

Public International Law

Kibrome M
JU - 2016

Chapter Five

Territory

Introduction

- **UNDERSTANDING THE CONCEPT:** *nationally and internationally*
- What is **the importance associated** with land and its distribution in **any society**?
 - **Firstly:** Ourselves and everything we own takes up **space**
 - **Secondly:** Land is composed of the **resources** we need to survive, prosper and express our selves, and
 - **Third:** land and **its properties** determine **how/whether** we continue to live
 - **i.e.** its location, its material composition, who or what lives on it, the environment ...

Territory Under International Law

- As one of the **requirements of statehood**, territory is **an important concept in IL**
- International law recognizes **three types of territories**:
 - **Sovereign Territory** – the state or territory that belongs to the state
 - **Terra Nullius** – that belongs to no one
 - **Res Communes** – that **belongs to all**, and is **incapable of being** under one sovereign

Contd.

- **Its centrality in PIL** is reflected in **two of the basic principles** of the law on state relation:
 - Territorial sovereignty
 - Territorial integrity
- **Territorial Sovereignty**
 - It is considered the **fullest possible right** that can be had over land/territory?
 - Lesser rights such as lease and servitude can be good comparison.
 - Territorial sovereignty **has two aspects**:
 - **Positive**: exclusive competence of the state with regard to its territory
 - **Negative**: obligation to protect the right of other states
 - Most of all it is the **mark of the sovereignty** of the state:
 - **i.e.** 'the right **to exercise therein, to the exclusion of any other** state, the functions of a state' **Island of Palmas Arbitration**

Contd.

- **Q for discussion:**
 - Do you see **the internal and external** exclusivity effect in this statement?
 - **But:**
 - Can this exclusivity be **absolute**?
 - **what limits** can you think of? And,
 - Can we **maintain it** in the modern age of **technology and globalization**?

Contd.

- **'Title' to territory** – how territorial sovereignty is established
 - Due to limitations inherent in the nature of IL, certain questions are worth addressing:
 - How and by whom is 'title to territory' established?
 - What does 'title to territory' mean?
 - What constitute title to territory?
 - What is the nature of the 'title'?
 - what leads to lose of title to territory?

Contd.

- Burkina Faso V. Republic of Mali – ICJ 1986
 - **The** court noted that **title comprehends** both any **evidence** which may establish the **existence of a right** and the **actual source of that right**.
 - **For e.g. the** court in dealing with the various **cartographic materials** submitted to it by the parties held that, **‘in frontier delimitations, maps merely constitute information, and never constitute territorial title in themselves alone**. They are merely extrinsic evidence, which may be **used**, along **with other evidence**, to establish the real facts.’
 - This clearly implies that, **unlike in municipal** systems, **title to territory is relative** under international law – not absolute.
 - **So ‘Title’** - refers to **the factual and legal conditions** under which territory is deemed to belong to one or another state.

Ways of acquiring Title to territory in PIL

- **Acquisition of territory arises as an issue** when:
 - **New states** are created and/or
 - **Additional territory** is acquired by an existing state.
 - It is **not an issue in the absence of an international contention**
 - i.e. no need under international law, for e.g. to ask how Ethiopia acquired title to territory on Axum.
- **New states**
- **Generally a new state** emerges **through two ways**
 - Constitutionally, and
 - Non-constitutional means – by force
 - **NB**: The right of self determination complicates this means
 - **Practically**, there is not much issue in relation to new states

Contd.

- **A theoretical issue in case of new states** is:
- If territory is a requirement of statehood, **how would a new state acquire title** to its territory ?
 - i.e. how can it have title before it becomes a state?
 - **Can the constitutive theory** of recognition be of help here?
 - **Another option is**, to **focus on the fact** that an entity has fulfilled the requirements of statehood
 - i.e. international law should focus on possession of the land upon independence as title to territory
 - **But** not really helpful **when there is contention** over the territory
 - **A third way out?** I.e. abandoning the classical view that only states acquire title to territory

Contd.

- **ACQUISITION OF ADDITIONAL TERRITORY**
 - States may acquire title to additional territory through different means:
 - **Occupation of *terra nullius*, Prescription, Accretion, Cession and Subjugation** (conquest)
 - Title acquired through these means may be **either an original or a derivative one**.
 - States mainly use **treaties** to **gain/lose** a territory, **or settle a dispute** over a boundary
 - **Hence**, a **frequent issue** in disputes over title to territory are **'boundary treaties'**
 - These agreements have certain **special characters** distinguishing them from treaties in general

The special nature of Boundary treaties

- **They create obligation Erga Omnes**
 - Unlike most treaties, boundary treaties **effectively bind** third parties
 - But the treaty has to be one **entered by a party who has title** to begin with
 - A **third party can object** such treaty if it can prove that:
 - it has a **better title** over the territory and show that its **interest is affected** by the agreement
- **Eritrea/Yemen territory award - 1998**
 - Eritrea's claim was based on **'succession'** – from Italy
 - Stating that title was given to its predecessor under the 1923 Lausanne – a fact not accurate
 - Yemen bases its claim based on **automatic reversion and historic title**
 - stating that it had title over the islands before the Ottomans took it and it has to be returned to it following the fall of the Ottomans, and
 - It didn't consent to the 1923 agreement

Contd.

- **The obligation created outlives the treaty**
 - i.e. even if the treaty lapses after a certain time, or even concluded for a specific period – the **expiration of such period won't nullify the obligation** created.
 - Unless it is clear from the treaty or a provision therein that the boundary is of a temporary nature for e.g. **a lease agreement**
 - **This** is in the **interest of stability of boundaries** – as you remember this interest was invoked in the **Temple case**
- **Libya V. Chad ICJ, 1994 (PIL material page 85 ff)**
 - related to **Art. 11 of the 1955 agreement** – treaty entered for 20 years
- **A binding or non binding earlier document** referred to **as establishing or confirming** a boundary line in a treaty will have the same effect.
 - See **Libya V. Chad ICJ, 1994** – In relation to **Art. 3 of the 1955 agreement** and **Annex 1** therein

Contd.

- **Interpretation of boundary treaties**
 - **The 1969 VCLT**, under Arts. 31 and 32 provides for the rules of interpretation of treaties
 - **But** most boundary treaties **pre-date** the Vienna convention
 - The **ICJ held in several cases** that, the provisions of the VCLT are codifications of CIL, so the techniques apply.
 - **See:** Libya V. Chad and Botswana V. Namibia cases
 - **NB:** this **effect of the CIL nature** of Arts. 31 and 32 of the VCLTs is **not limited to** boundary treaties only

Contd.

- **Application of modern scientific knowledge** in interpretation
 - As most boundary treaties **date back many years**, sometimes it becomes hard to determine what some of the terms of the treaty refer to.
- **See Botswana/Namibia case - ICJ 1999**
 - The court faced the challenge of identifying what **'main channel of a river'** in a 1890 treaty meant
 - So the court approved the **use of modern scientific knowledge** in understanding where it is.
 - Q: what problem do you see here?

Contd.

- **The principle of contemporaneity**
 - The interpretation of the treaty must take in to account the **circumstances prevailing at the time of the signing** of the treaty.
 - E.g. names of place, locations ...
 - **See the Ethiopia/Eritrea decision**
- **Boundary treaties** are capable of **constituting a root of a title in themselves** – i.e. create the title it self
- **The role of Boundary decisions/awards**
 - **Usually** referred to as one root of title to territory
 - **However**, though relevant in territory issues, **should only be seen as a means to ascertain ‘an already existing, but contested, title’** than creating a new one

The Five Methods

- **Cession**

- This refers to **a transfer of title to territory willfully** – either by sell, as a gift or as part of a peace settlement
 - E.g. Alaska, from Russia to the USA
- The **title transferred** is **only as good as** the title the transferring state had
 - Clearly one cannot transfer what one doesn't have
 - See ***Island of Palmas case***, Spain, the USA and Netherlands
 - The arbiters' decision highlight that even if Spain had the original title, that **title must be present at the time of cession**.
- **NB:** Cession in recent times is a rare occurrence.

Contd.

- **Accretion**
 - This refers to the creation of a new territory **through the forces of nature.**
 - These are very **rare and less important instances**, for e.g.
 - when a volcano creates a new island in the territorial sea of a state
 - Or when a change in the flow of a boundary river occurs
 - Accretion only refers to an **evolutionary change**
 - And the change is **slight and imperceptible**
 - Or a new island/land is created in a river mouth

Contd.

- **Conquest or subjugation** – *use of force involved*
 - This occurs after a war where the winner claims the territories it has conquered
 - **Under classical IL**, it has served as a legitimate way of acquiring territory when conquest is followed by formal annexation
 - **Modern IL** has **outlawed aggression**, and the use of force is allowed only exceptionally, See **Art. 2(4) UN Charter**
 - **Therefore**, conquest may result **from both lawful and unlawful** use of force
 - **In both cases** conquest will be **against** international law
 - **Q:** so can 'lawful title emerge from an unlawful act'?
 - **Q:** Will recognition from the rest of the world rectify the illegitimacy?
 - **E.g. Ethio-Eritrea war** – the debate whether to take Asseb back
 - **1990 annexation of Kuwait by Iraq** - resulted in universal condemnation of such acts.
 - The practice reveals the disapproval of such mode of acquisition
 - **Crimea** – a modern day challenge

Contd.

- **Effective Control: Occupation and Prescription**
- **Occupation**
 - This refers to the **acquisition** of territory ***terra nullius***
 - A territory is **terra nullius** in one of **two situation**:
 - It has **never been under** the sovereign of another state, or
 - It has **been abandoned** by the state that had a title over it
 - **NB: Abandoned doesn't** mean lose of title due to lack of effective control – **it is a conscious act of abandonment** by the state holding the territory
 - **Q: does our property law make a distinction between the two? What is the effect of such distinction?**

Contd.

- **Traditionally, discovery** would have sufficed to establish at least **an inchoate title** in case of occupation
 - i.e. the discovering state **has the option to occupy** the discovered territory **within a reasonable time, during which other states cannot** occupy the territory
 - i.e. discovery **serves as a notice to other states** – as held in the **Island of Palmas case**
 - **This status changed**, once terra nullius became very rare
- **Now occupation requires ‘effective control’** to establish title – i.e. **‘occupation with the will and intent to act as a sovereign.’**
 - **In case of occupation** the role of **acquiescence/protest**, in principle is **very limited** – acquiescence, though, **may compliment** a claim.

Contd.

- **Prescription** – ‘*presumption of possession*’
- This method is similar in many ways with occupation.
- **The difference** is prescription works in case of a **territory** that *used to be under the sovereignty* of another state and *its title is being claimed by another state*.
 - i.e. **the claimed loss of title** by the former sovereign is **not an intentional act**
 - **it loses its** territory as **a result of lose of effective control**
 - Hence, **proving prescription** requires a **longer period of time**
 - **Because** the loss of title by the former sovereign **cannot be readily presumed**.
 - **Therefore, ‘effective control’** needs to be **accompanied** by **acquiescence of or lack of protest** by the former sovereign.

Contd.

- In ***Island of Palmas case*** – Judge Huber cited the **lack of protest by Spain against Dutch acts** on the island **as one of the ground why Spain would have lost its title** and the Dutch acquired one.
- Generally, prescription is **the legitimization of the fact of possession** for a long time by a state.
- **NB:** This, and most other, **cases do not make clear** which doctrine is invoked specifically
- In cases where occupation and/or prescription are invoked, the issue boils down to **‘effective control’**
 - i.e. The exercise of **‘sovereign activity’**

Contd.

- **‘Effective Control’** however is a relative concept
- I.e. the **level of ‘effectiveness’** required depends **on the nature of the territory** being discussed: i.e.
 - Whether it is **terra nullius** or not
 - Whether it is **habitable or not** – this determines what amounts to effective control or **‘effectivites’**
 - Whether there is **an opposing claim** over the territory or not
- Hence, **determining ‘effective control’** has to also consider these **different factors**
- These different scenarios are well demonstrated in several ‘boundary decisions’

Cases on Effective Control

- **Western Sahara Advisory opinion - 1975**
- Colonized by Spain in 1884
- In 1960 added to the UN General Assembly list of non-self governing territories
- 1963 UNGA called for referendum to be arranged for the people to exercise their right to self determination
- **Mauritania and Morocco** objected, each claiming a **historical title** prior to Spain's colonization
- Hence, addressing '**Whether the territory was terra nullius**' at the time of colonization became relevant.
 - The court held that, **the state practice during the period of colonization**, i.e. the period under consideration, '***territories inhabited by tribes or peoples having a social and political organization were not considered as terra nullius.***'

Contd.

- **Botswana/Namibia case ICJ**

- This case illustrates **elements to take in to account in prescriptive mode**:
 - Most of the elements are equally relevant **for occupation as well**
- The court stated that, the '**possession must be by virtue of authority of the state** (in the exercise of sovereign authority), **peaceful and uninterrupted**, **public** and **enduring for a certain length of time.**'
- The **publicity** requirement has **double purpose**:
 - It **gives chance for interested states** to express their view – so that **protest and acquiescence** can be verified
 - Which makes it **more important for prescription**

Contd.

- **Minquiers and Ecrehos case - ICJ, France V. UK, 1953**
 - The **'endure for a certain length of time'** requirement – it is hard to say how long is required
 - Its **length may vary depending** on the nature of the territory
 - For e.g. the court in this case looked evidence as back to **1066**
 - The case was ultimately decided taking into account **'administrative activities'** of **relatively recent period**
 - **Late 19th C to 1950s**
- **Fisheries Case, ICJ 1951, Eritrea/Yemen case, Indonesia/Malaysia**
 - The **intent** of the **'authority of the state requirement'** in ascertaining effective control is addressed:
 - **I.e. the independent activity of private individuals is of little value unless** *it can be shown that they have acted in pursuance of...some...authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them.*

Contd.

- **Chamizal arbitration – the USA V. Mexico**
 - This case illustrates what the '**peaceful and uninterrupted**' element means
 - The US's claim over the land which resulted from the shift of the boundary river, the Rio Grande – on the ground of '*peaceful and uninterrupted*' possession
 - The US's claim was not tenable due to **Mexico's persistent protest** against the US's claim, plus their boundary was already in dispute
 - **Q: what form of protest do you think is expected?**
- **Temple of Preah Vihear Case – 'peaceful and uninterrupted'**
 - The role of **estoppel** in the creation of prescriptive title to territory
 - The **interest of 'stability'** of international boundary
 - Shows how a **legal title can be lost** through prescription in the interest of stability – i.e. in **the absence of protest**

Contd.

- **Eastern Greenland case - PCIJ Denmark V. Norway:**
 - The court highlighted other aspects of **the relative nature of effective control**,
 - *'Another circumstance which must be taken into account...is **the extent to which the sovereignty is also claimed by some other Power**. In most of the cases..., there have been **two competing claims to sovereignty**, and the tribunal has had to decide **which of the two is the stronger**...in many cases the tribunal has been satisfied **with very little in the way of 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**.'*

Contd.

- **Inter-temporal law and critical date**
 - This two concepts **play a crucial role in determining** the existence or absence of 'effective control'
- **Inter-temporal law** refers to the effect of **changes in the law** on title to territory
 - i.e. changes to the law on '**the how**' of 'acquisition of title to territory'
- **Critical date** – when the **right was created**/when the **dispute materialized**
 - Refers to the (due) date at which point the rights of the parties **crystallized**
 - It is **important in determining effective control** because, acts that occur after such time won't change the legal position.

Contd.

- **Inter-temporal law**
- Which laws apply in determining whether title is acquired at a certain time or not?
 - See Spain's **claim of acquisition by discovery** in **the Island of Palmas case**
- Would change in the law affect the requirements to maintain a title?
 - See **Palmas case** again on how Spain could **lose title**
- Would change of the law retroactively affect 'established order of things'?
 - Not as long as they are maintained in line with current law
- Can there be **any retroactive impact** by the new law?
 - **YES!!** See **Aegean Sea Continental Shelf case, ICJ 1978**
 - Greek's reservation on the 1928 Kellogg – Briand Pact
 - What does the phrase 'disputes relating to the territorial status of Greece' refer to?
 - The territory in 1928?
 - Or inclusive of its 'continental shelf' – which developed after the treaty was signed?

Contd.

- **Critical date**
- It is **important in determining** effective control because, **acts that occur after such time** won't change the legal position.
 - Depending on the case, the 'critical date' can be:
 - Date of a particular treaty if its provisions are at issue
 - ***See Island of Palmas case***
 - Date of independence – relevant in case of '*Uti Possidetis*'
 - ***See Burkina Faso V. Mali case***
 - It could also be other date than independence date, if there were some other reasons to consider
 - Date of occupation of a territory
 - ***See Island of Palmas Case***

Contd.

- There could also be **more than one critical date** in the same case
 - See **Nicaragua V. Honduras** case - **land and maritime dispute**, ICJ 2007
 - Two critical dates – for the land and the maritime
- There may **even be no critical date** to be dealt with
 - **Eritrea V. Yemen** territory award
 - In this case the tribunal analyzed all the evidences produced from different periods of time
- The **critical date can be moved** either by agreement or judicial award
- Hence, it is more of an issue to be dealt with **case by case**
- **Q: How do you see current Chinese activities in the disputed South China Sea in light of this? Would such acts have legal relevance?**

Contd.

- **Effectivites in summary**
- It refers to 'the **actual continuous and peaceful display of state functions.**'
 - **Island of Palmas Case**
- The title that arises is **relative than absolute one**
 - **Eastern Green Land Case**
 - **Island of Palmas case**
- Despite the relativity, **can there be** an '**absolute minimum requirement**'?
 - **Eritrea V. Yemen Boundary award held so**
 - But this seems to emanate **from the unusual questions it was asked** by the parties – '**to decide the sovereignty**' rather than 'to decide the award to one of the two parties' as was the case in Palmas case.

Contd.

- The **amount of effectiveness** expected to be made depends on the **nature of the disputed territory**
 - **Eastern Green Land case**
 - **Clipperton Island arbitration**, France V Mexico – uninhabited island
 - Here a **simple French declaration, without physical occupation** was sufficient
- **The activities must be that of the state** in the exercise of its sovereign authority or by anyone who is so delegated

Contd.

- **Effectiveness V Legal title:**
generally
 - **If there is a clear legal title the legal title prevails**
 - **But** if such title doesn't exactly define the relevant territorial limit, **effectiveness complements** it
 - **If there is no legal title, effectiveness can establish title** on its own

Contd.

- **NB: Effectivity is,** theoretically at least, different from **subsequent conducts**
- Conducts such as **recognition, acquiescence and estoppel**
 - Subsequent conducts can **alter or even derogate treaties**
 - Hence, can sometimes lead to **lose of a 'legal title'**
 - Because, such conducts are considered as **manifestations of the will** of the parties.
- **Lose of 'Title to Territory'** essentially follows the reverse of the modes of acquisition
 - One state's lose will often be another state's gain

Territorial Integrity of states, Self Determination and *Uti Possidetis*

- **The principle of territorial integrity**
 - See **Art. 2(4) and (7)** UN Charter
- Art. 2 'The Organization and its Members, ..., shall act in accordance with the following Principles.
 - (4) All Members shall refrain in their international relations from the threat or use of force against the **territorial integrity** or political independence of any state ...
 - (7) Nothing contained in the present Charter shall authorize the United Nations to **intervene in matters** which are essentially within the domestic jurisdiction of any state ...'

Contd.

- **This principle denotes:** *'the **material elements of the State**, namely the **physical** (land, sea and airspace) and **demographic** resources that lie within its territory and (that) are **delimited** by the State's **frontiers**.'*
 - i.e. refers to the **effective control over** and **possession of territory** by a State – a corollary/result of State sovereignty.
- **Hence**, the **forced loss of control** of the State over its territory in any case implies impairment of that State's territorial integrity.
- **NB:** this principle **cannot be invoked** by a state occupying a non self governing people.
 - In fact the territory of such non self governing peoples is also protected by the principle of territorial integrity.

Right of Self Determination

- **Development of the concept**
 - **From Westphalia to the interwar periods**
 - The creation of nation states
 - American and French Revolutions – a democratic question
 - Interwar period – e.g. Danzing
 - Not as a rule of IL but as a means of political settlement
 - **Post WWII – the ‘decolonization context’**
 - **Article 1(2) of the UN charter** – one of the purposes of the UN
 - ‘To develop friendly relations among nations based on the **respect** for the principle of **equal rights and self-determination of peoples...**’
 - **Article 73 of the Charter** provides for the duty of the colonizing powers – **mainly focused on non self governing territories/peoples**
 - **Eventually** it was recognized and included in both regional and international **human rights instruments**

Contd.

- Questions on the meaning of SD
 - What does right to SD mean beyond colonial contexts?
 - Internal self-determination?
 - External self determination?
 - What does the term 'people' refer to?
 - Is it consistent with the territorial sovereignty and integrity of states?

Contd.

- **Internal self determination**
- **'Internal'** refers to the **mode of implementation** of the right
 - i.e. the right is **exercised within the territorial confines** of an existing state.
- **The challenge here was** whether, a 'people' not under foreign domination have this right?
 - If so, **wouldn't it amount to an intervention** in the internal matter of independent states?
- The internal dimension is in fact **the main implementation mechanism** in non-colonial contexts
 - As a result of **the 'continuous' nature** of the right

Contd.

- This '**continuous nature**' is reflected in the development of general IL and international human rights law
 - E.g. in ICCPR and ICESCR – article 1, ACHPR – Article 20(1) ...
 - '**All peoples**' not just 'oppressed people' or 'non-self governing people' are recognized as holders of the right
 - ICCPR Art. 1(3) provides: 'The States Parties to the present Covenant, **including those having responsibility** for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination ...'
 - **Hence**, in addition to the 'all peoples' reference, this article makes it clear that all states have this **obligation towards their people**.

Contd.

- **Meaning:**
 - **In general** it can be understood to mean, '**a right of people to *participate* or *right to have a say* in the decision making process of the state**'
 - But what exactly would this right **mean practically**?
 - It can be said that a government which is '**representative**' of the whole population...can be taken as fulfilling the criteria.
 - **But what does 'representation' mean?**
 - Or is it only the western ideal of **Participatory democratic governance** that is required?
 - Wouldn't such **conception take away the right** of the people to choose for themselves, a non-participatory means of governance?
 - **What about indigenous systems** of governance **which people may prefer/accept**, irrespective of its participatory nature?

Contd.

- **Subjects of the right:** to whom does 'people' refer to?
 - **The territorial definition** – the entire population/nation of an existing state
 - **The ethnic definition** – sub groups within an existing state
 - **The minority definition – ICCPR Art. 27 based**
 - **Do you think such distinction will have any effect?**
 - **For e.g. in terms of the way people might be able to exercise their rights to SD?**
 - **What lessons can you take from your constitutional law classes?**
- The **very reason for the rise** of the right to SD supports the second view – without necessarily discarding the first view:
 - i.e. the right of participation in decisions which may directly or indirectly affect the protection, preservation, strengthening or development of the cultural, ethnic, and/or historical identity of the people.'
 - i.e. pertaining to **a group with a distinct (ethnic) character**

Contd.

- **External self determination and territorial integrity of the state**
- **‘external’** – because the right will be **exercised beyond and outside the territorial** confines of an existing state
- **This form** of exercise of the right will always affect the territorial integrity of the state.
- Almost all international documents addressing the right of self determination stress that –
 - *‘this right should not be construed as **authorizing or encouraging** any action which would **dismember or impair, totally or in part, the territorial integrity of the state.**’*

Contd.

- External self determination **can be exercised** in one of the following ways:
 - The dissolution of an existing state
 - Integration or merger with another state
 - Secession
- **NB:** if constitutional/consensual, no rule of IL is at issue
 - In fact it will be considered as the logical end of the people exercising their right to self determination.
- External self-determination becomes **an issue when it is invoked against the will** of the parent state.
 - **May** generally **amount to violation** of the principle of 'territorial integrity' of the state.
- **If so then, can there be a right of external SD under IL?**

Contd.

- **Unilateral Secession as a right? - Two theories forwarded**
- **Unconditional**
 - This theory argues for absolute right of secession
 - It is based on 'choice theory' – i.e. democracy
 - Not widely accepted
- **Conditional or qualified**
 - Right to secession arises only in limited circumstances
 - i.e. in **response** to **serious and persisting wrongs** suffered by the people at the hands of the parent state.
- **Q:** what is your position on article 39 of the Ethiopian constitution?

Contd.

- **The 1970 UN** declaration on friendly relations: **principle V para. 7**
 - Can an **a contrario reading** be used to infer a right to secede? I.e. when the parent state fails to fulfill the elements under Para. 7
 - If so who will make **the assessment**?
 - **Wouldn't it lead** to the breach of international peace
 - Since such a contrario reading would permit third states to assist a 'people's' effort to secede?
 - There is a **growing support among writers** for such a 'qualified' right of secession
 - The practice is **yet to evolve clearly**
 - But there are some examples

Contd.

- **Secession of Quebec case - Supreme Court of Canada**
 - The court in its analysis raised the **growing support to the view** that **denial of internal self-determination** can serve as one ground for secession.
 - ‘...the general state of international law with respect to the right to self determination is that **the right operates within the overriding protection granted to the territorial integrity of "parent" states.** **However...**, there are **certain defined contexts** within which the right to the self-determination of peoples does allow that right to be exercised "externally", which, in the context of this Reference, would potentially mean secession...’

Contd.

- **African Commission on Human and Peoples' Rights in *Katangese Peoples' Congress v. Zaire*. 1992**
- '...the Commission is **obligated to uphold the sovereignty and territorial integrity of Zaire**, a member of the OAU and a party to the African Charter on Human and Peoples' Rights. **In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government** as guaranteed by Article 13(1) of the African Charter, the Commission holds the view that **Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.**'

Contd.

- **Generally**, the following are **put forward as a condition** to be met in order **to pursue secession** as a means of self determination.
 - A **people**, even if a minority in the state, forming a majority in an identifiable part of the parent state
 - The **people** must have suffered grievous wrongs at the hand of the state – like:
 - Denial or violation of internal self-determination of the people
 - Serious and widespread violation of fundamental human rights of members of such people
 - There **must be no (other)** realistic and effective means of settling the conflict

Contd.

- **The doctrine of *uti possidetis***
- **A Roman law** principle – ‘**as you possess, so you may possess**’
- Developed under international law out of the practice in **South America** following the end of the Spanish colonization.
- **This principle calls for** ‘the **preservation** of the **demarcations** under the **colonial regimes** corresponding to each of the colonial entities that was constituted as a State.’
 - **i.e.** upon independence the colonies have to accept the colonial administrative lines as their boundaries.
- It is **maintained mainly** in the interest of:
 - Territorial **stability** and **continuity** of boundaries, and
 - **Avoiding hostilities** and foreign **intervention**

Contd.

- **Uti Possidetis and Africa**
- **Given the peculiar features** of colonial boundaries in Africa, can the same principle be followed in colonial Africa? – **i.e. the fact that:**
 - Upon colonization much of Africa was not considered terra nullius unlike South America
 - The colonial boundaries in Africa were drawn arbitrarily, without ethnic, historical, economic or geographical consideration
 - The ethnically heterogeneous nature of the African continent
- **Q: should this principle be accepted in African context?**
- **Q: would such principle be contrary to the right to self determination of people?**

Contd.

- **The African position**
- **Ethiopian prime minister, 1963**, Inaugural Conference of the OAU:
 - 'It is in the **interest of all Africans now to respect** the frontiers drawn on the maps, **whether they are good or bad**, by the former colonizers.'
- **In the same conference** the **representative from Mali** stated:
 - '**We must take Africa as it is and we must renounce any territorial claims if we do not wish to introduce what we might call black imperialism in Africa** [...]. African unity demands of each one of us complete respect for the legacy that we have received from the colonial system, that is to say, maintenance of the present frontiers of our respective States.'
- **1964, Cairo Declaration adopted by** the Heads of States and Governments of the OAU, proclaimed:
 - 'All Member States (vis a vis each other) **pledge themselves to respect the borders existing** on their achievement of their national independence.'

Uti Possidetis before the ICJ

- **Burkina Faso V. Republic of Mali - 1983, the ICJ held:**
- **On the definition of the principle**
 - 'The essence of the principle lies in its primary aim of **securing respect for the territorial boundaries at the moment when independence is achieved**... It applies to the State as it is, i.e. to the 'photograph' of the territorial situation then existing. **The principle of uti possidetis freezes the territorial title; it stops the clock, but does not put back the hands.**'
 - Hence, it **does not prohibit post independence consensual change** of boundaries.

Contd.

- **On the status of the principle under international law:**

- *'The principle is not a special rule which pertains solely to one specific system of international law. **It is a general principle, which is logically connected with the phenomenon of the obtaining of independence wherever it occurs** [...]. The fact that the new **African States have respected** the administrative boundaries and frontiers established by the colonial powers must be seen **not as a mere practice contributing to the gradual emergence of a principle** of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, **but as the application in Africa of a rule of general scope.**'*

Contd.

- **Application of the principle between administrative divisions**
- *'Such territorial boundaries may be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of uti possidetis resulted in administrative boundaries being transformed into international frontiers in the full sense of the term [...]. International law - and consequently the principle of uti possidetis - applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards.'*

Contd.

- **The principle Vs. right of self determination**
 - 'This principle of uti possidetis **appears to conflict outright with the right of peoples to self-determination**. In fact, however, the maintenance of the territorial status quo in Africa is often seen as **the wisest course**. *The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields* has induced African States to consent to the maintenance of colonial boundaries or frontiers, **and to take account of this when interpreting the principle of self-determination of peoples**. If the principle of uti possidetis has kept its place among the most important legal principles, this is by a deliberate choice on the part of African States.'

Contd.

- **Uti Possidetis in a non colonial context**
 - The dissolution of the USSR
 - The dissolution of the FSRY
- **Beyond Uti Possidetis**
 - In some cases it may be difficult to determine administrative lines or colonial boundaries
 - In such cases **the Uti Possidetis pre-independent line** can be **determined by *effectivites***: i.e.
 - **Colonial effectivites**
 - **Post colonial and more recent effectivites**

Contd.

- **Reading Assignment:**
 - **The common heritage of man kind**
 - Seabed and ocean floor – 1982 UNCLOS
 - The Moon – 1979 Moon treaty
 - **Boundary Rivers**
 - **Leases and servitude**
 - **Airspace above a state's territory and the Outer space**