# Some Reflections on Territorial Title in Contemporary International Law*

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## Introduction

As territory, population, and effective government are generally considered the three elements required to establish a State, territory is indispensable for the existence of a State.[1] In contemporary society, however, where even military strategies using space satellites are possible, securing territory no longer guarantees the security of the state, and it cannot be denied that the function of territory as a shelter providing security[2] is declining. This does not mean the States' interests regarding territory have weakened. Rapid advances in science and technology have demonstrated new potential uses of territory, including the exploitation of resources. While assertions concerning the self-determination and economic sovereignty of peoples have gained currency, sovereign rights over continental shelves and exclusive economic zones have been recognized through the establishment of a new regime of the law of the sea. As a result, the importance of territory—which is the basis for those rights—is conversely increasing.[3] Such interests regarding territory are always accompanied by the danger of easily leading to a resurgence of existing territorial disputes or sparking new ones.[4]

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1 However, when a new State is established, it is considered unnecessary for all of its boundaries to be delineated. R. Jennings & A. Watts (eds.), *Oppenheim's International Law* (Harlow, 9th ed., 1990), Vol. I: Peace, p. 563.

2 J. Gottmann, *The Significance of Territory* (Virginia, 1973), pp. 1-15.

3 S. Yamamoto, *Kokusaiho (shinpan)* [International law (new edition)] (Yuhikaku Publishing, 1994), p. 279.

4 Regarding the Senkaku Islands, for example, the results of an academic survey conducted in the autumn of 1968 showed that there may be oil reserves buried under the continental shelf of the East China Sea, which suddenly increased the interest of China regarding these islands. See K. Taijudo, "Ryodo mondai: Hoppo ryodo, takeshima, senkaku shoto no kizoku" [Territorial issues: Attribution of the Northern Territories, Takeshima, and the Senkaku Islands], *Jurisuto* [Jurist] 647 (1977): pp. 57-58.

Under the traditional theory of international law, issues concerning territorial change are discussed in the framework of the acquisition of territorial title or title to territory. To effectively establish territorial sovereignty over a given region, the claim must be constructed based on one of the recognized modes of acquiring title to territory, such as cession or occupation. Once the requirements for one of the modes are fulfilled, a state may immediately acquire title that is valid *erga omnes* (towards all). In cases where disputes arise, the issue becomes which of the states that are parties to the dispute has completely satisfied the requirements for the acquisition of title being claimed. Consequently, discussions under traditional theory have concentrated on what varieties of territorial title exist and what requirements are set for each kind of title.

However, the debate in recent years unfolding mainly in the United Kingdom shows an apporach which differs from the traditional modes of acquisition mentioned above. The treatment of territorial title by Brownlie and by Jennings & Watts goes beyond explaining each mode of acquisition based on the Roman law analogies. The background to the emergence of such new theory was the decision of 1928 on the Island of Palmas case, which has influenced the approach to handling territorial disputes in international adjudication.

Doubts about traditional theory of modes of acquisition also arise when discussing the establishement of new States, which is the main form of contemporary territorial transfer, because the theory has not explained how the territory of a new State is acquired.[5] While international law has prescribed a series of modes of acquisition for territorial transfer among existing states, it has remained virtually indifferent about territorial change accompanying the formation of a new State. In general, when a new State is established, the focus has been on the emergence of the new international legal subject, rather than on examining the acquisition or transfer of territory which takes place with its formation. As a result, the interpretation has been that the territorial change occurs within the framework of matters under domestic jurisdiction, and that the territory of the new State is acknowledged under international law through recognition of the new State, as a procedure to confirm a fait accompli. Nowadays, however, international law may become involved in an early stage of the establishment of a new State through the United Nations trusteeship system or the non-self-governing territories system.

Furthermore, States are no longer the sole example of an international juridical person. For those reasons, some have noted the need to take into consideration the history of a region dating back to before the recognition of a State, and to admit the effects of establishing territorial title to certain facts which existed during the period of State formation.

Despite these developments in theory, academic literature in Japan concerning territory, in most cases, continues to explain territorial title based on categorization of the traditional modes of acquisition, and does not give sufficient consideration to the above-mentioned criticisms and new approaches. To begin with, while most research on territory in Japan concerns specific cases such as the Northern Territories and Takeshima issues, more abstract and fundamental theory regarding territory does not seem to be addressed in detail outside of general works, such as textbooks. When discussing international law and territory, theory that ignores application to concrete cases is, of course, meaningless. The new way of understanding territorial title delved into in this paper incorporates a strong awareness of conflict resolution perspectives. Nevertheless, the

[5] R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester, 1963), pp. 7-12.

issues of individual cases inevitably involve fact findings which would be extensive and complex by themselves. Taking care to avoid getting buried in too many factual details and considering what the general and fundamental rules of international law are may ultimately contribute to the resolution of individual disputes.

Taking cues from Jennings & Watts, the purpose of this paper is to consider whether the scope of the traditional approach to territorial title is appropriate, and if new theory is emerging, to examine that theory and see how it differs from the traditional modes of acquisition. This paper is being written in the hope that it may help in studying how title to territory is established under contemporary international law, or how the theory of territorial title is structured. The following sections begin with an overview of traditional theory concerning title to territory from the perspectives of the nature of territorial title, and the requirements and problems with each modes of acquisition. The paper then presents the characteristics of the cases since the Island of Palmas case, and examines new approaches regarding territorial title.

## I. Traditional Theory of Territorial Acquisition

### (1)Nature of Territorial Title

Title consists of certain facts which the law recognizes as creating certain rights, and every right requires a title from which it is derived.[6] Territorial sovereignty is no exception. For a State to effectively establish or exercise sovereignty over a given region, it must have title to territory. That is to say, among the real display of state activities—possession, control, and administration of the region in question—the existence of facts, acts, and conditions which are recognized as having the legal effect of demonstrating that the region in question belongs to national territory, that territorial authority is being exercised, and has continuity so as to be able to effectively oppose the claims of other countries, is necessary.[7] In particular, having the power to oppose other countries in general, in other words, validity *erga omnes*, is the essence of title,[8] and when a State fulfills the requirements for acquisition of territorial title using any of the modes under the traditional theory of international law, it is considered to immediately acquire title with validity *erga omnes*. That is to say, territorial title is understood to be absolute.

### (2)Modes of Acquisition of Territorial Title

As has been noted, "The part of international law upon which private law has engrafted itself most deeply is that relating to acquisition of sovereignty over land, sea, and territorial waters."[9] Traditional theory regarding acquisition of territory shows strong influence from private law, and from Roman law in particular, regarding acquisition of ownership. This is especially conspicuous in the method for regulating territorial change, in which law specifies the modes of acquisition .[10] During the early stages in the development of international law, when perspectives that regarded State as a patrimonial entity were dominant, it was not really unnatural that the principles of Roman law were also applied to relations among States, viewing various territorial rights as similar to rights of

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6 R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester 1963), p.4.

7 S. Yamamoto, *Kokusaiho (shinpan)* [International law (new edition)] (Yuhikaku Publishing, 1994), pp. 278-279.

8 Jennings, *supra*, n. 1, pp. 5-6.

9 H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London, 1927), p. 91.

10 Ibid., pp. 99-100.

individuals over land.[11] With the passage of time, however, territorial sovereignty became established as an independent concept of international law, separate from ownership under private law, and the acquisition of territory by the State came to mean the acquisition of territorial sovereignty. Despite that, on issues of territorial change, the theoretical framework as "modes of acquiring territorial title", which retains factors reminiscent of private law, has still been maintained.

Confessedly, there was no unified perspective among international legal scholars regarding specifically what should constitute the modes of acquisition.[12] As pointed out by Brownlie, however, they are often divided into the five categories of cession, occupation, accretion, subjugation or conquest, and prescription, in standard legal textbooks especially in English.[13] Other than subjugation or conquest, these are all causes of acquisition seen in Roman law.[14] We now examine the specifics of these five categories based on this classification to clarify the concrete methods of territorial acquisition under traditional international law and their problems.[15]

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11 Y.Z. Blum, *Historic Titles in International Law* (The Hague, 1965), p. 1.

12 For the 19th century, even when looking only at accretion, for example, accretion is recognized as title by Hall and Pradier-Fodéré, but not by Wheaton or Westlake. Also in the 20th century, while Swift, for example, lists cession (after purchase and sale or conquest), avulsion or accretion, gift, prescription, and discovery and occupation, Verzijl states there are seven modes of territorial acquisition: facts of nature, occupation of *terra nullius*, annexation or incorporation (partial or total), cession or exchange, adjudication, acquisitive prescription, and novation. So the scholars are not all in agreement. W.E. Hall, *A Treatise on International Law* (Oxford, 7th ed., 1917), pp. 123-124; M.P. Pradier-Fodéré, *Traité de droit international public européen & américain suivant les progrès de la science et de la pratique contemporaines* (Paris, 1885) II, pp. 361-376; H. Wheaton, *Elements of International Law* (Philadelphia, 2nd ed., 1846), p. 208; J. Westlake, *International Law* (Cambridge, 1904), Part I: Peace, pp. 84-118; R. Swift, *International Law: Current and Classic* (New York, 1969), pp. 120-169; J.H.W. Verzijl, *International Law in Historical Perspectiv*e (Leyden, 1970), Part III: State Territory, pp. 346-386.

13 I. Brownlie, *Principles of Public International Law* (Oxford, 4th ed., 1990), pp. 131-132. For example, Brierly and more recently Jennings & Watts. J.L. Brierly, H. Waldock (ed.), *The Law of Nations: An Introduction to the International Law of Peace* (Oxford, 6th ed., 1963), pp. 163-173; R. Jennings & A. Watts (eds.), *Oppenheim's International Law* (Harlow, 9th ed., 1990), Vol. I: Peace, pp. 677-708. As an example showing that these titles have been adopted by other scholars, see D.H.N. Johnson, "Consolidation as a Root of Title in International Law" (1955), *Cambridge Law Journal* 216.

14 Lauterpacht, *supra*, n. 4, pp. 105-107.

15 Adjudication by a judicial organ is a sixth type of title, and there is an issue with it. For adjudication to be recognized as title, it must be possible to effect a change of sovereignty thereby. In other words, the organ in question must have the authority to allocate or dispose of territory on its own, instead of just declaring already existing title. Jennings & Watts, *supra*, n. 8, p. 679; Verzijl, *supra*, n. 7, p. 378. Such cases can be viewed as having the same nature as other modes of territorial acquisition in that one of the States immediately acquires new territorial title by adjudication. However, it may be difficult to explain how a judgment that is fundamentally only valid among the State parties becomes effective *erga omnes*. Treaties of cession also have a similar problem. See Brownlie, *supra*, n. 8, p. 133, p. 137. Some Japanese scholars refer to "annexation" as a type of title. Their argument is that among transfers of territory by agreement between States, those concerning a portion of a State's territory are cession, while those which transfer all the territory, resulting in the disappearance of the juridical personality of the State transferring the territory, are annexation. See, for example, Y. Takano, *Zentei shinpan kokusaiho gairon: Jo* [Completely revised outline of international law: Part I] (Koubundou Publishers, 1985), pp. 230-231; S. Tabata, *Kokusaiho shinko: Jo* [International law new lectures: Part I] (Toshindo, 1990), pp. 188-190. However, this categorization is not generally seen, and both these types of territorial transfer are usually handled as cession. Also, according to McNair, annexation is considered a political term. Lord McNair, *International Law Opinions: Selected and Annotated* (Cambridge, 1956), Vol. I: Peace, p. 285.

Under traditional theory, the above-mentioned titles are often further classified based on several standards. Among these, a distinction between original acquisition and derivative acquisition, which both have their origins in Roman law, has frequently been adopted. While there is almost complete agreement that cession is derivative acquisition, for the other titles the conclusions differ depending on how to define "original" and "derivative." For example, one theory is that original acquisition can be defined as incorporating a region that previously belonged to no State into the territory of one's own State, and that occupation and prescription apply here, as under Roman law.[16] On the other hand, from the perspective of *nemo dat quod non habet* some classify only cession as derivative acquisition, using the standard of whether or not the title of the new sovereign State is derived from the title of the original sovereign State; that is, that the validity of the new title depends on the validity of the original title.[17] Others insist that such distinctions are unnecessary because they just give rise to debate and confusion, and the value of such distinctions is unclear.[18]

### (3)Examination of Each Mode

#### 1. Cession

The cession of State territory is the transfer of territorial sovereignty from one State to another based on agreement.[19] Any State can cede part of its territory to another State, or cede all of its territory and become incorporated entirely into another State.[20] Aside from the point that cession must be by agreement, there are no set requirements or format for cession, and it has been accepted that a cession made between two States can, as a matter of course, be asserted as valid against third States in general.

In recent years, several new aspects have emerged that challenge these traditional characteristics of cession. First, in certain cases, problems came to be noted with the nature of the agreement or with the process of reaching the agreement. That is, a treaty of cession procured by the use or threat of force in violation of the Charter of the United Nations is a treaty by coercion, and is no longer recognized as valid under modern international law.[21] Secondly, in relation with the theory of occupation that will be later discussed, the advisory opinion of the International Court of Justice in the Western Sahara case showed different understandings from traditional theories regarding the entity that was ceding territory. For the period starting from 1884, the court found, "Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terra nullius*. It shows that in the case of such territories the acquisition of

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16 Yamamoto, *supra*, n. 2, p. 283. However, Yamamoto's work does not treat accretion separately. On the other hand, Rousseau notes that using the same standards, both occupation and accretion are considered original acquisition. However, Rousseau himself did not adopt the categorization of original versus derivative acquisition. Ch. Rousseau, *Droit international public* (Paris, 1977), Tome III: Les compétences, pp. 145-146.

17 Jennings, *supra*, n. 1, p. 16.

18 Brownlie, *supra*, n. 8, pp. 132-133; Johnson, *supra*, n. 8, p. 217.

19 For actual cases of cession, see, for example, P. Fauchille, *Traité de droit international public* (Paris, 1925), Tome I: Paix, pp. 751-754; Verzijl, *supra*, n. 7, pp. 372-378.

20 This does not apply in situations such as those pertaining to permanently neutral countries, which may have certain duties concerning cession under international law. However, national constitutions and other restrictions under domestic laws have no influence on the effect of the right to dispose of territory under international law.

21 See Article 52 of the Vienna Convention on the Law of Treaties. Jennings, *supra*, n. 1, pp. 56-61; Yamamoto, *supra*, n. 2, pp. 78-79, p. 305, pp. 619-620.

sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers."[22] If we accept this point of view, at least in the 19th century, State was not the only type of entity that ceded territory.[23]

While revisions were being forced on traditional theory, the appropriateness of cession as a mode also came to be questioned. This is because while to date the word "cession" has been used as a broad term to refer to various types of transactions, in cases where this title becomes an issue in actual disputes, the legal reality in question—that is, the specific format of the cession in question—becomes important.[24]

## 2. Accretion

Accretion is defined as an increase in territory through new land formation by natural phenomena or artificial activities. Under traditional theory, an expansion of national territory that is valid *erga omnes* occurs by the fact of the expansion of the land, and does not require any intentional act by the State to expand sovereignty. This is analogous to the concept of *accessio* under Roman law. It is based on the appurtenance theory of *accessio cedit principali* (that any addition belongs to owner of the principal object).[25]

As for natural accretion, there are generally four types recognized: alluvion, avulsion, emergence of a new island, and abandonment of a riverbed.[26] Alluvion refers to the gradual deposit of sediment, and because this moves the boundary between two States in cases where a river is a boundary between States, the acquisition of territory by one country implies the loss of territory by the country on the opposite bank. In contrast, avulsion is a sudden phenomenon, and in cases where what is separated forms land once again in the other country's territory, the country where the land originated loses territory and the country where the land is newly accreted gains territory.[27] As for the formation of a new island, while an island that is newly formed on the high seas constitutes *terra nullius* and is subject to occupation, an island that is newly formed in territorial sea or within an exclusive economic zone belongs to the coastal State, creates a new territorial sea baseline, and expands the territory of the State in question. The abandonment of a riverbed may occur when a river suddenly changes its course, or completely dries up, and the original riverbed may be called the old riverbed. However, the boundary remains at the old riverbed, and in general, territory does not increase or decrease, even when its shape changes.

On the other hand, artificial land formation occurs through activities such as the building of

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22 *I.C.J. Reports*, 1975, p. 39.

23 J.A. Andrews, "The Concept of Statehood and Acquisition of Territory in the Nineteenth Century" (1978) 94 *L.Q.R.*, pp. 408-427; M. Shaw, *Title to Territory in Africa* (Oxford, 1986), pp. 38-45. Regarding New Zealand, for example, the Treaty of Waitangi was concluded in 1840 between the U.K. and an alliance formed by the chiefs of the indigenous people, the Maoris. It is clear that the U.K. viewed this agreement as a cession treaty under international law. I. Brownlie, F.M. Brookfield (ed.), *Treaties and Indigenous Peoples* (Oxford, 1992), pp. 1-13.

24 Brownlie, *supra*, n. 8, p. 133.

25 Fauchille, *supra*, n. 14, p. 671; C.G. Fenwick, *International Law* (New York, 4th ed., 1965), pp. 419-420.

26 Fauchille, *supra*, n. 14, pp. 671-679; Jennings & Watts, *supra*, n. 8, p. 696.

27 According to Fauchille, there is also the theory that the separated part itself should be attributed to the original State as long as the separated part can be identified, and no new acquisition of territory occurs. Fauchille, *supra*, n. 14, pp. 672-674.

embankments, drainage and reclamation along coastlines and riverbanks, and the construction of man-made islands offshore. In the case of riverbanks, however, because expanding the territory of the State that is forming land at the same time reduces the territory of the State on the other side of the river, along with making changes in the course of the river, it is deemed necessary to gain the consent of the States in question beforehand.[28] Also, among the types of artificial land formations in oceans, those at the coastline expand the land by reclamation and other means, and because that creates a new territorial sea baseline, it results in an expansion of the State's territory. In contrast, even when the area of the artificially created land is the same, a change in the baseline is not recognized in the case of construction of a man-made island within the State's territorial sea, so in this case, while the amount of land within its territory increases, there is no change in the total area of the State's territory.

Thus, there are actually a variety of situations included under the term "accretion," and not all of them can be explained by the theory of appurtenance applied since Roman law. While that may have been acceptable in an era when accretion was limited to natural processes, it is simply unreasonable to treat artificial accretion in exactly the same way. The reason is that artificial accretion no longer constitutes a unilateral method of acquisition, given that the consent of the States in question is required, as in the case of rivers. Especially now that reclamation of substantially large areas of land has become possible, and because the 200-nautical-mile exclusive economic zone system has been established, there is room to reconsider whether there are no limits on recognizing artificial land formation at sea. Meanwhile, some legal scholars have expressed the idea that the basis whereby new land formation expands territory should be sought not in accretion by appurtenance, but rather in effective possession by the coastal State and the acquiescence of other States derived from public knowledge of the possession.[29]

### 3. Occupation

Occupation[30] was introduced to international law in the 17th century as grounds for the actions of the Netherlands, England, and France, which began competing to acquire colonies following Spain and Portugal. In the latter half of the 18th century, occupation became established as the sole legal basis for acquiring *terra nullius*, eliminating the doctrine of discovery which had been asserted by Spain and Portugal.[31] Thus, States were given the ability to acquire title *erga omnes* over a territory when the following two requirements were fulfilled by unilateral actions.

First, the land in question must be *terra nullius*. What becomes a problem here is when the land is

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[28] The grounds for this are that a State cannot be allowed to change the natural features of its own territory in a manner that is disadvantageous to the natural conditions of a neighboring State. Jennings & Watts, *supra*, n. 8, pp. 696-697.

[29] Brownlie, *supra*, n. 8, pp. 152-153.

[30] For historical considerations on the establishment and development of occupation, see K. Taijudo, "Kokusaiho jo no sensen ni tsuite: Sono rekishiteki kenkyu" [Regarding occupation in international law: Its historical research], *Hogaku ronso* [Kyoto law review] 61, no. 2 (1955).

[31] Fauchille, *supra*, n. 14, pp. 686-689. This implied the victory of the latecomers to the competition for acquiring colonies, and was also the result of recognizing the rationality of granting rights to the State with actual use of and administrative responsibility for the land. K. Taijudo, "Ryodo mondai: Hoppo ryodo, takeshima, senkaku shoto no kizoku" [Territorial issues: Attribution of the Northern Territories, Takeshima, and the Senkaku Islands], *Jurisuto* [Jurist] 647 (1977): p. 59.

inhabited by native peoples with a certain level of social and political organization. Early scholars of international law such as Francisco de Vitoria and Hugo Grotius held that the taking of such lands by the States of Europe should depend on the subjugation of infidels as the result of a just war.[32] Then, by the latter half of the 19th century, the argument became dominant that such lands formed the subject of occupation as *terra nullius*.[33] If that had not been the case, it would have been impossible for the theory to play the role of justifying the acquisition of colonies. However, the International Court of Justice has ruled that State practice in the 19th century did not regard such lands as *terra nullius*. In fact, most of the acquisitions of colonies by the Great Powers were based on agreements with local rulers. Consequently, at least since the 19th century, it is appropriate to consider the territories to be occupied based on the theory of acquisition of *terra nullius* as uninhabited regions, regions abandoned by their original sovereigns,[34] or regions not in the possession of a community with social and political organization.[35]

Second, for the occupation to become valid, the occupation must be effective. Specifically, as under Roman law, both the intention to acquire the territory (*animus*) and State activities which prove the existence of that intention (*corpus*)[36] are required. The General Act of the 1885 Berlin Conference is often cited as an example where notification to other countries was made necessary.[37] However, the Berlin Conference's General Act was a special legal arrangement to regulate the frequent competition among European powers to take colonies in Africa. This is evident from the subsequent abolition of the provisions in question by the Convention Revising the General Act of Berlin signed at Saint-Germain-en-Laye, and from international court cases that did not recognize the obligation for notification.[38] Consequently, occupation continues to be viewed as constituting an acquisition of territorial title by unilateral acts of State.[39]

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32 Shaw, *supra*, n. 18, pp. 31-32; Taijudo, *supra*, n. 25, pp. 49-73.

33 Shaw, *supra*, n. 18, p. 32. Relatively recently, Verzijl has also adopted a similar position. However, Verzijl's work was published prior to the Western Sahara case. Verzijl, *supra*, n.7, pp. 351-354.

34 Fauchille, *supra*, n. 14, pp. 692-697.

35 Brownlie, *supra*, n. 8, p. 139; Shaw, *supra*, n. 18, pp. 37-38; Yamamoto, *supra*, n. 2, pp. 283-284. It has to be said that Jennings & Watts' viewpoint is insufficiently developed as they avoid using the term *terra nullius* for land inhabited by people with a social and political organization, but still consider such land as a candidate for occupation as long as it is not under the sovereignty of a State. Jennings & Watts, *supra*, n. 8, pp. 687-688.

36 While this was interpreted in the sense of permanent settlement and colonization when settler colonies were mainstream, with the emergence of imperialism and the change in the character of colonies to trade and resource development bases, it gradually came to indicate the establishment of regional dominance. M. McDougal & W. Reisman, *International Law in Contemporary Perspective: The Public Order of the World Community* (New York, 1981), pp. 616-617; Taijudo, *supra*, n. 25, pp. 73-77.

37 Article 34 of the General Act of the 1885 Berlin Conference. However, one viewpoint holds that the acquisition of territory in Africa by European countries in the 19th century was via cession, not occupation, meaning that the word "occupation" used in the General Act is only a political term meaning the acquisition or appropriation of African territory. Or it may be that effective occupation became a rule that was binding only among European countries, and did not actually make stipulations about the acquisition of territory. Consequently, seeing this article as making notification of occupation mandatory is not accurate. Shaw, *supra*, n. 18, pp. 32-34, pp. 38-39.

38 See the rulings in the Island of Palmas case and the Clipperton Island case.

39 Conversely, for an interpretation that regards notification as mandatory and considers recognition by other States necessary for the establishment of occupation, see E. Fukatsu, "Ryoiki shutoku no hori" [Legal principles of the acquisition of territory], *Kokusaiho gaiko zasshi* [Journal of international law and diplomacy] 60, no. 3 (1961): pp. 69-75.

Occupation is a theory that was formed in the wake of geographical discoveries and colonization, and compared with other territorial acquisition methods, it is tinged as a product of ideologies and history. Now that nearly all the land on Earth belongs to sovereign States, the significance of occupation has inevitably diminished, and occupation is only discussed when past title becomes an issue during disputed cases. In many of those cases, however, it is difficult to plainly invoke occupation. This situation is addressed further under the following item.

### 4. Prescription[40]

There has been a debate regarding whether or not to recognize prescription as a territorial title.[41] To maintain order and ensure stability in international society, however, the possibility of creating rights through long-term continuous possession should be admitted.[42] In that sense, it is understandable that a comparatively large number of scholars regard prescription as a title. It is necessary to note, however, that the term "prescription" as used by scholars refers to at least two different situations.[43]

The first is the case under which legality is presumed when certain circumstances have continued for an extremely long period of time, and it is unclear whether their origin is legal or illegal. This is the case of so-called "immemorial possession." Ever since this was introduced to international law by Grotius,[44] while almost all scholars have recognized its existence itself,[45] it has also been subjected to the following criticism. To begin with, despite prescription being a legal principle for acquiring something that belonged to another, in cases of immemorial possession, it cannot be said that the subject region was clearly the property of another. Consequently, since the origin of possession is unknown, it is not suitable to categorize it under prescription.[46] Additionally, even if possession

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40 The term "prescription" may refer to extinctive prescription and acquisitive prescription. In this paper, however, prescription is used in the latter sense of acquisitive prescription.

41 Blum makes a major distinction between Anglo-American law and continental law when classifying how theories recognize prescription in international law. The reasons for this are, first, international law scholars in the Anglo-American legal camp subscribe to natural law concepts that consider Roman law as a supplementary source for filling gaps in international law, while the latter camp adopts a strict positive law doctrine. For that reason, the attitudes of these two legal systems toward private law analogies are naturally different. Second, the two legal systems have a different concept of prescription under municipal law. While the Anglo-American legal system considers "lapse of time" as proof of prescription, the continental legal system considers this as one requirement for establishing prescription. Consequently, the former system is closer to the position of recognizing prescription under international law, where the requisite length of time is not specified by a legislative organ. Blum, *supra*, n. 6, pp. 6-12.

42 Fauchille, *supra*, n. 14, pp. 757-758; Jennings & Watts, *supra*, n. 8, p. 706; D.H.N. Johnson, "Acquisitive Prescription in International Law" (1951) 27 *B.Y.I.L.*, pp. 333-334. In contrast, for an opinion that criticizes this position, see Blum, *supra*, n. 6, pp. 12-15, pp. 19-20.

43 Jennings, *supra*, n. 1, p. 21; Johnson, *supra*, n. 37, pp. 334-340.

44 Jennings & Watts, *supra*, n. 8, p. 705. Grotius holds that because prescription, in the strict sense, was introduced under the influence of municipal law, it does not apply among states. As a legal principle with the same effect when a region of another State is under possession for a long period of time, Grotius proposes the theory of presumed abandonment and subsequent occupation. M. Yanagihara, "Shoyuken, shihaiken" [Ownership and sovereignty], in *Senso to heiwa no ho: Fugo gurothiusu ni okeru senso, heiwa, seigi* [The law of war and peace: war, peace, and justice of Hugo Grotius], ed. Y. Onuma (Toshindo, 1987), pp. 237-238.

45 Blum, *supra*, n. 6, p. 16; Johnson, *supra*, n. 37, pp. 335-336.

46 Brownlie, *supra*, n. 8, p. 154.

so long that it goes beyond memory were demanded of a modern state, that would be extremely difficult to apply realistically, and therefore immemorial possession is also criticized because it cannot carry significance after all.[47]

The second case is prescription in the strict sense, or narrowly-defined prescription, whereby the defect in title arising from violating the sovereignty of another State at the time of acquiring possession is cured through the long-term exercise of sovereignty. This is positioned as analogous to *usucapio* (acquisition by possession) in Roman law. Among the four requirements for *usucapio*, however, international law does not prescribe a period of continuous possession, or require good faith, so it must be said that this explanation is strained.[48]

The two cases are alike, however, in that they result in granting perfect title. This leads to the position which defines prescription in international law as "the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order."[49] Examining this definition carefully shows that it simply asks that other States do not dispute the possession, that is, it just requires their recognition or acquiescence. If that is the case, even if it is necessary to grant rights in some formulation under international law when territory has been under possession or has been controlled for a substantial period of time, discussing it in the framework of "prescription" may only cause confusion.[50]

The fundamental difference between occupation and prescription lies in the legal status of the region being acquired. Territory subject to occupation is *terra nullius*, while territory that is the subject of prescription is mostly the territory of other States, and from this distinction, differences emerge in the length of time required to establish title. Nevertheless, occupation and prescription are both centered on possession that is continuous and effective, and are both theories to rationalize current possession and control. When considering disputed cases, the disputes often involve cases where it is unclear to which State the region in question originally belonged to. Consequently, it is not always easy to clearly distinguish between occupation and prescription if not in theory, then as a practical issue.

### 5. Subjugation or Conquest

Subjugation or conquest takes place through a two-stage procedure. The territory of an enemy State is first occupied through military action. The country that is victorious in the war then unilaterally declares its intention to annex the occupied region in question and incorporate the region into its own territory after the state of war is over.[51] In an era when the use of armed force was generally accepted, as long as these two requirements were met, subjugation or conquest existed as an effective means of acquiring title. That is, even though there were occasions that a third State

47 Jennings & Watts, *supra*, n. 8, p. 706, n. 4; Johnson, *supra*, n. 8, p. 219.

48 Blum, *supra*, n. 6, pp. 17-19; Brownlie, *supra*, n. 8, p. 155.

49 Jennings & Watts, *supra*, n. 8, p. 706. However, Jennings & Watts clearly state that this definition was formulated by Lauterpacht, the editor of the 8th edition.

50 Ibid., pp. 707-708. The passage in question was added in the 9th edition.

51 Yamamoto, *supra*, n. 2, p. 295.

intervened in a case of subjugation or conquest because of considerations such as the balance of power or the Concert of Europe, the validity of the title was not considered depended upon the recognition of other countries.[52] Under the UN Charter, however, the use or threat of force to violate the territorial integrity and political independence of another country is generally prohibited. Now that the prohibition has become incorporated into customary international law, subjugation or conquest—which is a means of acquiring the territory of another country by force—is no longer recognized as a legitimate means of acquiring title.

In reality, armed conflicts continue to occur in international society, which lacks a coercive enforcement apparatus, and it is a fact that there is a possibility of territorial transfer as a result of the conflicts.[53] The problem is that in some cases such illegal possession of territory subsequently continues for a long period of time. It goes without saying that the title obtained through subjugation or conquest cannot be recognized. Clearly the question of "whether an international crime of the first order can *itself* be pleaded as title because its perpetration has been attended with success"[54] cannot be answered in the affirmative. Nevertheless, from the perspective of the stability of international society, one cannot say conclusively that it is appropriate to regard the situation as that of continued illegality. I would like to revisit this issue when examining new approaches to understanding territorial title.

## II. New Ways of Understanding Territorial Title

### (1)Analysis of Court Cases and Limits of Traditional Theory

While the acquisition of territory has been debated within the framework of the theory presented above, the attribution of territory has been disputed, in practice also, in various cases of international adjudication. Basically, territorial and boundary disputes[55] are said to be a field with many court

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52 I. Brownlie, *International Law and the Use of Force by States* (Oxford, 1963), pp. 14-26; Jennings & Watts, *supra*, n. 8, p. 702.

53 A typical case should be that, as under traditional subjugation, a State ventures to acquire territory that it recognizes as the territory of another State. In other cases, the State which uses force may claim it is only recovering what was formerly its own territory. Assuming that claim is true, the taking of territory would be treated as a domestic issue and would not become a problem that falls under the prohibition on the use of force or subjugation. Nevertheless, disputes usually arise because the validity of such claims is unclear. Moreover, considering that the recognition of validity of such claims is not necessarily be dealt with by international courts, which lack compulsory jurisdiction, such States must be handled in the same way as States that intend to conquer other States' territory. Jennings, *supra*, n. 1, pp. 66-67, pp. 71-74; O. Schachter, *International Law in Theory and Practice* (Dordrecht, 1991), pp. 116-117.

54 Jennings, *supra*, n. 1, p. 54.

55 Disputes regarding territory are often categorized into territorial disputes and boundary disputes. While territorial disputes concern the attribution of sovereignty over a given region, boundary disputes are about attempts to establish the location of international boundaries. Boundary disputes are further categorized into delimitation, which seeks to define the course that a boundary should take, and demarcation, which mainly addresses the procedure to be followed in marking that definition on the surface of the Earth. Nevertheless, in disputes regarding territory, because there is often no clear definition of the scale or "structure" of the region in question for which title is at issue, in actual cases, a clear distinction is not always made between territorial disputes and boundary disputes, and on the contrary, these concepts are often mutually related. N.L. Hill, *Claims to Territory in International Law and Relations* (New York, 1945), pp. 22-26; R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester, 1963), p. 12; R. Jennings & A. Watts (eds.), *Oppenheim's International Law* (Harlow, 9th ed., 1990), Vol. I: Peace, pp. 668-689; T. Sugihara, "Hanrei kenkyu" [Study of past cases], *Kokusaiho gaiko zasshi* [Journal of international law and diplomacy] 88, no. 5 (1989): pp. 38-39.

cases.[56] Among these, the ruling in the 1928 Island of Palmas case[57] is considered the "beginning of change".[58] With that ruling as the turning point, subsequent cases have given rise to noteworthy trends. The series of judgments and advisory opinions in the Island of Palmas case, the Eastern Greenland case,[59] the Minquiers and Ecrehos case,[60] the case concerning the Temple of Preah Vihear,[61] the Western Sahara case,[62] and the case concerning the frontier dispute between Burkina Faso and the Republic of Mali[63] have the following common characteristics.[64]

First, when the courts elaborated on the grounds for their decisions regarding the attribution of disputed territory, their logic did not depend on traditional modes of acquisition such as occupation and prescription that various theories have examined in detail.[65] For example, while the Eastern Greenland case is often presented as a ruling that clarified the requirements for occupation,[66] the grounds whereby the court determined that the disputed territory belonged to Denmark were the display of peaceful and continuous sovereignty by Denmark and its recognition by Norway. Of these factors, the first one signifies effective possession, which is a requirement for occupation, and that is definitely discussed in detail in the ruling. However, occupation, which is the legal principle to acquire a *terra nullius*, was the title recognized here.

Another example is that, in the Island of Palmas case, the word "prescription" was used twice in the entire text of the ruling. However, one of these references[67] was to the system of prescription under municipal law, while the other reference[68] merely follows "continuous and peaceful display of State authority" with the phrase "so-called prescription" in parentheses. Furthermore, the expression "continuous and peaceful display of State authority" is used repeatedly in other parts of the ruling. Consequently, it is believed that the arbitrator Huber tried to avoid using the term "prescription."[69]

The second characteristic was that the courts took the position that decisions in bilateral

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56 A.L.W. Munkman, "Adjudication and Adjustment—International Judicial Decision and the Settlement of Territorial and Boundary Disputes" (1975) 46 *B.Y.I.L.*, p. 21.

57 *R.I.A.A.*, vol. II, pp. 829-871.

58 Jennings & Watts, *supra*, n. 1, p. 708.

59 *P.C.I.J. Series A/B*, no. 53, pp. 22-75.

60 *I.C.J. Reports*, 1953, pp. 47-109.

61 *I.C.J. Reports*, 1962, pp. 6-146.

62 *I.C.J. Reports*, 1975, pp. 12-176.

63 Sugihara, *supra*, n. 1, pp. 35-68.

64 Awards were rendered by various courts of arbitration around the same time period, including the 1966 Argentine-Chile frontier case and the 1968 case concerning the Indo-Pakistan western boundary (Rann of Kutch), but this paper only considers cases adjudicated by permanent judicial courts, except for the Island of Palmas case.

65 I. Brownlie, *Principles of Public International Law* (Oxford, 4th ed., 1990), pp. 131-132; D.H.N. Johnson, "Consolidation as a Root of Title in International Law" (1955), *Cambridge Law Journal*, pp. 215-217.

66 For example, J.G. Starke, *Introduction to International Law* (London, 10th ed., 1989), pp. 160-161; S. Yamamoto, *Kokusaiho (shinpan)* [International law (new edition)] (Yuhikaku Publishing, 1994), p. 285.

67 *R.I.A.A.*, vol. II, p. 839.

68 *R.I.A.A.*, vol. II, p. 868.

69 Brownlie, *supra*, n. 11, p. 155; Jennings & Watts, *supra*, n. 1, pp. 708-709. In Jennings & Watts, however, in a footnote regarding prescription (this appears before the pages in question), the Island of Palmas case is mentioned as one of three recent cases where prescription was recognized, and doubts about the consistency of the passages remain. The other two examples are the Chamizal case and the Grisbadarna case. Ibid., p.707, n. 5.

disputes are determined not by the existence of absolute title, as in the past, but rather by the relative strength of the respective titles or claims invoked by each of the states involved. As shown most clearly in the Minquiers and Ecrehos case, the weight given to any of the acts, conditions, or inactions claimed by the parties can no longer be determined using absolute standards. That is because judgment greatly depends on the existence of competing claims in the same field, and on the nature and strength of those claims.[70] The adoption of such a method of judgment may be natural and practical, in that it allows a court to fulfill its function of settling disputes that are limited to the States involved.[71]

In this way, instead of applying any of the traditional modes of acquisition as grounds for a decision, the courts consider the various factors claimed by the States involved, apply a variety of principles, and determine the attribution of the disputed region. For example, what was given the greatest emphasis in the Island of Palmas, Eastern Greenland, Minquiers and Ecrehos, and Western Sahara cases was the concept of continuous and effective possession of the territory in question. In the Eastern Greenland case and the case concerning the Temple of Preah Vihear, by applying the principles of recognition, acquiescence, and estoppel, the courts were inclined to seek the basis for their rulings on the consent of the States involved. On the other hand, in the Western Sahara case and the case concerning the frontier dispute between Burkina Faso and the Republic of Mali, the principle of self-determination played an important role.

The approaches taken in such cases indicate that the traditional logic or theory of establishing several modes of territorial acquisition and clarifying the requirements for each mode has its limits when dealing with territorial disputes in contemporary international society. To begin with, when the States involved in the dispute each claim their own method of territorial acquisition, traditional theory does not become the basis for any sort of resolution.[72] That is because, in this situation, the case becomes a question of fact-finding, if one tries to determine which party is correct. However, it is precisely because the facts are vague that disputes arise in the first place. Such situations stand out in cases where occupation and prescription are being disputed.[73]

In addition, because the modes of acquisition are limited in number, circumstances may arise where the basis for, and the facts of, both States' claims do not fit any of the modes, or do not meet the requirements of any of the modes. The competition between the sovereign acts of two States in a dispute, which can be seen in the Minquiers and Ecrehos case, is a perfect example. Because the disputed region belongs to one of the States that are the parties to the dispute, it is not *terra nullius*, but that does not mean that land that is clearly not one's own is under illegal possession either.[74] Or the effectiveness of the possession may not meet the standards traditionally required for prescription or occupation. It goes without saying that even under such circumstances the court must still reach

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70 G. Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Points of Substantive Law Part II" (1957) 32 *B.Y.I.L.*, pp. 64-65. According to Fitzmaurice, the U.K. repeatedly asserted that while the title claimed by France might be complete if no competing claims existed, that was not actually the case, and even if the French inaction would normally be understandable, in light of the acts by the U.K., a stronger response was necessary to protect its claim.

71 Y.Z. Blum, *Historic Titles in International Law* (The Hague, 1965), p. 2.

72 Munkman, *supra*, n. 2, p. 94.

73 M. Shaw, *Title to Territory in Africa* (Oxford, 1986), p. 17.

74 Brownlie, *supra*, n. 11, p. 155.

a decision on attribution of the territory in favor of one of the State parties to the dispute. Under traditional theory, however, a court cannot respond flexibly to the individual nature of each case. That is, the theoretical framework dating back to Roman law, which limits the modes of acquisition, prevents itself from working as the norms of dispute resolution.

Moreover, under traditional theory, when the requirements for any of the modes are met, the State immediately gains absolute title *erga omnes*. In particular, among the methods discussed in the preceding section, the titles of cession, occupation, and subjugation or occupation—on which agreement on their definitions was reached from a relatively early stage in the development of theory—are structured so that with their acquisition, there is no room whatsoever for intervention by a third State. In addition, once a title was effectively obtained, in principle, it would remain permanently valid unless it were to later fall under one of the modes for loss of territory.[75]

Yet because this approach does not encompass temporal factors, it ultimately fails in resolving disputed cases. That is because various acts occur with the passage of time, prompting the conditions surrounding States and the relations between the States Parties to undergo change. Thus, even for a title that was effectively acquired at a given point in time, when deciding on whether it continues to be valid, it is necessary to focus on its subsequent maintenance.[76] Consequently, although the legal principle of prescription, which requires the acquiescence of other countries and time to establish title, is often criticized as a traditional mode of acquisition because it is ambiguous and vague, it can also be said to include aspects that may lead to a theory for dispute resolution.[77]

### (2)Territorial Title in Dispute Resolution

Faced with such conditions, efforts are being made in international law to examine the issues of territorial title in disputes, as seen in the court cases, from a more general and theoretical perspective. This tendency is particularly pronounced in British academic circles. This may be said to constitute a step outside traditional international legal theory, which explains title using only traditional modes of acquisition.

Of course, international court rulings are not a formal source of international law nor they constitute precedents, which is contrary to the case of domestic trials in common law countries.[78] Regardless, Brownlie views international court judgments, at the very least, as authoritative evidence regarding the conditions of international law, and holds that the accumulation of consistent court cases would naturally bring about an important effect on international law.[79] If the importance that rulings have cannot be ignored,[80] highlighting the failure to use traditional theory regarding territorial title in various international cases and examining the significance of that failure cannot

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75 In Jennings & Watts, six types of loss of national territory are listed: cession, dereliction, operations of nature, subjugation, prescription, and revolt. Jennings & Watts, *supra*, n. 1, pp. 716-718.

76 See the section "The Effects of Intertemporal Law" in this paper.

77 Jennings & Watts, *supra*, n. 1, p. 708.

78 See Statute of the International Court of Justice Article 38 and Article 59.

79 Brownlie, *supra*, n. 11, pp. 19-24.

80 It has been noted that the judgments of international courts provide authoritative evidence regarding the effectiveness and content of rules of international law, as well as promote the formation of new general international law, thereby playing an important function in the recognition and formation of rules of international law. Yamamoto, *supra*, n. 12, pp. 68-70.

simply be dismissed as attitudes peculiar to common law scholars. Moreover, a dispute resolution perspective is essential for international law concerning territory, and application of international law is called for precisely when specific territorial and boundary disputes arise.[81] Consequently, past cases have great value as practical examples of the application of international law in dispute resolution, and there is a need to elucidate the various legal principles and methods adopted therein.

According to Jennings & Watts,[82] traditional modes of acquisition must still be accurately understood as theories to explain titles that have existed since historical times, for so many titles have, and because they are a starting point for understanding the development of new law. Nevertheless, issues concerning territorial sovereignty and title when disputes arise are subject not to traditional modes of acquisition any more, but rather to how much weight is given to various factors and elements under consideration at the critical date in each case. As such factors, eleven specific items are noted: continuous and effective occupation and administration, acquiescence and/or protest, relative strengths and weaknesses of competing claims, the effects of intertemporal law, the principle of stability in territorial title and boundaries, regional principles such as *uti possidetis*, geographical and historical factors, the attitudes of the international community, the possible requirements based on self-determination, the possibility that the origin of possession was illegal, and the fact that conquest itself is no longer permitted as a mode for acquiring title. Title becomes consolidated as these factors interact with the passage of time.[83]

This approach has several points in common with the theory proposed by Shaw, which focuses on the interaction of several definitive principles such as the doctrine of sovereignty, the principle of effectiveness, the principle of recognition, the territorial integrity of the State, and the principle of self-determination.[84] Shaw, however, criticizes traditional theory for making unnecessary categorizations, and asserts that what are traditionally referred to as cession and accretion are the logical consequence of the doctrine of sovereignty, and that under the principle of effectiveness, it is unnecessary to distinguish between occupation and prescription. That is, Shaw attempts to explain the rules on the acquisition of territorial sovereignty under international law in a new framework not necessarily limited to cases that are being disputed. Thus, Shaw's perspective is slightly different from that of Jennings & Watts, who attempt to provide theory for the methods of settling disputes.[85]

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81 Jennings, *supra*, n. 1, p. 70.

82 Jennings & Watts, *supra*, n. 1, pp. 708-716.

83 As is well known, after the concept of consolidation was used in the judgment of the Anglo-Norwegian fisheries case, Charles de Visscher, who was the judge of the case, attempted to reformulate the concept of "consolidation" as "consolidation by historic titles." While this attempt clearly had a great influence on the discussion of revising title theory, including by Shaw and Schwarzenberger, de Visscher's statements were very brief and seem to be understood and used by scholars in different ways. In Jennings & Watts, consolidation seems to be used in contrast to acquisition of title under traditional theory, which was viewed as fixed and instantaneous and indicates the process whereby the interaction of various factors creates and maintains a title. Ch. de Visscher, *Théories et réalités en droit international public* (Paris, 1953), pp. 244-245.

84 Shaw, *supra*, n. 19, pp. 16-24.

85 In the paper by Schwarzenberger, this tendency appears even more clearly. Schwarzenberger stresses how traditional theory based on private law analogies is inappropriate. He argues that the rules under the basic principles of international law—namely, the principle of sovereignty, the principle of recognition, the principle of consent, and the principle of good faith—are the main rules concerning acquisition of territory, and that accretion and acquisition of *terra nullius* are explained through the principle of sovereignty, denial of conquest and cession through the principle of consent, and prescription through the mutual effect of the three principles of sovereignty, consent, and

At any rate, they share the understanding that when disputes arise, they can no longer be addressed using traditional theory.

### (3)Factors Considered

Here, to more clearly understand the process whereby territorial title is established when settling disputes, we examine each of the factors considered in that process as seen, for example, by Jennings & Watts.[86]

#### 1. Continuous and Effective Occupation and Administration

Unlike domestic legal systems, which guarantee rights through the authority of the State, it is difficult for international law, which lacks any supra-national enforcement organization, to recognize, at an abstract level, important rights concerning the basis for the existence of the State, such as territorial sovereignty, without concrete manifestations.[87] Consequently, when deciding the attribution of territory, the fact of actual control is given substantial weight.[88] It has been noted that sovereignty is not only an exclusive right, but also includes an obligation to protect the rights of other States and foreign nationals within a territory,[89] and that obligation has made the tendency to emphasize the fact of actual control even stronger.[90] Without actual control, fulfilling such an obligation is ultimately impossible.

The existence of control is recognized by the concrete exercise of sovereignty, that is, by the existence of certain types of acts of State. In the court cases to date, the exercise of jurisdiction in the disputed region, daily local administrative operations, and legislative acts pertaining to the region in question have been recognized as demonstrating effective control.[91] In contrast, acts that are not acts of State, acts not conducted *à titre de souverain*, and acts that can be explained not just through

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good faith. He also focuses on the relationship between title and third States. While traditional theory simply states that title is naturally opposable against third States, Schwarzenberger considers that all titles are initially relative, and that through the interaction of various principles, especially recognition and consent, they are gradually transformed into absolute titles that are valid *erga omnes*. Consequently, even in transfers of territory by consent of both States involved, the cession treaty between them is only one of the constituent factors of the title, and claiming acquisition of territory with respect to third States requires recognition from those States. No mention is made by Schwarzenberger of the principle of self-determination, which is probably an essential factor to consider in dispute resolution, so Schwarzenberger's ideas may be a theory to explain acquisition rather than theory on the methods of settling disputes. G. Schwarzenberger, "Title to Territory: Response to a Challenge" (1957) 51 *A.J.I.L.*, pp. 308-324.

86 Not all of these factors are discussed individually by Jennings & Watts.

87 *R.I.A.A.*, vol. II, p. 839.

88 N. Araki, "Ryodo kokkyo funso ni okeru kogi no igi" [The significance of protest in territorial national boundary disputes], *Saitama daigaku kiyo: Shakai kagaku hen* [Journal of Saitama University: Social science] 37 (1989): p. 33.

89 *R.I.A.A.*, vol. II, p. 839. However, whether the fulfillment of this obligation is an absolute condition for the existence of sovereignty is a separate issue. Brownlie, *supra*, n. 11, p. 144.

90 For observations on how actual possession is also emphasized from the perspective of State responsibility, see Schwarzenberger, *supra*, n. 31, pp. 323-324.

91 In the Minquiers and Ecrehos case, for example, judicial proceedings regarding crimes on the Ecrehos, autopsies on bodies discovered on the Ecrehos, and registration of contracts concerning real estate transactions on the Ecrehos were scrutinized as manifestations of acts of State. The legal proceedings, autopsies, and real estate contract registrations were all carried out in the U.K. territory of Jersey. See Fitzmaurice, *supra*, n. 16, pp. 49-55.

the existence of territorial sovereignty are not regarded as valid State activities.[92] Additionally, for acts of private persons, prior authorization or subsequent ratification is required for their acts to be recognized as State activities.

Of course, there have also been such accounts in the traditional theory of territorial acquisition regarding the concept of effective occupation. With the adoption of methods comparing the claims of the States that are the parties to a dispute, however, continuity and effectiveness of control become distinctly relative in their nature as standards for dispute resolution.[93] That is, when there are no competing claims, the acts of State concerning the region in question can be very minor and infrequent, and even when there is a competing State, as long as its claims do not surpass one's own, very minor exercise of sovereignty is deemed sufficient to uphold a State's claims.[94]

### 2. Acquiescence and/or Protest

Acquiescence is a display of consent in the form of silence or the absence of protest under conditions where an explicit reaction demonstrating opposition is deemed necessary,[95] and because it arises from a complete omission to protest, it is distinguished from "implied or tacit recognition," which involves some sort of action. When considering acquiescence in territorial disputes, different effects on title may arise depending on the relationship between the State that gives acquiescence and the region in question. When the State that gives acquiescence is the only other State that can claim sovereignty over the region in question,[96] the acquiescence is decisive for establishing title.[97] That is because even if the title which was acquiesced is extremely weak, or even subjected to the possibility of non-existence, the sole State which could claim that territory will never have the opportunity to dispute the validity of that title in the future.[98] On the other hand, general

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92 Similarly, in the Minquiers and Ecrehos case, the court found that the hydrographical survey of the islets of Minquiers and the placement and management of buoys by France could not be recognized as sufficient proof of will to act *à titre de souverain* by the French government, and that acts of this nature could not be seen as including manifestation of State functions with respect to these islets. *Ibid.*, pp. 55-58.

93 See H. Lauterpacht, "Sovereignty over Submarine Areas" (1951) 27 *B.Y.I.L.*, p. 416.

94 "It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries." *P.C.I.J. Series A/B*, no. 53, p. 46.

95 Jennings, *supra*, n. 1, p. 36; I.C. MacGibbon, "The Scope of Acquiescence in International Law" (1956) 31 *B.Y.I.L.*, p. 182.

96 Or there could be multiple States with claims, but when they all give acquiescence, this can be considered in the same way.

97 Jennings, *supra*, n. 1, pp. 42-43, pp. 45-46; Lauterpacht, *supra*, n. 39, p. 395; Schwarzenberger, *supra*, n. 31, p. 316.

98 However, there is sharp criticism against viewing, from the perspective of the effect of acquiescence mentioned, acquiescence and estoppel as the same. The first reason is that defenses based on estoppel are only possible among the parties to a dispute, while acquiescence has functions not limited to the parties in question, as discussed later in this paper. Also, even if considering only acquiescence by the sole State with a claim, viewing acquiescence and estoppel as the same is prevented by the following characteristics of estoppel. First, the State seeking to gain rights by estoppel (State A) must not know of the competing claim by the other State (State B), and the inaction by State B must make State A believe there is no conflicting claim. Second, State A must sustain a loss incurred by relying on State B's inaction. However, in the case of territorial title, it can be said that the State that profits is the one acting to invoke estoppel. Third, while good faith is required for estoppel, there is no requirement for good faith in the acquisition of

acquiescence by third States can be strong proof of the existence of title.[99, 100]

As for whether silence or the lack of protest constitutes acquiescence, that mostly depends on the conditions under which the silence occurs.[101] It has been said that "silence may constitute consent," and in general, silence may lead to presumption of acquiescence. However, because it is impossible to express any attitude toward something completely unknown, knowledge of the act or situation that is the subject of silence or protest is a prerequisite for recognizing the establishment of acquiescence. Except when there are special provisions based, for example, on treaties, the fact of acquiescence cannot be denied on the grounds that there was no formal notification of the act or situation in question. In general, it is difficult to confirm whether a State actually had knowledge of the conditions related to the territory in question, so here knowledge comes to mean constructive knowledge that is assumed from the surrounding circumstances, such as the attitudes of States.[102]

Conversely, as for the question of what level of action is required to prevent a presumption of acquiescence, while some scholars say that diplomatic protest is sufficient,[103] others insist the pursuit of all measures that can possibly be used for the settlement of international disputes is required.[104] However, at the current stage of institutionalization of international society, submitting disputes to international organizations and international courts is not obligatory, and the courts do not have compulsory jurisdiction. Thus, it may be difficult to sustain the interpretation that acquiescence occurs if the latter requirement for the pursuit of all measures is not met. As for the opinion that diplomatic protest is sufficient, the frequency of protest required depends on the individual situation, so it is difficult to make generalizations. In particular, in cases where there is recognition by multiple third States, the recognition naturally has a certain effect, and the relative significance of a State's protests inevitably declines, indicating the possibility that measures in addition to protest may become necessary.[105]

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territorial title. Blum, *supra*, n. 17, pp. 90-98; D.W. Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence" (1958) 33 *B.Y.I.L.*, pp. 197-201.

99 Jennings, *supra*, n. 1, p. 44; Lauterpacht, *supra*, n. 39, p. 396.

100 Munkman criticizes positions which give a primary role to acquiescence in the acquisition of territorial title, and particularly by linking this to estoppel, as giving an insufficient basis for court decisions in the resolution of disputes. Munkman says that applying acquiescence is unfair because of the substantial gap in power relations among States, the lack of compulsory jurisdiction of courts, and the difficulties, in practice, of certifying estoppel with respect to States that have existed over a long period of time and have multiple representatives. Munkman, *supra*, n. 2, pp. 96-99.

101 Blum, *supra*, n. 17, pp. 129-155, pp. 170-171; G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law" (1954) 30 *B.Y.I.L.*, pp. 33-43; MacGibbon, *supra*, n. 41, pp. 171-182.

102 The judgment of the Anglo-Norwegian fisheries case calls for a strict obligation to pay attention to the domestic legislation of other States, making it extremely difficult to prevent the establishment of acquiescence on the grounds of lack of knowledge of the legislation and other official acts of other States.

103 Brownlie, *supra*, n. 11, p. 157. Hyde, Fauchille, and Oppenheim are listed as taking a similar perspective.

104 D.H.N. Johnson, "Acquisitive Prescription in International Law" (1951) 27 *B.Y.I.L.*, pp. 346-348; Schwarzenberger, *supra*, n. 31, p. 323.

105 Araki, *supra*, n. 34, p. 32.

### 3. Relative Strengths and Weaknesses of Competing Claims

As seen in the discussion on court cases, in bilateral disputes it is possible to work toward resolution of the dispute not by treating it as an issue of absolute title as under the traditional approach, but rather by comparison of the strengths of the titles and claims invoked by the respective parties. This approach becomes the basis for a new way of understanding territorial title, in that it leads to the relativity of title.

### 4. The Effects of Intertemporal Law[106]

The theory of intertemporal law holds that the assessment of past situations and acts in question and interpretation of treaties should be made in light of the rules of international law that were valid at that time. This theory corresponds to the principle of non-retroactivity under municipal law, and this is a particularly important issue in international law, where the lifespan of the legal subject (the State) is substantially long compared with municipal law. Especially in disputes concerning the attribution of territory, issues are scattered over a long period of time, such as acts of colonization that took place several centuries ago and the content and meaning of treaties on the disposition of territory that were concluded more than 100 years ago, so that the application of the theory of intertemporal law becomes essential.

Here, how to understand intertemporal law in the ruling of the Island of Palmas case becomes the main issue. According to the ruling, "A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or fails to be settled."[107] Furthermore, "As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law."[108]

This second aspect of intertemporal law, as described in the Island of Palmas ruling, has been criticized because it may lead, in effect, to unconditional recognition of the retroactive application of new international laws and regulations, and as a result, to threatening and destabilizing many existing titles.[109] If this were followed, there would certainly be cases where the effective continuation of territorial sovereignty, even when validly established in the past, would have to be denied in light of the various conditions that have arisen along with subsequent changes in international law.

Nevertheless, what should be noted here is the importance of continuous manifestation of sovereignty stressed throughout the Island of Palmas case. As mentioned above, in international

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106 Brownlie, *supra*, n. 11, pp. 129-130; Fitzmaurice, *supra*, n. 47, pp. 5-8; Jennings, *supra*, n. 1, pp. 28-31; Ch. Rousseau, *Droit international public* (Paris, 1977), Tome III: Les Compétences, pp. 149-150; C.H.M. Waldock, "Disputed Sovereignty in the Falkland Islands Dependences" (1980, reprinted) 25 *B.Y.I.L.*, pp. 320-321; Yamamoto, *supra*, n. 12, pp. 280-281.

107 *R.I.A.A.*, vol. II, p. 845.

108 Ibid.

109 See Brownlie, *supra*, n. 11, p. 129; Yamamoto, *supra*, n. 12, p. 281.

law, territorial sovereignty as an abstract right receives exceedingly low levels of recognition. Consequently, to maintain a title, that is, to continue to uphold territorial sovereignty, even if it has been validly acquired once, it is necessary to display effective sovereignty at all times, as the law of the time demands.[110] However, there is a distinction made between effectiveness in the acquisition of title and effectiveness in its maintenance. A State that holds title at present, even when there are competing claims, must only perform acts sufficient to demonstrate that it has not abandoned its own right by implication or has not acquiesced to the other party's claim. It has been noted that the conditions required for continuation of rights under the second aspect of intertemporal law should also be understood in this sense.[111] The point is that requiring the same level of effectiveness from a party that holds title as that required from a party seeking to take that title would render the meaning of holding title absolutely meaningless.

### 5. The Principle of Stability in Territorial Title and Boundaries

According to Kaikobad, the ruling in the 1909 Grisbadarna case was the first which referred to the principle of stability in relation to national boundaries: "It is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible."[112] When a change is made to national boundaries, usually one of the States in question is forced to diminish its national territory. Because the importance of territory is very high for all States, once a State finds out it is facing such a disadvantage, it is clear that friction and tension will intensify among the States in question. Consequently, when drawing national boundaries and determining the attribution of territory, sufficient consideration must be given to ensure that a new dispute is not triggered that would threaten the peace of the international community. Such caution provides the basis for the functioning of the principle of stability in territorial title and national boundaries.

To ensure stability, substantially strong finality is recognized in treaties, or agreements that substitute for treaties, among the States in question. In disputed cases, however, the validity of an agreement itself may be disputed, and in many cases, disputes concern the interpretation of treaty provisions that are not entirely clear.[113] In such cases, what becomes important are the concepts of acquiescence and recognition. While the ruling in the case concerning the Temple of Preah Vihear did not recognize as legally binding a map distributed without the formal recognition of a delimitation commission established by the two States, it reached the conclusion of accepting the boundaries on the map because Thailand demonstrated no reaction within a reasonable period of time after the map's distribution, and also used the map officially thereafter. According to the court, "In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed,

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110 As an example of the need to maintain title had led to positive law, Rousseau cites Article 10 of the Convention Revising the General Act of Berlin signed at Saint-Germain-en-Laye. "The Signatory Powers recognize the obligation to maintain in the regions subject to their jurisdiction an authority and police forces sufficient to ensure protection of persons and of property and, if necessary, freedom of trade and of transit." Rousseau, *supra*, n. 52, p. 150.

111 Jennings, *supra*, n. 1, pp. 30-31.

112 K.H. Kaikobad, "Some Observations on the Doctrine of Continuity and Finality of Boundaries" (1984) 54 *B.Y.I.L.*, p. 119.

113 Hill, *supra*, n. 1, pp. 30-31, p. 160.

whenever any inaccuracy by reference to a clause in the parent treaty is discovered."[114] In this manner, it becomes possible to ensure stability, using the theory of acquiescence to add certain restrictions to such requests for revision.

The ruling in the Eastern Greenland case took the stance of recognizing the significance of Denmark's activities in the disputed territory, even though the activities were minimal. Lauterpacht points out that even in cases where there is some possibility of *terra nullius*, decisions to avoid considering territory as *terra nullius* may be made because of considerations of stability.[115] Furthermore, demands for the maintenance of stability can be seen when invoking *uti possidetis* and historical factors. On the other hand, the nature of claims based on the principle of self-determination is to sharply oppose the maintenance of the status quo, which emphasizes existing effective possession in the name of maintaining stability.

### 6. Regional Principles such as *Uti Possidetis*

*Uti possidetis* (the principle of recognizing the status quo) was first applied for preventing border disputes among newly established States when Spain gave up its colonies in the Americas in the 19th century, and for maintaining the independence and stability of the new States. Because this principle does not recognize *terra nullius* in the regions in question, it did not permit acquisition of territory based on effective occupation by European countries.[116] While praised for disallowing acquisition based on effective occupation, the results were not entirely satisfactory in preventing boundary disputes because of the lack of precision in the Spanish administrative divisions that were to be applied.[117]

*Uti possidetis* is said to be a regional type of international law that was unique to Latin American countries, and it is also treated for the purpose of this discussion under the category of regional principles. However, in the 1960s, the countries of Africa adopted a policy of generally respecting the former colonial boundaries, and this principle was invoked in boundary disputes among countries in Asia as well.[118] Subsequently, the ruling in the case concerning the frontier dispute between Burkina Faso and the Republic of Mali held that *uti possidetis* is a general principle invariably related to decolonization for preventing border disputes among newly independent countries, for guarding against recolonization—which could occur with the withdrawal of colonial rulers—and for protecting the independence and stability of new countries.[119]

### 7. Diverse Geographical and Historical Factors

In general, international law does not recognize the watershed doctrine, or the doctrine of proximity and hinterlands, as constituting independent territorial title or source for title.[120] Nevertheless, the geographical characteristics of disputed regions such as isolated islands, regions

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114 *I.C.J. Reports*, 1962, p. 34.

115 H. Lauterpacht, *The Development of International Law by the International Court* (London, 1958), p. 241.

116 Hill, *supra*, n. 1, p. 155.

117 Brownlie, *supra*, n. 11, p. 135.

118 Ibid.

119 Sugihara, *supra*, n. 1, p. 40.

120 Jennings & Watts, *supra*, n. 1, p. 690; Yamamoto, *supra*, n. 12, p. 290, etc.

not easily reached by humans, and places not suited for human habitation can provide guidelines for deciding the extent of display of sovereignty required to acquire and maintain title.[121] In particular, in cases related to uninhabited land where concepts such as control and possession are largely constructive in nature, and where the activities of the State with the claim cannot be a determining factor, the geographical relationship that the territory of the claiming State has with the disputed region, and the natural features of the disputed region, may play an important role in determining attribution.[122]

On the other hand, for ensuring the stability of national boundaries and territorial title, the period during which territory was continuously under possession may be considered.[123] Nevertheless, there is no fixed period of time that perfects title, as under the prescription system of municipal law. Furthermore, the category of historical factors also includes the concept of historical continuity noted by Jennings.[124] A typical example of respect of historical continuity is the principle of succession of states, whereby when the sovereign changes, the national boundaries are transferred without change.[125] However, what becomes an issue in territorial disputes may be the claims of historical continuity that are asserted to maintain consistency with the territory of States in the past or with colonial-era territories.[126] That is because these claims may contradict or oppose the principle of self-determination, which will be discussed later.

### 8. The Attitudes of the International Community

Under traditional theory, as clearly shown when examining the concepts of occupation and cession, there was no room for third States to intervene in a valid acquisition of territorial title. However, when the attitudes shown by third States toward certain acts and claims of title become a stance of the international community that is formed and expressed through the recognition process and the United Nations, the attitudes may have a great influence on acquisition of title. That is because recognition by a large number of States can, through the cumulative effect of the recognitions, become a factor in the consolidation of title. In particular, UN General Assembly resolutions and other items approved at the United Nations are powerful factors promoting the consolidation of title, as showing systematic recognition or non-recognition reflecting the position of the majority of the international community.

Jennings & Watts take this position further to suggest the possibility of including international decisions on the status of territory as factors that consolidate title.[127] In contrast, previous work by Jennings stresses actual possession and clearly states that while UN resolutions and

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121 The Eastern Greenland case and the Clipperton Island case are typical examples where attention was paid to these considerations.

122 Munkman, *supra*, n. 2, p. 100.

123 Ibid., pp. 108-109.

124 Jennings, *supra*, n. 1, pp. 76-78.

125 See Article 11 of the Vienna Convention on Succession of States in respect of Treaties.

126 Jennings gives the following as an example. Indonesia asserted that West Irian was an integral part of its territory because West Irian had been an integral part of the former Netherlands East Indies. The Netherlands responded by saying that if West Irian must be given to Indonesia because it belonged to the former Netherlands East Indies, then Ceylon would also have to be attributed to Indonesia. Jennings, *supra*, n. 1, pp. 76-77.

127 Jennings & Watts, *supra*, n. 1, p. 715, p. 716, n. 2. Here, the U.N. Security Council Resolution 662, issued after Iraq declared its annexation of Kuwait, is quoted as a specific example.

recommendations advance consolidation of title based on actual possession, they have no legislative effect or quasi-legislative effect in relation to title.[128] Brownlie also recognizes that resolutions of the UN General Assembly function as important factors in consolidation of title over a region that is already in the possession of other parties, but denies that the United Nations has any "capacity to convey title."[129]

### 9. The Possible Requirements based on Self-Determination

There may be cases where, after the threat or use of force was prohibited in general, a State intending to transfer territory using force attempts to justify this transfer as being a liberation of colonies based on the principle of self-determination, and where the result of the territorial transfer achieved by force is objectively consistent with the purposes of liberation of colonies and self-determination.

For example, the claims of Argentina during the Falklands War[130] and the claims of India in the Goa dispute[131] included such justifications, and in the Goa dispute, the principle of self-determination may have been applicable. Illegal use of force cannot be justified even by the right to self-determination. Nevertheless, for cases invoking self-determination in which territorial transfer is accompanied by subsequent continuation of possession, it is noted that a valid title tends to emerge as a result of the general acquiescence and recognition that can be gained relatively easily, compared with illegal seizure of territory for reasons unrelated to self-determination.[132] The process of obtaining this title is discussed in the next section.

One procedure for implementing self-determination is voting or elections by local residents when the future political status of trust territories and non-self-governing territories is determined under the auspices of the United Nations. This is a new dimension to the use of plebiscites, seen in cases of cession.[133] This still does not mean that territorial transfer is rendered invalid if the expression of will by the residents is considered insufficient.[134] More and more examples of plebiscites being carried out will be required for plebiscites to become a complete means for making claims on transferred territory based on the principle of self-determination. Be that as it may, including self-determination in territorial law in any form is highly significant in that it introduces the concept of the people into what was a State-centered field.[135]

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128 Jennings, *supra*, n. 1, p. 83-87. He also argues that to be able to talk about legislation by the international community, legislation would have to be able to cause not only the acquisition of title but also the loss of title.

129 Brownlie, *supra*, n. 11, pp. 160-161, pp. 172-175. However, this and the above-mentioned work by Jennings were published prior to Iraq-Kuwait incident, so they cannot be directly compared with the work by Jennings & Watts.

130 However, it was the U.K. that asserted the principle of self-determination for the islands' residents, demonstrating the difficulty of applying the principle of self-determination to territorial disputes.

131 N. Araki, "Kyoseiteki ryoiki hendo ni tsuite no jyakkan no kosatsu: Sonoichi" [Some considerations on forced territorial change: Part 1], *Waseda daigaku daigakuin hoken ronshu* [Waseda University Graduate School law review] 35 (1985): p. 39.

132 Brownlie, *supra*, n. 11, p. 170, pp. 597-598.

133 Jennings & Watts, *supra*, n. 1, p. 713.

134 Brownlie, *supra*, n. 11, p. 170.

135 Jennings & Watts, *supra*, n. 1, p. 715.

### 10. The Possibility that the Origin of Possession was Illegal

After the use of force was prohibited in general, and even when the prohibition on force was said to be established as *jus cogens*, there may be cases where a given State uses armed force for expanding its own territory, or seizes the territory of another State or territory that it claims as its own territory but where the legitimacy of that claim is uncertain, and then continues to possess the territory for an extended period of time. If the principle that "*ex injuria jus non oritur* (illegal acts cannot create law)" is fully followed, such possession cannot lead to a valid title. Nevertheless, it cannot be denied that instances exist whereby full reversion to the original conditions would be very difficult. So as long as possession has continued peacefully for an extended period of time, title which has been consolidated by such factors as general recognition by third States[136] and the lack of protest by the original sovereign State may be recognized independently from the origin of possession.[137] In other words, even rules of *jus cogens* cannot declare such a title to be invalid. Stability considerations play a great role here, and it has been argued that the issue of how to control the illegal use of force should be separated from the issue of how to regulate the transfer of territorial sovereignty.[138] Conversely, the State that had its sovereignty violated and lost possession of territory must avoid encouraging presumptions that it is giving acquiescence to possession by the other State.

### 11. The Fact that Conquest Itself is No Longer Permitted as a Source of Title

What was presented under the discussion of subjugation or conquest and the previous section entitled "The Possibility that the Origin of Possession was Illegal" generally applies here. When considering that the prohibition on the use of force has been established as *jus cogens*, and considering the influence of such a prohibition on title gained through conquest in the past, it seems that in accordance with intertemporal law, retroactive application of the prohibition on the use of force should not be contemplated. Even if the validity of a past conquest is still questioned on the grounds that *jus cogens* is at stake, the fact that peaceful and effective possession has continued may be used as the basis for acquisition of title.[139] This conclusion is considered appropriate from the perspectives of ensuring the stability of territory and the stability of the international community.

Naturally, the question arises of whether the factors to be considered should be limited to those mentioned above. For example, Munkman—who carefully follows the various awards and judgments concerning territory and considers the criteria applied by the tribunals and courts—gives as factors to be considered the principles of recognition, acquiescence, and preclusion; possession and administration; the affiliation of the inhabitants of the disputed region; geographical considerations; economic considerations; and historical considerations.[140] While relying on Munkman,[141] Jennings &

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136 While this may, of course, take the form of acquiescence, the point is that the recognition is of a general nature. "In the past, violations of rights were easily remedied by acts of recognition by third States, and diplomatic protests by a State whose rights were violated often had little effect on the process for changing territorial sovereignty, but recently, along with a certain level of organization of the international community, such remedies have become difficult." Araki, *supra*, n. 34, p. 32.

137 Jennings & Watts, *supra*, n. 1, p. 705.

138 Araki, *supra*, n. 34, p. 19.

139 Jennings & Watts, *supra*, n. 1, pp. 704-705.

140 Munkman, *supra*, n. 2, pp. 95-110.

141 Jennings & Watts, *supra*, n. 1, p. 710.

Watts are believed to have narrowed down some of the factors by intentionally excluding elements such as the affiliation of the inhabitants and economic considerations. Munkman, however, examined court cases concerning territory, and the cases are not limited strictly to terrestrial issues. In particular, Munkman notes that the concept of economic considerations is mostly used in maritime disputes.[142]

On the other hand, previous work by Jennings holds that some of the 11 factors are political claims, and distinguishes these in principle from legal claims that courts should consider in issues concerning title.[143] That is to say, while legal claims are about who holds title at present, political claims are about arguments that title should be transferred based on certain reasons. Specifically, Jennings lists geographical considerations, historical continuity, and self-determination as political or "quasi-legal" concepts. Yet as Jennings himself recognized, this distinction is not easily maintained in actual cases, and for international law to be applied to territorial disputes, a legal system that flexibly responds to changes in international power relations is required. Based on this type of argument, Jennings & Watts list these factors without dividing them into legal claims and political claims; the intent not to limit judgment criteria is clear. If attention continues to be paid to the formation of rules in other fields of international law, as well as to changes in international society, adding factors aside from those listed here becomes possible.

Furthermore, even though title is consolidated by the interaction of these factors, some of the factors may be contradictory, and the question may be whether there is some sort of priority among the factors to harmonize and resolve issues. While some factors may restrict other factors, others conversely are made more important through their interaction. In general, because of the territorial sovereignty hardly being an abstract right, continuous and effective occupation and governance are factors that are emphasized, but even these factors are restricted by other considerations such as the presence or absence of inhabitants, geographical conditions, and the principle of self-determination. From the standpoint of responding to changes in international society, viewing actual control—which is easily linked to considerations of stability through maintenance of the status quo—as being absolute in nature is rejected. In particular, it cannot be overlooked that the concept of actual control is subjected to substantial limitations by the principle of self-determination. As long as the individuality of each case is assumed and respected as a principle of dispute resolution, the conclusion may be that the priority of the factors varies from case to case.

### (4)Relativity of Territorial Title

The final point is that under this new approach, because the limited number of modes of acquisition is no longer an issue, title is understood as having a relative nature. Under traditional theory, among the several types of title whose requirements are determined in advance, only one can exist. That is, whether or not certain requirements were met leads to the recognition of title that is valid *erga omnes* or no existence of title at all. In dispute resolution, however, a variety of factors are considered, and title over the territory in question is recognized as consolidated from their interaction. Moreover, the evaluation process involves that of comparison to assess which of the competing claims is stronger; what becomes necessary is to have superior rights than those of the other State.

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142 Munkman, *supra*, n. 2, p. 108.

143 Jennings, *supra*, n. 1, pp. 69-87. For another scholar taking a similar position, see Hill, *supra*, n. 1.

As a result, the constituents of consolidated title vary from case to case, and because what is required is relative superiority, the strength of a claim is a relative concept that is influenced by the claims of the other party. As also noted by Brownlie, even if a given title depends on very preliminary acts, the title becomes sufficient by itself versus others who do not have superior title.[144] For example, the Island of Palmas case ruling shows that even what is commonly called "inchoate title" may be given priority in certain cases. The direct grounds of this award were that the Netherlands proved continuous and peaceful display of sovereignty over the Island of Palmas. According to the arbitrator, however, even if the proof was imperfect, the conclusion remained unchanged. The reason is that the Netherlands gained an inchoate title for fulfilling the requirements of sovereignty by demonstrating certain acts of state and the existence of external signs of sovereignty (for example, by raising its flag and coat of arms). Moreover, an inchoate title based on such display of sovereignty is superior to inchoate title based solely on discovery or claims derived from the concept of proximity.[145] It must, however, be added that the description "inchoate" may not be entirely appropriate. That is because what is happening here is ultimately a comparison of title based on relativity, and because a superior title is sufficient, the perspective of whether a title has been perfected is considered unnecessary.[146]

Incidentally, Jennings and Brownlie regard such relative title as analogous to the concept of "better right to possess" under the common law.[147] In the common law, there is no differentiation or opposition between protection of ownership (legal right to possess) and protection of possession as seen in civil law systems, and the institution for protection of possession works to protect ownership at the same time.[148] That is, possession is one type of title, and actual possession is legally protected against parties that do not have better title.

On this point, Honoré recognizes two categories of legal systems based on the number of independent titles that they recognize, or, in other words, the number of titles that are not derived from a common source.[149] The first is the legal system in which only one independent title can exist, which is called a "unititular system." Under this system, when title to a certain thing belongs to A, B cannot independently gain title to it, except through the process of taking over A's title. Roman law adopts this system. It must be admitted that, while possession during the period of prescription (*usucapio*) is protected from third parties in general, reversion of possession to the true owner cannot be prevented. Nevertheless, strictly speaking, because prescriptive title is recognized after the required period of time (i.e., the prescription period) has elapsed, it can still be viewed that only one title exists under this system.[150]

In contrast, English law adopts the second system which is described as "multititular system,"

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144 Brownlie, *supra*, n. 11, p. 164.

145 *R.I.A.A.*, vol. II, pp. 869-870.

146 See Brownlie, *supra*, n. 11, p. 147.

147 Ibid., p. 124; Jennings, *supra*, n. 1, p. 6.

148 M. Kai, *Tochi shoyuken no kindaika* [Modernization of land ownership rights] (Yuhikaku Publishing, 1967), p. 79; T. Kinoshita, "Hanrei no gaikan: Eibei bukkenho, shintakuho" [Overview of past cases: Anglo-American law of real rights and trust law], in "Eibei hanrei hyakusen II: Shiho" [One hundred Anglo-American cases II: Private law], *Bessatsu jurisuto* [Jurist separate volume] 60 (1978): p. 120.

149 A.M. Honoré, "Ownership," A.G. Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford, 1961), pp. 134-141. Title here is grasped in the limited sense of that which gives foundation for claims of possession over something.

150 W. Buckland & A. McNair, F.H. Lawson (ed.), *Roman Law and Common Law: A Comparison in Outline* (Cambridge, 2nd ed., 1952), p. 80.

and under this system, the acquisition of title becomes possible without going through the above-mentioned process. That is, in cases when B unlawfully takes possession from A, B in possession also has title, while A has its own title until the period of extinctive prescription lapses. Even after that period has passed, B does not gain a new title; the title held by the other party no longer exists.[151] In other words, multiple titles with different priority exist and compete, and the validity of these respective titles is considered relative. As a result, when claiming possession of land, it is not necessary to prove that one has the best title. The common law, in general, has a tradition of judging issues relating to the property law by assessing, relatively speaking, which of the parties in a dispute has the better title.[152, 153]

**Conclusion**

Since the Island of Palmas case, almost all rulings regarding territorial issues have been decided without using traditional territorial acquisition theory, and therefore territorial acquisition theory in international law is at a turning point. That the traditional modes of acquisition are virtually useless in dispute settlement has already been amply demonstrated. To be sure, there were many territorial disputes prior to the Island of Palmas case, which were resolved in some fashion or other, so perhaps we cannot jump to a conclusion without examining how international law was involved in those resolutions. It is clear, however, that there is a gap between traditional academic theory and, at least, the above-mentioned cases. Moreover, as demonstrated by the arguments regarding the definition of *terra nullius*, it may be said that State practice was not necessarily consistent with traditional theory.

While there is a need to consider separately why such state of affairs have arisen, to express a few of my personal opinions, in the field of law of territory to date, compared with other areas of international law, there has been a strong tendency whereby reality has led and theory has followed to legitimize the acts that were carried out. In particular, because the greatest concern was the acquisition of new territory outside of Europe by European countries, the regulation of territorial change was synonymous with the regulation of territorial acquisition, and in reality, some legal stability was successfully ensured under that approach. When problems did occur, the response was limited to resolving individual symptoms in isolation, and there was apparently not much effort made at construction of theory. One may conclude that it was because of such course of developments that theory that tracked analogies from private law was preserved over a long period of time.

Based on such realities, the approach addressed in this paper, of incorporating the rules of dispute settlement, suggests one possibility for constructing territorial title theory in contemporary international law. When disputes arise, the attribution of territory should be decided through a

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151 Ibid.

152 *Eibeiho jiten* [Dictionary of Anglo-American law] (University of Tokyo Press, 1991), p. 853.

153 However, it is widely known that in ejectment, which is one means of protecting possession under Anglo-American law, there is disagreement among U.K. scholars regarding what must be proven for a plaintiff to win a suit. One theory argues that a plea of *jus tertii* (right of a third party) by the defendant is acceptable, and consequently the plaintiff is required to prove absolute title that is valid *erga omnes.* This theory stands in opposition to the understanding that only proof of better title is required, as in the past. Kai, *supra*, n. 94, pp. 81-97; M. Kaino, "Hanrei hihyo" [Review of past cases], in "Eibei hanrei hyakusen II: Shiho," *Bessatsu jurisuto* 60 (1978): pp. 126-127; M. Nomura, "'Kengen' no sotaisei wo megutte" [Regarding the relativity of title], in *Gendai Igirisuho: Uchida rikizo sensei koki kinen* [Contemporary English law: A celebration of Mr. Uchida's 70th birthday] (Seibundo Publishing, 1979), pp. 93-127.

comprehensive consideration of diverse factors, and a decision based on the relative nature of title, weighing which of the States that are the parties to the dispute has a better title, is reached. As a result, the constituents of a consolidated title that is the basis for actual attribution will vary from case to case.[154] Such an approach emphasizes a flexible response to the individualities of cases.

At present, however, this is not a commonly adopted theory. In particular, as is shown by the fact that relative title is characterized as similar to better rights to possess under the common law, influence from the common law system cannot be denied. More detailed research is required on the extent to which such new theory is suited to reality, including comparison with the theoretical situation in civil law countries.

Even if this approach is adopted, there is also room to consider how to treat traditional title acquisition theory. Some issues are not necessarily explained clearly by the new approach. For example, should the traditional modes of acquisition be viewed only as valid in the context of intertemporal law, or should they still be viewed as appropriate theory even today to explain the acquisition of territory when there is no dispute? Under the former understanding, the problem then arises as to what regulates territorial acquisition at present, and the conclusion is very close to that reached by Shaw and Schwarzenberger, in which both acquisition theory and dispute resolution theory are explained within a single framework. In contrast, the latter viewpoint results in admitting four modes of title acquisition with the exclusion of conquest—a mode which is clearly inconsistent with contemporary international law—but there are problems with each of these modes as discussed above. The theoretical frameworks of prescription and accretion have been criticized in particular, and it will be difficult to maintain these modes in their present form.

In the same vein, it has been pointed out, considering we can currently detect in advance the emergence of a new island being formed through geological phenomena, the unrestricted recognition of unilateral territorial acquisition, even when the island in question is located on the high seas, by a single State is unreasonable supposing such acquisition to be based on discovery or occupation.[155] On the contrary, the argument is that in such cases, it may be better to consider geographical proximity and other factors, and decide attribution of the territory through deliberations among the States in question. This approach suggests a need to go beyond dispute resolution and consider broad revisions to international legal theory on territorial mutations.

**Note:** This paper was written based on the authors thesis for a master's degree.

[154] When reviewing this type of norm in dispute resolution and its significance, much can be learned in the debate regarding the equitable principles in delimiting the boundaries of continental shelves. See A. Kanehara, "Tairikudana no kyokai kakutei ni okeru kohei no gensoku: Kanshu kokusaiho no keisei katei no shiten ni motozuite" [The principle of equity in demarcating the boundaries of continental shelves: From the perspective of the formation of customary international law], pts. 1-3, *Kokka gakkai zasshi* [The journal of the Association of Political and Social Sciences] 101, nos. 7/8, 9/10, and 11/12 (1988).

[155] K. Taijudo, "Ryodo mondai: Hoppo ryodo, takeshima, senkaku shoto no kizoku" [Territorial issues: Attribution of the Northern Territories, Takeshima, and the Senkaku Islands], *Jurisuto* [Jurist] 647 (1977): p. 59. While this passage that is cited is about discovery, judging by its intention, it may also mean that acquisition by occupation is rejected.

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