburgh lighthouse constituted acquisition of possession *à titre de souverain* and the maintenance of title. Singapore added the alternative claim in oral argument that Pedra Branca was *terra nullius* until its acquisition of possession by the United Kingdom.[57]

The structure of the ICJ's reasoning in acknowledging the original title of the Sultan of Johor over the islands was as follows: first, it considered whether the territorial domain of the Sultanate of Johor covered all of the islands and islets within the Straits of Singapore, including Pedra Branca and, second, it ascertained whether the original title to Pedra Branca was based in law. Before entering the consideration of the islands, with respect to the original title to the Straits of Singapore, the Court did confirm 'the general understanding',[58] which was not disputed, that 'the Sultanate of Johor, since it came into existence in 1512, established itself as a sovereign state with a certain territorial domain under its sovereignty in this part of southeast Asia'.[59] The Court acknowledged the following evidence as indicating 'the general understanding': that Grotius had made an explicit reference to Johor as a 'sovereign principality' in *De Iure Praedae*; that the Sultan of Johor as sovereign protested the Dutch East India Company's seizure of Chinese junks in the Straits; that British authorities in Singapore recorded a number of descriptions of the geographic extent of the Sultanate of Johor and that a report in the *Singapore Free Press* in 1843 referred explicitly to Batu Puteh as part of the territories of Johor.[60]

However, this evidence was not presented to prove the fact that the Sultan of Johor exercised his authority over the territorial domain or territorial control but merely to endorse 'the general understanding' that the Sultanate of Johor existed as a sovereign state. Furthermore, 'the general understanding' was not fully proven by concrete evidence except for Johor's protest of the Netherlands' seizure of two junks. The other evidence cited was documentary records, not state practices. Grotius' reference

[55] *Ibid.*, para. 17 (dissenting opinion of Judge ad hoc Franck).

[56] For background on the dispute, see Haller-Trost, *supra* note 48, at 261–294.

[57] *Pedra Branca* case, *supra* note 2, paras. 37–41.

[58] *Ibid.*, para. 60.

[59] *Ibid.*, para. 52.

[60] *Ibid.*, paras. 53–57.

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is particularly misleading. He refers to the Sultanate of Johor as a sovereign principality (*supremi principatus*) in the context of deciding who had the authority to conduct a public war, not in the context of statehood or title to territory.[61]

The ICJ then considered it necessary to ascertain that the Sultan of Johor's possession of Pedra Branca, in particular, could be seen as satisfying the condition of 'the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States)'.[62] In this respect, there were two determinative factors in the Court's decision on original title to Pedra Branca: Pedra Branca was not '*terra incognita*' because it had been known as a navigation hazard and there was no evidence that any competing claim had been asserted over the islands in this area.

As for the former factor, the ICJ inferred that a navigational hazard could not remain unknown by the local community; therefore, the Sultan of Johor would not have left the island out of his territorial domain.[63] As for the latter, the Court recalled the several pronouncements made by the Permanent Court of International Justice (PCIJ) in the *Case Concerning the Legal Status of Eastern Greenland*[64] and by Huber in the case concerning the island of Palmas. In *Eastern Greenland*, the PCIJ found that the absence of rival claims and special circumstances such as a thin population and inaccessibility should be taken into consideration in determining the degree to which the display of state sovereignty fulfils the requirements of title. In the *Palmas* case, Huber admitted that the existence of gaps, intermittences or discontinuities in the exercise of territorial sovereignty could not, in and of themselves, necessarily be interpreted as proof that sovereignty was non-existent. Based on the passages of the eminent precedents, the Court in the *Pedra Branca* case legitimated original title of the Sultan of Johor to the island because there were no competing claims and Pedra Branca was a tiny uninhabitable island.[65]

It is necessary to reaffirm here that a display of sovereignty over Pedra Branca itself was not proven before the ICJ. What the Court did was to infer the existence of the island in the territorial domain from the fact that Pedra Branca was not unknown. It is true that a sparse display of sovereignty might suffice to constitute title in special circumstances; however, this pronouncement presupposes the existence of a display of sovereignty, which was not proven in this case. The Court seemed to consider it necessary to supplement the lack of display of sovereignty, mentioning the ties of loyalty between the Sultanate of Johor and the Orang Laut, 'the people of the sea'. Malaysia argued that these ties of loyalty could prove the title of the Sultan of Johor. The Court declared that 'the existence of the sufficient political authority by the Sultan of Johor to qualify him as exercising sovereign authority over the Orang Laut', relying on contemporary official reports by British officials. It also observed that the exercise of authority over the Orang Laut, who lived on islands in the Straits of Singapore, confirmed 'the ancient original title' of the Sultan of Johor to those islands, including Pedra Branca.[66]

[61] Hugo Grotius, *De Iure Praedae Commentarius*, translated by Gwladys L. Williams (1604), ch. XIII, at 314.

[62] *Palmas* case, *supra* note 9, at 839.

[63] *Ibid.*, para. 61.

[64] *Case Concerning the Legal Status of Eastern Greenland (Denmark v. Norway)*, 1933 PCIJ Series A/B, No. 53.

[65] *Pedra Branca* case, *supra* note 2, paras. 62–67.

[66] *Ibid.*, paras. 74–75.

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To summarize, the ICJ was satisfied with the general confirmation of territorial control over the broad area, including the island in question, rather than specifically ascertaining whether the sultan actually exercised his authority over the island in question. Although it offered its considerations regarding the Straits of Singapore first and regarding Pedra Branca second, the determinative factor affecting the final decision was whether Pedra Branca fell into the general geographic scope of the Straits of Singapore.

C *Commonalities in the Two Judgments*

The *Ligitan/Sipadan* case and the *Pedra Branca* case produced opposing results in terms of the sultan's original title. However, they have in common the ICJ's approach to deciding whether there was original title to the islands in question. Both judgments emphasize whether the islands in question lie within the general scope of territorial domains geographically or historically.[67] In other words, the Court articulated the question of whether *terra nullius* existed in a given region rather than whether the sovereignty over territory existed. In the *Ligitan/Sipadan* case, the reason for rejecting the Sultan of Sulu's original title was not the lack of effective possession or display of sovereignty but the fact that these islands do not geographically belong to the Sulu Archipelago proper. In the *Pedra Branca* case, the character of the island as a navigational hazard – that is, not *terra incognita* – allowed the Court to infer that this island would have been part of the territorial domain of the Sultanate of Johor. It should be recalled that these findings about the scope of the main part of the territory presuppose the existence of title to the territory proper, such as the Sultan of Sulu's title to the Sulu Archipelago proper and the Sultan of Johor's title to the Straits of Singapore.

Thus, the validity of the attribution of marginal territory depends on the title to the territory proper. However, in these two cases, the ICJ did not try to establish original title to the territories proper but, rather, took it for granted. Having observed the attitude of the Court in the *Pedra Branca* case in rejecting the attempts to deny Johor's statehood, Marcelo Kohen stated: '[The Court] clarified the situation of the local Asian States with regard to their original sovereignty, overcoming the doubt that could have been cast after its 2002 judgment in *Pulau Ligitan and Pulau Sipadan*.'[68]

Having confirmed original title to the territorial domain in a general sense, there was no room to examine whether the islands were *terra nullius* unless the islands were proven to lie outside the domain. In the *Pedra Branca* case, this allowed the ICJ to concentrate its argument on whether Pedra Branca was *terra incognita* and whether there had been any rival claims, apart from establishing whether the Sultan of Johor had demonstrated a display of sovereignty sufficient for Malaysia to claim title to it. On the other hand, in the *Ligitan/Sipadan* case, the Court had cautiously declared that the islands claimed by the parties were not *terrae nullius*. Having decided that the islands

[67] Contra, *Minquiers and Ecrehos*, Judgment, 17 November 1953, ICJ Reports (1953) 46, at 57; *Palmas* case, *supra* note 9, at 854.

[68] Kohen, *supra* note 42, at 159.

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did not geographically belong to the Sulu Archipelago proper, the Court considered it necessary to mitigate the possibility of the islands being *terrae nullius*.

To outline the cases in the terms of the two conceptions of original title, how the ICJ acknowledged original title deserves greater attention. First, with respect to the territory proper (*terra firma*), the Court simply confirmed a title that had existed for time immemorial rather than examine whether the territory was *terra nullius*. This idea reflects the second conception – original title with constitutive elements. Second, the Court dealt with the marginal islands by surveying whether they were included in the territories proper or not. If they were not included, original title by occupation of *terra nullius* (the first conception) would become the question. However, original title in the first conception was not dealt with in either case because the Court carefully denied the possibility that the islands in question were *terrae nullius*. In the *Ligitan/Sipadan* case, what kind of title was attributed to Malaysia was not clear. The Court in the *Pedra Branca* case did not involve itself with the marginal island, as it had decided that Pedra Branca was included in the territorial domain of Johor based on the second conception of original title.

Thus, in both judgments, the ICJ managed to acknowledge original title while avoiding an unequivocal statement of whether the islands in question were *terrae nullius*. There is a second commonality that is a consequence of the first: avoiding the assessment of the actual situation of territorial control. Even considering the extent of territorial domain, actual control of territory is still significant.[69] In fact, the Court maintained the position in the two judgments that the display of sovereignty was required, even in recognizing the extent of territorial domain. Though no concrete display of sovereignty was established there, this position in the *Palmas* case was apparently maintained in the two ICJ judgments. In the *Ligitan/Sipadan* case, the Court cited the *Eastern Greenland* case,[70] suggesting that it considered the display of sovereignty in the *Palmas* sense necessary to establish *effectivités*. In the *Pedra Branca* case, the Court also cited the pronouncement of the *Eastern Greenland* case and the *Palmas* case in regard to the relative nature of the degree of the display of sovereignty, and it referred to the exercise of Johor's authority via its ties of loyalty with the Orang Laut as additional proof of Johor's original title.[71] In spite of the fact that the Court was aware of the necessity of proving the display of sovereignty, territorial control was never examined thoroughly in either case. Territorial control in the *Ligitan/Sipadan* case was very thin, even considering the relative nature of territorial control.[72] As

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[69] *Palmas* case, *supra* note 9, at 840.

[70] *Ligitan/Sipadan* case, *supra* note 1, paras 134–137, 142–147.

[71] The two judgments differ in how they evaluate whether ties of loyalty existed between the sultan and the tribe that used the islands in question for their maritime activities. In the *Ligitan/Sipadan* case, the ICJ stated briefly that such a tie was not sufficient proof to establish title to territory. Unfortunately, neither judgment provided clear logic for the differential treatment of the matter. This question is important in terms of colonization. See the restrained attitude of the advisory opinion of *Western Sahara*, which contrasts clearly with that of the *Pedra Branca* case. *Western Sahara* case, *supra* note 16, at 68, para. 162.

[72] Merrills, 'Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia), Merits, Judgment of 17 December 2002', 52 *International and Comparative Law Quarterly* (2003) 797; Colson, 'Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)', 97 *AJIL* (2003) 398. For the relative nature of display of sovereignty, see Huh, *supra* note 15.

for Pedra Branca, the Court did not examine actual territorial control over the island but, rather, confirmed 'the general understanding' of sovereignty over its surrounding maritime area.

4 Concluding Remarks

What if a dispute very similar in setting to the *Ligitan/Sipadan* and the *Pedra Branca* cases had occurred in the colonial era? In the *Palmas* case – a decision delivered in 1928 during colonialism – Huber stated that '*native princes or chiefs of peoples*' were 'not recognized as members of the community of nations'.[73] The leading case on the display of sovereignty approach did not assume that sovereignty would have been displayed by non-European states. As a consequence, the arbitrator could examine whether Spain or the Netherlands acquired title to the island of Palmas as *terra nullius*, unconcerned with territorial control or the original title of the King of Tabukan, the local ruler of the area that included Palmas. Furthermore, the arbitrator considered the Netherlands' and the Dutch East India Company's contracts with the King of Tabukan as proof of the display of Dutch sovereignty, rejecting the idea that such contracts might create rights and obligations between the Netherlands and the Kingdom of Tabukan.

The position of the *Palmas* case cannot be easily adopted by the ICJ today in the post-colonial era, even applying the principle of intertemporal law. Recalling the negation of Western Sahara as *terra nullius* in the *Western Sahara* opinion, it is no longer possible to determine categorically that certain territory is *terra nullius*. The Court in *Western Sahara* posited that 'territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius*'. It also pointed out that the acquisition of title to such territories was not generally considered to have been accomplished unilaterally through 'occupation' of *terra nullius* by original title but, rather, through agreements with local rulers. Furthermore, the Court added that such agreements were regarded as derivative roots of title and not original title obtained through occupation of *terra nullius*.[74]

What position did the two ICJ judgments of the post-colonial era take, given the advisory opinion of *Western Sahara*? The two judgments clarified the conception of original title as independent of the concept of *terra nullius*, meaning original title with 'a constitutive element' (as expressed by Judge Torres Bernárdez). This is a big contribution to the law of territory, serving to free the concept of original title from the colonial context and extend it in scope. However, such a liberation did not bring about a drastic change. Rather, it seems that the two judgments were attempts to gradually adjust their positions to the conventional law of territory. In the two cases, the Court did not attempt to establish original title from the very birth of the sultanate; rather, they took original titles for granted and simply confirmed them. Thus, through recognizing original titles in an abstract manner, the Court succeeded in freeing original title from *terra nullius* as a new achievement while preserving the existing framework of law of territory.

73 *Palmas* case, *supra* note 9, at 858 (emphasis in the original).

74 *Western Sahara* case, *supra* note 16, at 39, para. 80.

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Nevertheless, such recognitions of original title without examining territorial control are fragile.[75] It is perplexing to examine territorial control or the exercise of sovereignty. If the ICJ had tried to address original title from the birth of the state, it would have had to explore the process of establishing statehood and may have argued for a pattern of territorial governance, which might differ from the European one on which the traditional law of territory is based. A standard of assessment is required to assess whether territorial control deserves title to territory. The standard should be based on the rationale or legitimizing foundation for territorial sovereignty – that is, why some kinds of territorial control can be recognized as vesting sovereignty. In this regard, Huber articulated the reason why 'the continuous and peaceful display of sovereignty' is treated as title to territory:

> Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.[76]

According to him, whether the title holder can assure 'the minimum of protection of which international law is the guardian' is the standard for legitimizing the display of sovereignty as a title.

This article does not claim that Huber's idea of territorial sovereignty is the only answer to the foundation for title to territory. However, so long as it remains true, even in the post-colonial era, that sovereign states are the only entities with enforceable power in international society, each state might have to assure 'the minimum of protection of which international law is the guardian' to preserve international order through the exercise of sovereignty within its territory. Thus, the effective exercise of sovereignty is crucial to international, as well as national, society.

It does not yet mean that the logic of the *Palmas* case always applies. To demand that every title, including ancient titles, be equipped with a doctrine by which to exercise sovereignty might be irrational.[77] Discussion is needed in order to establish a new possible foundation of title to territory in the post-colonial era. This article cannot provide the answer, but it does suggest some factors to consider. Basic principles such as self-determination, territorial integrity and the prohibition of all armed attacks and threats as a means of obtaining territorial control should be considered regarding the foundations of title to territory. In addition, attention might have to be paid to securing the independence of new states and preventing further disputes.[78] These two judgements thus present us with the new task of ascertaining how territorial control deserves title to territory and confirms the unstable status of law of territory in the post-colonial era.

[75] The article presents not only a theoretical problem but also a practical one. Recognizing title in an abstract manner might give rise to claims about the reversion of sovereignty. It is possible to claim title that no longer exists when the claim is put forward, although such title had existed in the past (see Iraq's claim over Kuwait in 1990). Such claims have been advanced in several cases. For this warning, see Kohen, *supra* note 42, at 156.

[76] *Palmas* case, *supra* note 9, at 839.

[77] Brownlie, *supra* note 17, at 129.

[78] Cf. Kohen, *supra* note 20. For the reference to the rationale for the principle of *uti possidetis*, see *Burkina Faso and Mali* case, *supra* note 13, para. 23.

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