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Theories on Territorial Sovereignty: A Reappraisal

Cover Page Footnote

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Theories on Territorial Sovereignty: A Reappraisal

***Theories on Territorial Sovereignty:
A Reappraisal***

By

Prof. Giovanni Distefano*

Abstract:

Territory and its normative translation, that is territorial sovereignty, are still the cornerstone of contemporary international legal order, as Article 2 (1) of the United Nations Charter solemnly declares. Hence, it is not without interest to enquire into this fundamental legal notion. This article purports to analyse firstly different legal theories which have been advanced so far in order to explain the legal relationship between State and territory; secondly, the so-called mode of acquisition of territorial sovereignty; thirdly, specific territorial situations (such as international administration, protectorates, servitudes, etc.); fourthly, the role of such peremptory rules of public international law (*ius cogens*) in the context of the establishment of legal titles to territorial sovereignty (use of force as well as the rule enshrining the right of self-determination)

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1. State and Territory in International Order

1.1. *The State as Primary and Original Subject of the International Order.* The international order, as any other legal order, is composed by a plurality of subjects.⁽¹⁾ The latter may be roughly divided in territorial and non-territorial entities. Among the territorial ones the State stands out, as the primary and original subject of the contemporary international order. The consubstantiality between international law and State is so obvious that it has often been questioned in doctrine which of the two was the first to appear from a chronological point of view.⁽²⁾

According to a traditional division of time, with the Peace of Westphalia in 1648 there was the definite completion of a process that had begun four centuries before, to say the least. In other words the State, as territorial entity, emerges as a defined and primary subject of the contemporary international order. This horizontal character of the new international order presupposes the centrality of the territory and the effective deployment of sovereign powers over it.

(1) International Court of Justice (I.C.J.), Advisory Opinion of 11 April 1949, in *I.C.J Reports*, 1949, at 174 ff.

(2) On the consubstantiality between international law and State, see R. Romano, *L'ordinamento giuridico*, Pisa, Tip. Ed. Mariotti, 1928, at 44-46.

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The territorialization of international system with the Munster and Osnabruck Treaties respectively, represents undoubtedly the unending legacy of the Peace of Westphalia. It suffices to think to Art. 2 (1) of UN Charter which spells out the 'sovereign equality' of Member States, as the fundamental principle on which the UN has been built upon. Therefore, one can even argue that the international order, so far, is essentially a territorial order.⁽³⁾ The great number of territorial disputes (territorial and maritime), as well as the fact that they represent a significant part of all the international arbitral awards, confirms the existence of a true 'territory obsession'.⁽⁴⁾

1.2. *The Different Components and the Features of the State's Territory.* Traditionally, the state's territory is composed ('*ab inferos et usque ad sidera*') by land territory (mainland) and its subsoil, internal waters and their soil and subsoil, and by the surjacentes column of air (the aerial or atmospheric space). These spaces constitute the state's territory strictly speaking. It needs to be distinguished by other spaces on and within which riparian States exercise rights and competences which, although derived from States' sovereignty, must not be confused themselves with the latter, thereby preventing the subsumption in the concept of territory such as the Continental shelf and the Exclusive Economic Zone (EEZ). As far as the main features of the territory are concerned, it is generally recognized by the doctrine and consolidated practice that the territory must be (a) stable, (b) delimited, (c) continuous. The first characteristic refers to the permanence of the residing population, thus excluding the phenomenon of nomadism. With regard to the second one, it has not to be interpreted in a restrictive manner when it is affirmed that the state's territory has to be clearly delimited. Indeed, there exist certain States whose borders are not clearly limited in their entirety and nevertheless their existence is not put into question.⁽⁵⁾ Finally, the third one refers to the continuity of State's territory.

However, a State's territory may be composed by many islands (Japan), by two territorial spaces separated by the sea (Malaysia), as well as by the territory of another State (Oman and the peninsula of Musandem; Russia and Kaliningrad).

(3) On the territorial character of the international legal order, see the classical considerations of R. Aron, *Guerre et paix entre les Nations*, Paris, Calmann-Lévy, 1984, at 187.

(4) See, G. Scelle, 'Obsession du territoire. Essai d'études réaliste de droit international', in *Symbolae Verzijl*, The Hague, Nijhoff, 1958, at 137-361.

(5) P.C.I.J., Advisory Opinion, 4 September 1924, in *Reports of P.C.I.J.*, Series B 9, at 10.

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The aforementioned territorial situations are different from enclaves, meaning States' territories which are completely surrounded by another State or States' territory (the Italian enclave of Campione in Swiss territory or Madha, the enclave of Oman in United Arab Emirates). These situations, although rare, does not invalidate the quality of state's territory, which is consequently recognized to those areas. In the same vein, one should mention that nowadays there is only one truly enclaved State, *i.e.* Lesotho, which is entirely surrounded by the territory of one single State, namely the Republic of South Africa.

2. The Legal Relationship between State and Territory: the Theories on Territorial Sovereignty

When scholars speak about the legal relationship between State and territory, they refer to the legal nature of the state's territory in international law. Leaving aside the problem, although valid, of the legal nature of territory in national order, there are four theories – developed by international doctrine – which try to explain the aforementioned legal question.

Before analyzing these theories, however, it is worth clarifying the notion of sovereignty. The two pillars of the contemporary international legal order are the principle of sovereignty and the already examined principle of territoriality. Both are derived from the horizontal structure of the international system, which has started to come into being during the twelfth century.⁽⁶⁾ The dominant paradigm of sovereignty absorbs the latter to the concept of independence. The principle of territoriality presupposes and implies a subjective right on the State, that is to say the *ius excludendi alios*: 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of State'.⁽⁷⁾ Thus, the territorial sovereignty is conceived as the States' faculty to pretend that other States (as well as other international subjects of law) abstain themselves from undertaking the functions related to States' sovereignty. This judicial situation, or subjective right of exclusion, is opposable *erga omnes* and its essential requirement is based on the effectiveness of the sovereignty that a State exercises in its own territory and within its boundaries. The territorial sovereignty is thus the link between the State and its own territory and this is precisely due to the horizontal structure of the modern international legal order. However, sometimes these

(6) *Supra* para. 1.1.

(7) P.C.A, Arbitration Award, 4 April 1928, in *RIAA*, Vol. II, at. 838.

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normative categories collide with territorial situations which go beyond the cultural context where they have been elaborated, that is Europe.

At the beginning of 1970, the International Court of Justice, upon the General Assembly request, rendered an Advisory Opinion on the legal situation in the Western Sahara (former Spanish colony). In that occasion the Court could not use the same legal construction adopted in the *Palmas' Island Case* in order to fully understand the situation at hand. This was because the situation concerned a case where the territory was not only undefined but it varied according to the wander of nomad population residing thereon. The latter element, though, prevented a legal crystallization of the territory and therefore a definition of the territorial sovereignty.

The link between sovereign and territory – meaning the territorial sovereignty – was displaced in that case by the personal relationship (*'lien d'allégeance personnel'*) between the sovereign and the abovementioned populations. Consequently, the sovereign exercised only one of the two competences composing the notion of sovereignty, namely the *ratione personae* one, whereas the territorial competence was absent precisely because of lack of a territory.⁽⁸⁾ From the foregoing, it stems that the concept of territorial sovereignty adequately refers only to an order of an exclusive territorial character, as it is the case of the international one.

2.1. *The theory of the territory-object (Eigentumstheorie)*. For the sake of birthright one ought to commence with this theory which, more than the other ones, betrays an evident Roman law legacy, which can be resumed as follows: *'Quisquis est in territorio est de territorio'*. Traces of this theory can be found, with all the due terminological and conceptual precautions, in the less recent international jurisprudence and doctrine.⁽⁹⁾

According to the abovementioned minority theory, the relationship between the State and its territory is precisely the same as the one between the individual and a subject of the national legal system. To put it differently, the territorial sovereignty of the State is a kind of property of international law, that is, an exclusive power of disposing of a territory as is the power to dispose of goods

(8) I.C.J, Advisory Opinion, October 1975, in *I.C.J. Reports*, 1975, at 12 ff.

(9) On the legal character of the territory in international law, see L. Delbez, 'Le concept d'internationalisation', in *Rev. Gen. Dr. Intern.*, 1967, 5-62, at 10.

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within the municipal legal order. Thus, there is no difference between the two judicial relationships, nor there is a difference in international law between *dominium* and *imperium*.⁽¹⁰⁾

The right of a State over a territory – implying the power to dispose of it – is an absolute right since it is opposable *erga omnes* and it is also concrete (real), for it refers to goods or things. Real rights, belonging to the family of absolute rights, attribute to their holders a capacity of ruling, sometimes full (ownership), others limited (real rights over a thing belonging, in terms of ownership, to another subject, *infra*, para 3). Thus, the State is the holder of the *ius excludendi alios*, i.e. the *imperium strictu sensu*, and of the *ius abutendi atque fruendi* (i.e. right to dispose of and exploit a good, in other words the *dominium*). Grotius⁽¹¹⁾ had already pointed out the coincidence between *imperium* and *dominium*, and also the later jurisprudence and case-law supported this authoritative view.

The said theory has certainly the merit of having reasonably explained the judicial nature of the activities exercised by a State over a territory (for example, the cession, the sell, the purchase and administrative concession). The abovementioned situations, therefore, are examples of all those situations that can be included in the normative category of real rights and that in national law are drawn near the right to property. However, the aforementioned theory reveals the traditional legal construction according to which the State was mixed up with the (absolute) sovereign, who exercised a real right of disposal and enjoyment over the territory.

Critics to this reasoning are twofold. First, it is not adequate in dealing with the phenomenon of multiple properties on the same territory, that is to say the State and individuals (or moral entities). The supporters of the theory, though, tried to answer that even if the two properties stem from the same title, they refer to different levels: the level of national law for individual properties, and that of international law for the State's property. Although the latter hypothesis may be considered true, the second remark it is nonetheless highly questionable.

(10) G. Sperduti, 'Sovranità territoriale, atti di giurisprudenza ed effettività in diritto internazionale', *Riv. Dir. Intern.* 1959, 491-425 at 401, 417.

(11) H. Grotius, *De iure belli ac pacis, Libri tres*, Amsterdam, Vol. I, Ch. III, para. VIII.

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Indeed, the relationship between State and territory within the international legal order is not limited to the mere property, but it goes beyond it, turning out to be a composite concept. In spite of its similarities with the notion of property in national law, it can by no means be confused with that concept.

2.2. *The Theory of the Territory-Subject (Eigenschaftstheorie)*. According to the pillars of this theory, in international law the territory of another State is one of the constitutive elements –together with the population and the government – of the State.⁽¹²⁾ Unlike the aforementioned theory, this one stresses the perspective of the ‘essence’ rather than of ‘possession’. This theory was particularly popular in Germany,⁽¹³⁾ but it faced difficulties to develop in publicist doctrines of other European countries.⁽¹⁴⁾ As the theory of the territory-object is the outcome of private law speculations, the theory of the territory-subject stems from public law, which is well developed in Germanic countries.

The main problem with this approach is represented by its inability to explain the immanency of the State when changes of its territory occur: indeed, if one of its constitutive element changes, the State’s personality should change accordingly. Moreover, it does neither explain some events of the international life of a State – happening quite often – which imply a partition of the title between sovereignty’s rights on the one hand and their exercise on the other. In addition, the said theory considers only the territorial dimension of State sovereignty, leaving aside the personal dimension, that is, the sovereign powers that a State may exercise on its citizens abroad. On the other hand, the colonial territories were excluded from this legal construction since they were not fully considered as state’s own territory, neither under international law nor under national law.

The supporters of this theory were therefore compelled to construe unconvincing logical fictions in order to explain these phenomena.

(12) In *Re Dutchy of Seeland*, Judgment of Administrative Tribunal of Cologne (RFG), 3 May 1978, in 80 *ILR*, at 685.

(13) K. Friker, *Vom Staatsgebiet*, Tubinga, Verlag der H. Laupp’schen Buchhandlung 1857, *passim*.

(14) T. Perassi, ‘Paese, territorio e signoria nella dottrina dello Stato’, in *Riv. Dir. Pubbl.*, 1992, 146-160, at 146 ff.

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2.3. *The Kompetenztheorie*. The ‘Vienna School of Thought’ tried to improve the theory of territory-subject and to ‘purify’ the legal concept of territory. Thereby it contributed to the ‘demystification’⁽¹⁵⁾ of the State.

According to this way of thinking, the territory is nothing more than one of the two jurisdictions (or competences) included in the State’s sovereignty, namely the territorial jurisdiction (*ratione loci*) and the personal one (*ratione personae*).⁽¹⁶⁾ This idea of State’s territorial sovereignty prefers the term ‘jurisdiction’, adopted in other international instruments of normative character, especially in the early twenty-first Century, for example the Charter of the League of Nation (Art. 15 (9)) and the UN Charter (Art. 2(7)).

2.4. *The Dominant Theory*. Each of the abovementioned theories hold some truth to the extent that each of them points out some particular aspects of the legal relationship existing between State and territory. According to the prevailing legal theory, the territorial state can be conceived as space and goods at the same time: ‘In international law, the sovereignty expresses itself both as the exercise of the real right over the territory and as the manifestation of the exclusive power of government on the territorial community’.⁽¹⁷⁾ From the abovementioned it follows that the territory is the object of two different types of powers: personal and real at the same time.⁽¹⁸⁾ As a land, the territory is the place ‘where the *imperium* is exercised’; whereas, as a good, it can be subject to appropriation and to the exercise of *dominium*.⁽¹⁹⁾

To sum up, the State holds a real right, which is similar to the right to property under national law. Consequently, it (the right) may become State’s possession according to the different ways provided for by international law (*infra*, para. 4), in

(15) E. Suy, ‘Réflexions, sur la distinction entre la souveraineté et la compétence territoriale’, in *Internationale Festschrift für Alfred Verdross*, München-Salzburg, W. Fink, 1971, 493-508, at 495.

(16) H. Kelsen, *Théorie pure de droit*, 2nd updated version adapted to German, H. Thévenaz (ed.), Neuchâtel, La Baconnière, 1953, reprinted in 1988, at 174.

(17) Court of Appeal of Rome, 23 (25) June 1965, in P. Picone, B. Conforti, *La giurisprudenza italiana di diritto internazionale pubblico. Repertorio 1960-1987*, Naples, Jovene, 1988 at 110.

(18) J. Combacau, S. Sur, *Droit international public*, 5th Edition, Paris, Montchrestien, 2001, at 398-400.

(19) P. Paone, Contributo allo studio della tutela giuridica internazionale dell’attività statale, Milan, Giuffrè, 1961, at 160-165, 172-174.

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the same manner as an individual becomes the owner of a good under national law. Therefore, the State is vested with a plurality of rights on its own territory (pertaining governmental functions). This is the first pillar of the theory at issue, which clarifies those particular territorial situations (of private law) concerning the separation between sovereignty and its exercise. These instances are on the contrary considered as aberrations by the *Kompetenztheorie*, which then cannot explain them correctly.

On the other hand, the second basis of the theory under exam refers to the territory as a space. To put it differently, it considers it as a dimension where the State exercises its sovereignty, that is, its territorial jurisdiction. Indeed, the State exercises its powers not *on* a land itself (*dominium*) but rather *within* the space subject to its sovereignty (*i.e. imperium*) and with regard to individuals (physical and moral entities) therein. The said space would constitute the sphere of territorial validity of State's jurisdiction, that is to say, its territorial jurisdiction.⁽²⁰⁾

Therefore, the two aspects of territorial sovereignty (*imperium* and *dominium*) are indissolubly united in the light of this theory: international legal order grants to States the subjective right to exercise the prerogatives relating to its sovereign powers on a specific area. This is to say that all the other subjects of international law other than the State itself are excluded. The aforementioned concept, whose inherent coherence seems unlikely to be questioned, recognizes the historical evolution of the international legal order and the medieval idea of State, until nowadays.

3. Special Territorial Situations

3.1. *Divorce Between Ius Nudum and Exercitium Iuris*. An objective and impartial analysis of state practice shows that sometimes a State exercises sovereign jurisdiction on the territory of another State with the agreement of the latter: these rights are labeled *iura in re aliena*, namely “(State) rights in foreign territory”.

Although a minority part of doctrine deems these territorial events as disguised cessions, the theory under review (*supra* para 2.4) explains these situations. Indeed, since it considers the territory both as a *res* and as the area

(20) R. Quadri, ‘Le navi private nel diritto internazionale’, 1939, in *Scritti Giuridici*, Vol. 1, Milan, Giuffr  1988, 39-188 at 72; J. Combacau, S. Sur, *supra* note 18, at 396.

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where the sovereign powers are exercised, it is possible attributing to these territorial situations suitable legal status.⁽²¹⁾ In all these instances (as in the case of rent or lease for administration) there is a division between sovereignty and its own exercise. The former becomes, therefore, *ius nudum*, a mere right: ‘The belonging of the territory to a State is meant as the immanent final destination of the said territory to that State’s sovereignty. On the other hand, one should refer to ‘nominal sovereignty’ or ‘pure sovereignty’ when there is the ownership but the subjective right is lacking for reason of another’s right over the territory’.⁽²²⁾

Often, the territory’s continuity is guaranteed by the obligation of the State (exercising the right) to pay for the tribute (a real personal right) or a rent. Sometimes, State’s refusal to do so can be considered as the evidence of an *interversio possessionis*, meaning the shift of sovereignty (therefore of the *ius nudum* as well).

As regards to international practice, it is worth considering the past cases of Cyprus (1878-1914), Bosnia-Herzegovina (1878-1908), as well as the different types of European ‘settlements’ in the Chinese territory. This expression was used to indicate Government’s territorial concessions to the European Powers between the Nineteenth and Twentieth century. It was thanks to these concessions that China preserved the *ius nudum* and accordingly the *interversio possessionis*, that is the right to recover the exercise of sovereignty.⁽²³⁾ Another more recent example of the diversion between *ius nudum* and *exercitium iuris* is in the Annexes of the Peace Treaty between the Hashemite Reign of Jordan and the State of Israel, concluded on the 26 October 1994. By virtue of this agreement, a special status was established for two territories⁽²⁴⁾: the Jordan sovereignty was recognized, but Israel could exercise – for a period of twenty-five years, renewable with tacit consent (Article 6) – some functions pertaining to State sovereignty, namely civil and criminal jurisdiction, and the territorial and personal application of Israeli

(21) Court of Cassation, 21 October 1982, No. 5487, in P. Picone, B. Conforti, *supra* note 17, at 906.

(22) Court of Cassation, Sezione Lavoro, 6 June 1978, n. 2824, in P. Picone, B. Conforti, *supra* note 17, at 938.

(23) A. Cavaglieri, ‘L’annessione della Bosnia-Erzegovina’, in 4 *Riv. Dir. Intern.* (1990) 387-401, at 487, 488.

(24) Zones of Naharayim/Baqura (annex 1b) and Zohar/Al-Ghamfr.

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law⁽²⁵⁾. A similar territorial regime was established in the ‘Tiwinza’ region between Peru and Ecuador on 24 October 1998⁽²⁶⁾.

Unless rare exceptions, the international jurisprudence as well as the jurisprudence considered the cases of divorce between sovereignty and its exercise, that is between *imperium* and *dominium*, not as disguised concession, but rather as situations in conformity with international law. However, and notwithstanding the foregoing, the enjoyment of the *imperium* entitles its holder to *subsume* the *dominium*.

3.2. *The Territorial Servitude*. The doctrine is not unanimous with regard to the existence of servitudes in international legal order.⁽²⁷⁾ On the other hand, international case-law is quite unsure, albeit some awards which do admit their existence.⁽²⁸⁾ Be that as it may, one can say that, under the influence of the doctrinal arguments and the *rationes decidendi* of *international case-law*, it stems a certain degree of acceptance of the existence of servitudes in international law. It is worth pointing out, though, that the characteristics of the said servitudes are not the very same of servitudes as defined by private law. Indeed the main differences concern the subjective rights and their different nature under international law.

3.3 *Condominium and Coimperium*. By virtue of the theory on territorial sovereignty described above (see section 2.4), the term “condominium” means the joint ownership of a real right over a certain territory. On the contrary, the common exercise of sovereignty (*ius excludendi alios*) is reflected in the notion of *coimperium*. Since these two legal regimes do not necessarily overlap each other, it is possible to have situations under condominium but not *coimperium* and *vice versa*.

3.4 *Territories Under International Control or Administration*. At the end of the First World War, the territories of German colonies as well as part of the former Ottoman Empire were subjected to a new legal status by the League of Nations (LoN): the so called “mandate”. This institution was laid down in art. 22

(25) See the text of the aforesaid Treaty : *ILM*, vol. 34 (1995-I), pp. 43-66.

(26) In the highly disputed region of « Tiwinza » (Articles 4 and 5 of the Peace Treaty signed on the 17th of February 1997).

(27) G. M. Ubertazzi, *Studi sui diritti reali nell’ordinamento internazionale*, Milan, Giuffrè 1949, *passim*.

(28) *North Atlantic Coast Fisheries Case (United State v. United Kingdom)*, Arbitral Award, 7 September 1920, in *RIAAA*, Vol. XI, at 182.

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of the Covenant of the LoN. The provision aimed at ensuring the “well being and the development” of the populations living in the territories concerned.⁽²⁹⁾

According to the degree of development within each indigenous community, the LoN established three different types of mandate (A, B, or C). The territories and the populations therein were administered by a Mandatory on behalf of the League, whose aim was that of accomplishing a “sacred trust of civilization” (art. 22).

By the end of the Second World War, the international community established the United Nations (UN), which can be seen, at least from some points of view, as the successor of the League of Nations. Chapter XII of the UN Charter (UNCh) established the trusteeship system, applicable to: a) territories now held under mandate (of the LoN); b) territories which may be detached from enemy states as a result of the Second World War; c) territories voluntarily placed under the system by states responsible for their administration (art. 77.1 UNCh).

The UN trusteeship system, which in large part shared the essential features of the mandate under the LoN, did not extend the Trustee’s sovereignty over the territory. It only granted the right to exercise some sovereign powers, in the interest of the indigenous communities. For instance, pursuant the Geneva Agreement of 27 January 1950 (on the trusteeship administration of Somali territory by Italy), the government of Rome did no longer wielded its sovereignty over that territory but it only exercised temporary powers in view of the final independence of Somalia itself.

Under Chapter XIII of the UNCh, a specific Trusteeship Council was entitled to supervise the activity of the Trustee States under whose administrations the territories were placed.

As well as the mandates’ system under the LoN, the UN trusteeship system was, by its very nature, a temporary one, since it was designed to lead the populations concerned “towards self-government or independence” (art. 76(b)); hence, all forms of annexation by the administering Powers were prohibited. This system has effectively reached its purposes and today no territories are under trusteeship administration.

(29) As far as the legal nature of the Covenant is concerned, it is worth noting that it was an international agreement, even though characterized by a special nature: see I.C.J., Advisory Opinion of 21 June 1971, in *I.C.J. Reports* 1971, at 16 ff., para. 94.

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Some different considerations are to be made with regard to the “non-self governing” territories, under Chapter XI of the UNCh. While the purposes appear to be the same both in the case of trusteeship system under Chapter XII and non-self governing territories under Chapter XI, the mechanisms provided for by the Charter significantly differ between the two. Indeed, art. 73, in setting up the regime applicable to the non-self governing territories, seems to be less stringent with regard to the role played by the State under whose administration they are placed. The provision provides for an international embryonic control, in that the UN Charter requires States to exercise authority over these territories only to a certain extent, namely, “to transmit regularly to the Secretary-General for information purposes [...] statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible”.

Finally, the different case of territories directly under UN administration must be addressed. International practice confirms the capacity of the UN to administer a territory. With the sole exception of Namibia, where the General Assembly (GA) transferred to itself the mandate awarded to South Africa at the time of the LoN, without however being able to ensure the stability of its administration for a long time,⁽³⁰⁾ the recent cases of Timor Leste (before independence) as well as of Kosovo have reasserted the effectiveness of these international forms of UN territorial administrations.

As far as the Timorese situation is concerned, the Security Council (SC) adopted the resolution 1272 (1999) of 25 October 1999, by virtue of which it created “a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice” (para. 1). Among the functions and powers exercised by ATNUTO, there were the following: “(a) To provide security and maintain law and order throughout the territory of East Timor; (b) To establish an effective administration; (c) To assist in the development of civil and social services; (d) To ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance; (e) To support capacity-building for self-government; (f) To assist in the establishment of conditions for sustainable development [...]” (para. 2).

(30) See GA Res. No. 2145 (XXI) of 27 October 1966.

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With regard to Kosovo, at the end of the armed conflict following the NATO intervention, the SC acting again under Chapter VII of the Charter, adopted resolution 1244 (1999) of 10 June 1999 and established a “international security presence in Kosovo” (par. 3), appointed, upon consultation with the Secretary General, “a Special Representative to control the implementation of the international civil presence” (par. 6). Moreover, the SC conferred to the Special Representative precise tasks and functions and, in particular, authorized the Secretary General “to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo” (par. 10).

Being Kosovo at that time a territory under the sovereignty of a State, this situation is similar to those which will be dealt with in the following section. The unilateral proclamation of independence by the Parliament of Kosovo on the 17th of February 2008, entails highly interesting issues from the standpoint of public international law. In this respect, its compatibility with UN Security Council resolution 1244 whose Preamble adamantly reaffirms “the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2”, can be legitimately questioned. The Un General Assembly requested on the 10th of October 2008 the ICJ to render an Advisory Opinion whether the Kosovo Proclamation of independence is in accordance with public international law⁽³¹⁾. One can easily understand why the Opinion of the UN “main judicial organ” is eagerly awaited.

3.5 *Internationalized Territories*. Leaving aside the instance of the of international waterways and straights as well as the particular regime covering Antarctica, the concept of internationalized territory applies to all those situations which share a common characteristic: the sovereignty of a State is restricted with regard to a part of its territory, by virtue of an international treaty.

(31) Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo.

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Such treaties can assume two different aspects: (i) a normative aspect, that is to say, they can impose particular obligations upon the State concerned; or (ii) an institutional aspect, by transferring to an international subject some sovereign competencies and powers.

The first hypothesis encompasses all the cases where the sovereignty of or its exercise by a State over a certain territory is clearly limited by an international treaty, in favor of the international community or of a number of States. The said restriction is provided for in the treaty itself and the State whose sovereignty is restricted shall not necessarily be a Contracting Party. In this case, the treaty has “extra-conventional effects” or it may create “objective legal situations”.⁽³²⁾ The State concerned will assume obligations over a part of its own territory, in the name of the “international interest” as it is perceived by the group of States (Parties to the treaty).

In this regard, it should be recalled the demilitarization of Åland islands: the archipelago was under Russian sovereignty according to the Treaty of Paris (1856) but its provisions were considered to be still in force (and thus binding) on the new sovereign Finland, even though the latter was not a Party to the treaty⁽³³⁾. By the same token, it may be cited the case of Suez Canal, whose territorial status was defined in the Convention of Constantinople (29 October 1888), then terminated when Egypt opted for the nationalization of the Canal (26th of July 1956).

In these situations, the succession of sovereignty does not jeopardize the obligations arising from the treaty, for the latter are deep-rooted and inherent in the territory itself. They are *iura in re* and, therefore, follow the fate of the territory which they are related to.

As a matter of fact, the 1978 Vienna Convention on Succession of States in respect of Treaties provides, namely in arts. 11 and 12 (reflecting customary law), that a succession of States does not as such affect a boundary (art. 11) and other territorial regimes (art. 12) established by a treaty.

(32) I.C.J., Advisory Opinion of 11 April, 1949, *cit.*, at 185.

(33) Iles d’Åland, Différend suédois-finlandais, Commission des juristes (Société des Nations), décision du 5 septembre 1920, *Journal officiel de la Société des Nations*, octobre 1920, pp. 14-19.

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As far as the second hypothesis is concerned (*i.e.* treaties with an institutional aspect), it may be contended that, despite some differences among the various cases, they all imply that an international subject is vested with the administration or, at least, with the control of some territory. For instance, the area of Sarre (1919-1935) was under the control of the LoN through an appropriate Govern Commission, even though the territory was under German sovereignty. Another relevant case between the two World Wars was the “Free Town of Danzig” (1919-1939): it was under Polish sovereignty but nevertheless administered by the LoN, and its legal status was laid down in the Treaty of Versailles. Even the city of Tangier (between 1923 and 1956), despite its specificities, may well fall within this category of international administrations.

After WWII, it has to be cited the “Free Territory of Trieste”, divided into two zones (A and B) by the Peace Treaty between Italy and Allied Powers (10 February 1947). According to the Treaty, the SC should have exercised relevant functions through a Governor appointed by the SC itself.

Nonetheless, because of the impasse in the Security Council caused by the Cold War, the regime provided for Trieste in the Peace Treaty did not really worked, and the Governor was never nominated. Therefore, the “Free Territory of Trieste” did never exist in facts; it was instead more similar to a military occupation, which lasted until the 1954, when the London Memorandum was signed. Italy obtained the administration over Zone A (essentially Trieste, already under allied government), while Zone B continued to be under the control of Yugoslavia. The present situation was definitely recognized by the Parties with the Treaty of Osimo, signed on 10 November 1975.⁽³⁴⁾

Interestingly enough, the Italian Courts have always considered the Zone A of the “Free Territory of Trieste” as being under the Italian sovereignty between 1947-1954.

More recent cases of temporary international administration, apart from the abovementioned situation in Kosovo, are those of East Slavonia, of Baranja and the two years administration of West Srem (in Croatia), by virtue of the SC res. 1037 (1996) of 15 of April 1996.

(34) See Italian Court of Cassation, Sezione Lavoro, Judgment No. 2824 of 6 June 1978, commented in P. Picone, B. Conforti, *supra* note 17, at. 1006.

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3.6 *Spheres of Influence*. Spheres of influence are usually established by international treaties, the object and purpose of which is solely the partition, among the Parties, of those territories which have not yet been occupied (or even explored). Thus, the main difference with the previous category (internationalized territories) is that in this case there is no transfer of sovereignty, or of the right to exercise it.

Indeed, such treaties do not confer real and subjective rights but merely rights and obligations of a personal character over a certain territory (which must be *terra nullius*).

The Contracting Parties are not the holders of sovereign rights on those areas. Hence, only an actual peaceful and continuous occupation of a *terra nullius* displaying State's *animus possidendi* would entitle the latter to the protection afforded by international law. The Contracting Parties to the treaties concerning spheres of influence may not occupy these territories. If one State should nevertheless do it, although the occupation might be effective, it would violate the treaty obligation toward the other Party/ies.

4. Origin and Extinction of Territorial Titles

4.1 *Territorial Sovereignty: Modes of Acquisition*. If one uses the usual wording of private law, it is possible to distinguish between “original” modes of acquisition and “derived” modes of acquisition of territorial sovereignty.

As far as the former is concerned, the real right of a State over a territory constitutes also a “new” subjective right, which did not exist previously. Accordingly, in this case the mode of acquisition is completely independent from any relation with another subject of international law, namely a State. Situations falling within this first category are the actual occupation of a *terra nullius* coupled with *animus possidendi* (that is, with the intent to transfer State sovereignty), or “prescription” (which nevertheless may imply that the territory is under another State sovereignty).

The terminology from private law is useful to emphasize that the two ‘original’ modes of establishing a territorial title are neither based on cession nor conquest.

Nevertheless, according to the dominant doctrine (section 2.4 *supra*) the legitimacy of prescription under international law is controversial, for it would lack

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the constitutive elements of the corresponding institution under private law⁽³⁵⁾. Even admitting the existence of such means of acquisition of territory under international law, it is still contested whether it belongs to the “original” or “derived” mode of acquisition.

With regard to the latter mode of acquisition (derived), it has to be meant as a sort of extension⁽³⁶⁾ of sovereignty through a previous legal relation that may take the form of an international treaty or of a chain of unilateral legal acts and/or State’s behaviors conveying the legal title. Within this second category, the common feature as well as the postulate for the transfer of sovereignty is to be found in the legal relation between the acquiring State and the one which cedes the territory. Such legal relation may be represented by juristic act (treaty-based or unilateral) or by a “composite legal act”, that is to say, an aggregation of legal facts and acts (even incomplete) that may create a legal title over a territory. As examples of juristic act, one may cite the cession (or sale) of Louisiana (1803) and Alaska (1867) to the United States by France and Russia respectively. With regard to the “composite legal act”, it is worth noting the judgment rendered by the International Court of Justice in the *Fisheries Case*,⁽³⁷⁾ or the *Dubai/Sharjah* border arbitration.⁽³⁸⁾

Finally, a third mode of establishing a legal title over a territory, other than the “original” and the “derived”, has to be discussed: the so called *ope legis*. In other words, all those natural changes which are so deep and drastic as to have legal effects and consequences under international law. In this case there is neither the element typical of the “original” mode of acquisition (the *animus possidendi*) nor it depends upon an agreement (legal relation) between two States, that we find in the “derived” approach.

Two conditions are to be fulfilled in order for an *ope legis* to arise: (i) there shall be a legal rule providing for such and effect; and (ii) the natural event envisaged by the rule must actually occur. The expansion of a river’s shore due to

(35) See: G. DISTEFANO, *L'ordre international entre légalité et effectivité. Le titre juridique dans le contentieux territorial*, Paris, Pedone, 2002, pp. 292-313.

(36) In this context, the term “extension” is preferred, *cf.* Court of Appeal of Brescia, 17 June 1964, in P. Picone, B. Conforti, *supra* note 17, at 903.

(37) *United Kingdom v. Norway*, I.C.J., Judgment 18 December 1951, *I.C.J Reports*, 1951, at.116 ff., at 139.

(38) Arbitral award, 19 October 1981, 91 ILR, at. 543 ff., para. 153.

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sedimentation, the sudden detachment of a part of the shore as well as the abrupt emersion of an island in the middle of a river may well represent examples of *ope legis* creation of legal titles.⁽³⁹⁾

4.2 *Some Observations on the Modes of Acquisition of a Territorial Title.* The abovementioned categorization of the modes of acquisition under international law is far from being generally accepted. Indeed, many commentators use to criticize and contest the normative character of such “modes” as well as their legitimacy under international law.⁽⁴⁰⁾ It is contended that neither they reflect the State practice nor are they binding⁽⁴¹⁾.

According to some eminent scholars, the so-called “modes” would exclusively have a descriptive value, certainly useful for the purpose of categorization, yet absolutely unable to have a binding effect, for they are not enshrined in any rule of positive international law. Thus, they can not but be defined as a “synthetic denomination (expressive enough)” of some modalities through which territorial sovereignty may be extended.⁽⁴²⁾

Being only descriptive categories and not normative ones, these ways of acquisition would not retain the same binding status as those provided for in modern civil codes.

Hence, the dominant doctrine, drawing particular attention on State practice and international jurisprudence, prefers to split up the modalities of acquisition (i.e. extension) of territorial sovereignty into the categories of legal acts and facts. This category, well-established in law, is instrumental to the explanation of all the phenomena related to the change of territorial sovereignty.

(39) A different case, from an international law point of view, would be the surfacing of an island in the sea.

(40) See R. Jennings, A. Watts (eds.), *Oppenheim's International Law*, 9th Ed., Vol. I, Harlow, Langman, 1992. It is worth noting that the international jurisprudence does not often rely on these “modes of acquisition”, even though sometimes the latter are mentioned in decisions and judgments; see ICJ, Judgment of 10 October 2002, in *I.C.J. Reports*, 2002, para. 65.

(41) M. Giuliano, ‘I diritti e gli obblighi degli Stati’, in G. Ballardore Pallieri, G. Morelli, R. Quadri (eds.), *Trattato di diritto internazionale*, Sect. I, Vol. III, Tome I, Padova, Cedam, 1956.

(42) M. Giuliano, T. Scovazzi, T. Treves, *Diritto internazionale*, Vol. II, Milano, Giuffrè, 1983, at. 55.

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These legal behaviors (constituted by acts and facts), when coupled with the exercise of an effective control, constitute the legal basis (or title) for the extension of sovereignty over a territory.

4.3 *Fundamental Principles of International Law and Acquisition of Territorial Sovereignty: the Prohibition of the Use of Armed Force and the Right to Self-Determination.* As already clarified, States have the possibility to translate among them the sovereignty over a territory through their effective legal behavior. Nevertheless, this right is not unlimited.

Indeed, the insuperable legal border of this practice is represented by the *jus cogens* or peremptory norms of international law, which encompasses the fundamental values and principles of international law, as well as those principles without which no legal order can be established and functions accordingly.

Two norms of *jus cogens* are particularly relevant for the purpose of the present discussion: (i) the prohibition of any territorial extension of sovereignty through the threat or use of force, (ii) and the right to self-determination.

As far as the former is concerned, any territorial change by virtue of threat or use of military force is *ipso jure* null and void, even if the resort to force was lawful (for instance, under self-defense).⁽⁴³⁾ Generally, this rule⁽⁴⁴⁾ is interpreted as the natural corollary of the prohibition of the use force *ex art. 2(4)* of the UN Charter. Therefore, conquest cannot represent the material precondition for the acquisition of a territory⁽⁴⁵⁾.

By the same token, the rule providing for the right of self-determination implies that any change of sovereignty over a territory may not infringe this right. As a consequence, no State can dispose of a territorial title, even by international treaty with one or more States⁽⁴⁶⁾, unless in that case a population can validly oppose a legal title on the same area. Neither the effectiveness of the occupation

(43) The origin of the prohibition of the threat or use of force for the purpose of extending territorial sovereignty is to be found in the so called “Stimson” diplomatic note (from the name of the US Secretary of State), at the time of Manchurian war of 1924.

(44) For a clear enunciation of the norm, see GA Res. No. 2625 (XXV) of 24 October 1970 and GA Res. No. 3314 (XXIX) of 14 December 1974.

(45) See: G. DISTEFANO, “Some Remarks on the United Nations and Territorial Sovereignty in the Occupied Palestinian Territory”, *Journal of Sharia and Law*, vol. 30 (2007), pp. 35-46.

(46) See: East Timor (Portugal v. Australia), Judgement of 30th of June 1995, *I.C.J. Reports*, at pp. 90 ff..

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nor the (dubious) recognition of the illegal situation by other States can derogate to such a subjective right, which belongs to the population fighting for its determination, for this right is embodied in a peremptory norm of international law.⁽⁴⁷⁾

5. Determination of State Boundaries.

The concept of boundary (or boundary line) derives from the notion of “armed front”; in other words, the line that can not be crossed by an enemy army to enter into the territory beyond.

The term boundary (or border) was probably used for the first time at the beginning of fourteenth century in a diplomatic note. It replaced the word marchland, that is to say, the space characterized by a fluctuation of sovereignty.⁽⁴⁸⁾

The definition of a boundary is a crucial moment in the life of a State. Generally, a frontier line should be linear and continuous, even though the identification by boundary-stones or similar objects is not required under international law. In any case, the delimitation of a State’s territory is an operation mainly governed by law and, as such, it has to be based on legal justifications, thus implying the existence of a legal title over that territory.⁽⁴⁹⁾

The determination of the boundary line will be the result of the comparison of the legal titles of both parties, that is, of the subjective rights concerning the respective territories. These titles are generated by the legal behaviors (acts and facts) discussed above (see section 4.2.). Therefore, there exists no rule of international law prescribing a pre-determined boundary line; it is only established by the validity of both titles combined together.⁽⁵⁰⁾

(47) See: Case concerning the Frontier Dispute (Burkina Faso / Republic of Mali), Judgment of 22nd of December 1986, *I.C.J. Reports 1986*, at pp. 554 ff., para. 23-25; see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, I.C.J., Advisory Opinion of 9 July 2004, *I.C.J. Reports*, 2004, para. 88, 118-122, 156.

(48) See the case concerning the territory of “Rann of Kutch”, *India v. Pakistan*, Arbitral Award of 20 June 1965, *RIAA*, Vol. XVIII, at. 563.

(49) See *Guinea-Bissau v. Guinea*, Arbitral Award of 14 February 1985, in *Rev. Gen. Dr. Int.*, 1985, at. 484 ff., para. 120

(50) I.C.J., Judgment of 22 December 1986, in *CIJ Recueil*, 1986, at. 554 ff., para. 47.

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A fortiori, the natural features of a territory do not have as such any relevance from a legal point of view; they can not impose themselves *ipsis rebus dictantibus*.⁽⁵¹⁾ Nevertheless, due to practical reasons, a clear geographical feature may be agreed upon by the parties as the boundary, for it may allow a better visibility of the frontier line for instance. In the case of rivers, there are specific criteria for establishing the delimitation's line, which can be in the middle of a ship canal (*thalweg*), or at the equidistant line between the shores or simply on one of them. Nevertheless, these criteria are not binding and may be chosen case by case by the States concerned.

For the purpose of determining a boundary between two or more States, an important principle is that of *uti possidetis*, which comes from the Roman law on succession. This expression was originally used when the Spanish and Portuguese colonies in America were fighting for their independence. The governments of the newborn States decided to transform *ipso jure* the administrative borders among the various colonies in their new international boundaries. To put it differently, the former internal borders which delimited the regions became automatically the international boundaries between the newly independent States. The application of *uti possidetis* within this specific historical context pursued two main aims: (i) to solve any potential territorial dispute without resorting on the use of force (*endogenous* purpose); (ii) at the same time, to assert that no territory of Latin America was a *terra nullius* and, thus, be potentially acquired by the European Powers or by the United States through actual occupation (*hexogenous* purpose).

The principle of *uti possidetis*, originally a regional customary rule, later on has become applicable to any situation of fragmentation of a State and it now constitutes an example of extension *ratione personae* of a customary rule.⁽⁵²⁾

(51) G. Distefano, L'ordre international entre légalité et effectivité. Le titre juridique dans le contentieux territorial, Paris-Genève, Pedone, 2002, at. 406-418.

(52) I.C.J., Judgment 22 December 1986, in *CIJ Recueil*, 1986, at. 554 ff., para. 20-26.

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ملخص بحث

نظريات حول السيادة الإقليمية : إعادة تقييم

للأستاذ الدكتور/ جيوفاني ديستيفانو

الإقليم وترجمته النموذجية والتي تعني السيادة الإقليمية مازالت حجر الزاوية في النظام القانوني الدولي المعاصر كما صرحت بذلك المادة 1/2 من ميثاق الأمم المتحدة. وعليه، فإن من الأهمية بمكان البحث في هذه الفكرة الأساسية. وهذا البحث يهدف في المقام الأول إلى تحليل النظريات القانونية المختلفة المقدمة لغاية الآن وذلك من أجل تفسير العلاقة القانونية بين الدولة والإقليم، وثانياً إلى تحليل ما يسمى بصيغة أو نمط اكتساب السيادة الإقليمية، وثالثاً إلى تحليل الأوضاع الإقليمية الحالية (مثل الإدارة الدولية، المحميات، حقوق الارتفاق... الخ) ورابعاً دور قواعد القانون الدولي العام في إطار إرساء أو تأسيس الحقوق القانونية المترتبة على السيادة الإقليمية (استعمال القوة والقواعد المقررة للحق في تقرير المصير).