

Ratio Evolutionis: The Interiority Of Self-Determination To The Intertemporal Rule

*Benjamin Franklen Gussen**

This article examines the intertemporal rule in international law, emphasizing its intrinsic connection with the right to self-determination. The intertemporal rule, established by Judge Max Huber in the Island of Palmas Case, dictates that legal situations be assessed by the laws in force at the time the events occurred, ensuring fairness and legal certainty. The article explores the two key elements of the rule: the contemporaneity principle, which requires actions to be judged by the law at their time, and the evolutionary principle, which demands ongoing legal relationships align with evolving legal standards. Through the Costa Rica and Panama Arbitration Case, the Island of Palmas Case, and the Temple of Preah Vihear Case, this article illustrates how self-determination is embedded within the intertemporal rule. This relationship ensures that historical contexts are respected while adapting to modern legal standards, crucial for the legitimacy and adaptability of sovereignty claims. The article underscores the dynamic interaction between law and history, emphasizing the need to balance historical legal frameworks with contemporary human rights and environmental law standards. By highlighting this nexus, the article positions the intertemporal rule as an essential construct for navigating the evolving landscape of international law, reinforcing the right to self-determination as a fundamental principle that both shapes and is shaped by the intertemporal rule, ensuring that historical and contemporary legal realities are acknowledged and integrated.

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* Prof. Dr. Engr. Ben Gussen is a tenured international and constitutional law jurist at the Swinburne Law School, Melbourne, Australia.

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I. INTRODUCTION

This paper adopts a deconstructive approach to examine the presence of self-determination in cases involving the intertemporal rule.¹ Deconstruction, rooted in critical theory, offers a methodological lens to scrutinize the assumptions, power dynamics, and underlying meanings embedded within legal texts and judgments. By interrogating binary oppositions, questioning dominant narratives, and revealing silenced perspectives, this approach seeks to uncover how legal interpretations of self-determination are constructed and contested. Through this analysis, the article highlights nuances in applying the intertemporal rule, contributing to a deeper understanding of its implications for concepts of sovereignty and individual rights.

The intertemporal rule in international law is a principle that addresses how legal issues should be evaluated over time, particularly when laws or conditions have changed since an event or action occurred. It is based largely on Judge Max Huber's *dictum* from the *Island of Palmas Case*,² which is pivotal in understanding the rule's application to issues like territorial title and human rights obligations.³ Huber formulated this rule on the premise that "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when the dispute regarding it arises or fails to be settled."⁴ However, the claimant must also continuously comply with the evolving law to preserve their title.⁵ This latter requirement significantly alters the original rule and has drawn criticism.⁶ This second aspect of the intertemporal rule explains the role that the right of self-determination plays in interpreting the intertemporal rule.⁷ This role is particularly relevant to

¹ See generally Jack M. Balkin, *Deconstruction*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 361, 362 (Dennis Patterson ed., 2nd ed. 2010) (stating that deconstruction in legal scholarship is primarily used for ideological critique by identifying elements that are minimized or suppressed in legal doctrines. It examines how these overlooked principles, if acknowledged, could challenge the dominant principles within a legal field. This approach reveals the hidden significance of marginalized counter-principles that could potentially displace the prevailing ones).

² *Island of Palmas (Neth. v. US)*, 2 R.I.A.A. 829, 845 (Perm. Ct. Arb. 1928).

³ See also T.O. Elias, *The Doctrine of Intertemporal Law*, 74 AM. J. INT'L L. 285, 300 (1980) (explaining that the intertemporal rule, while initially focusing on territory acquisition, is now applied broadly across customary international law).

⁴ *Island of Palmas*, *supra* note 2, at 845.

⁵ *Island of Palmas*, *supra* note 2, at 845.

⁶ See generally Philip C. Jessup, *The Palmas Island Arbitration*, 22 AM. J. INT'L L. 735 (1928) (furnishing a critical analysis of the Award in this case).

⁷ See, e.g., TOM SPARKS, SELF-DETERMINATION IN THE INTERNATIONAL LEGAL SYSTEM: WHOSE CLAIM, TO WHAT RIGHT? 40–57 (2023) (noting that Sparks analyzes the role of international actors and

historical and ongoing sovereignty claims of independence movements, as it intersects with evolving norms and understandings in international law regarding self-determination.⁸ Specifically, the second aspect of the rule—that a claimant must evolve with the law to maintain their title or rights—has significant implications for the sovereignty claims of First Nations within the framework of contemporary international human rights law. Over time, international law has increasingly recognized the rights of indigenous peoples to self-determination, to their traditional lands, and to preserve their culture, languages, and institutions. The evolution of international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁹ exemplifies this shift. UNDRIP recognizes the right of indigenous peoples to self-determination and sets forth principles for protecting their lands, territories, and resources. For First Nations asserting sovereignty or territorial claims, adapting their claims to align with these evolving legal standards is crucial to maintaining and legitimizing their claims under international law.

As international law evolved, the continued assertion of colonial claims without adaptation to the new legal context became increasingly untenable.¹⁰ For First Nations and indigenous peoples worldwide, the intertemporal rule underscores the importance of engaging with the evolving legal framework to reinforce and legitimize their sovereignty and territorial claims. It highlights the need for indigenous claims to sovereignty and self-determination to be articulated in a manner that aligns with contemporary international norms and standards. This approach not only strengthens the legal basis for such claims but also aligns with the principles of justice, equity, and respect for the rights of all peoples that underpin the international legal system.

This article argues that the intertemporal rule is fundamentally grounded in the right to self-determination, rather than self-determination being an exception or a limitation under the second aspect of the rule. Self-determination can be traced back to the 13th Century,¹¹ predating the key developments that

provides a nuanced perspective on who can claim self-determination rights and under what conditions).

⁸ Cf. Manuel Gruber, *Time for a Reappraisal? The Intertemporal Principle of International Law Examined*, 26 AUSTL. INT'L L.J. 91, 102 (2019) (“It is desirable that any territorial changes occur peacefully, by organic political processes that take into account legitimate interests in self-determination. It would be *inappropriate and dangerous* for courts and tribunals to be able to *retroactively* declare a border void or a nation independent solely due to a reassessment of the intertemporal principle. Regarding territory, there is little alternative to the status quo.”).

⁹ , G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, art. 3 (Sept. 13, 2007); *see also* International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

¹⁰ *See, e.g.*, Benajmen Franklen Gussen, *Urbs ex Machina? On the Hohfeldian Incidence of City Subsidiarity as a Jus Cogens*, 52 DENV. J. INT'L L. & POL'Y 1, 19–24 (2023) (furnishing “A Stylized History of 20th Century Self-Determination,” which chronicles the sweeping decolonization movements that transformed the global landscape across Latin America, Africa, and Asia).

¹¹ *See* SPARKS, *supra* note 7, at 41 (explaining that self-determination can be traced back to the Scottish “Declaration of Arbroath of 6 April 1320”. Sparks also discusses the The Plakkaat van Verlatinghe (Act of Abjuration) of 1581, at 50 et seq., announcing the independence of the Low Countries from Philip II of Spain).

established international law as a distinct field in the 16th Century, particularly following the Peace of Westphalia in 1648.¹²

The Declaration of Arbroath represents a pivotal exercise of the right to self-determination by the Scottish people.¹³ Following the effective collapse of English control in Scotland, the Scots shifted their focus from mere resistance to asserting full sovereignty. Despite their military successes, which included frequent and increasingly fierce raids into England, the Scots faced significant diplomatic challenges as Edward II sought to undermine their efforts. In response to Edward's appeals, the Pope issued a series of Bulls in February 1320, excommunicating the Scottish leaders involved in the raids and reiterating the excommunication of Robert the Bruce for a previous crime. This move threatened to delegitimize the Scottish cause and undermine their bid for independence. In April 1320, the Scots convened at the Abbey of Arbroath to craft a decisive diplomatic response. The result was the Declaration of Arbroath, a powerful appeal to the Pope. This letter articulated the Scottish case for independence, calling for the lifting of the interdict on Scotland and the excommunication of Robert the Bruce. The declaration sought to remove the ecclesiastical penalties imposed on Scotland and secure papal recognition of their sovereignty. Such recognition would bolster Robert the Bruce's claim to kingship and provide a protective endorsement from the highest religious authority, deterring further English aggression. By drafting the Declaration of Arbroath, the Scots strategically exercised their right to self-determination. They aimed to secure internal legitimacy and external validation of their independence, asserting their right to self-government and seeking international acknowledgment of their sovereignty. This historic declaration stands as a testament to the enduring principle of self-determination and the lengths to which a people will go to affirm their right to independence.

The crucial point is that England did not formally acknowledge Scottish independence immediately after the Declaration of Arbroath in 1320. The English crown continued to assert its claim over Scotland, leading to ongoing conflicts. It was not until the Treaty of Edinburgh-Northampton in 1328 that England, under King Edward III, formally recognized Scotland's independence and Robert the Bruce as its king.¹⁴ This treaty was a significant achievement for the Scots, marking a temporary cessation of hostilities and acknowledgment of their sovereignty. However, this recognition was not permanent; hostilities resumed in subsequent years, leading to the Wars of Scottish Independence continuing sporadically.

The broader international community, particularly the Papacy, played a crucial role in the Scottish quest for recognition.¹⁵ The appeal to the Pope in the

¹² Treaty of Westphalia, Oct. 24, 1648, 1 Consol. T.S. 271.

¹³ SPARKS, *supra* note 7, at 46.

¹⁴ Treaty of Edinburgh-Northampton, Eng.-Scot., Mar. 17, 1328, <https://www.scottisharchivesforschools.org/WarsOfIndependence/Edinburgh-Northampton.asp#:~:text=This%20source%20is%20the%20indenture,and%20Robert%20I%20as%20king.>

¹⁵ SPARKS, *supra* note 7, at 41–50 (analyzing the role of the papacy in Scottish self-determination).

declaration was a strategic move to gain papal support and legitimacy. While the Pope did not immediately lift the excommunication of Robert the Bruce or issue a definitive statement recognizing Scottish independence,¹⁶ the declaration helped to present the Scottish cause as a legitimate struggle for self-determination. The Papacy's eventual diplomatic pressure on England contributed to the negotiation of the Treaty of Edinburgh-Northampton.¹⁷ Additionally, the declaration influenced international opinion by framing the Scottish cause in terms of the right to self-determination and resistance to unjust domination.¹⁸

As international law evolved, self-determination continued to play a wider role in the application of the intertemporal rule. Essentially, the liberal dichotomy identified by the two aspects of the rule serves as an exception to a more enduring dynamic equilibrium, while international law consistently evolves beyond the Roman-Christian norms that characterized its origins.

This article elucidates the role of the right to self-determination in the application of the intertemporal rule, providing deeper insights into its application through relevant legal precedents. Parts II and III provide a more comprehensive understanding of the intertemporal rule. These sections inform the analysis of Part IV, which examines the rule's application through the lens of self-determination. Final Part V provides conclusions on the implications of the intertemporal rule for the legal sovereignty and self-determination of First Nations, highlighting potential areas for future research and legal development.

II. THE CONTEXT

The intertemporal rule in international law, exemplified in the *Island of Palmas Case*, represents a significant principle in the adjudication of territorial disputes.¹⁹ This case, arbitrated by Max Huber,²⁰ underscored that sovereignty over a territory should be assessed based on the law in force at the time the sovereignty claim was made. This ruling set a crucial precedent in international law, emphasizing the importance of historical context in legal decision-making.

A. Conceptual Underpinnings

The *Island of Palmas Case* involved a dispute between the United States and the Netherlands over the Island of Palmas (or Miangas) located in the Philippines. Huber's decision in favor of the Netherlands was grounded in the principle that the legal status of a territory is determined by the laws and sovereign claims applicable at the time the dispute arose, rather than subsequent developments in international law. This principle has since become

¹⁶ SPARKS, *supra* note 7, at 46.

¹⁷ SPARKS, *supra* note 7, at 49–50.

¹⁸ SPARKS, *supra* note 7, at 49–50.

¹⁹ *Island of Palmas*, *supra* note 2, at 829–871.

²⁰ See generally Dietrich Schindler, *Max Huber – His Life*, 18 EURO. J. INT'L L. 81, 81–96 (2007) (highlighting Huber's significant contributions as a judge and his theoretical work on the sociological and ethical aspects of international law).

a key component in the resolution of territorial disputes, it guides how historical claims and legal actions are evaluated in international courts.

While the *Island of Palmas Case* suggests that the intertemporal rule emerged in the 20th Century, some have suggested that its origin can be situated in the 17th Century:

After the break-up of western Christendom following the Treaty of Westphalia of 1648, a number of historical changes took place in customary international law. One of the most important changes, if not the most important, was the emergence of the nation-state and the political philosophy to which it gave rise, that is to say, the theory of political sovereignty as the cornerstone of the rights and duties of the various states that came into existence. The political sovereignty of states resulted in the gradual replacement of the old international relations within Christendom, which were based upon a theocratic system of law, by a wider legal system that later embraced nations outside Christendom and engendered a universalization of international relations and, therefore, of international law.²¹

Put succinctly, the relationship between the right to self-determination and the intertemporal rule can be understood through the context in which the intertemporal rule emerged. This rule developed in response to a problem of scale,²² driven by the theory of political sovereignty, which necessitated a faster and broader rhythm of change in international law. The decentralization of decision-making away from a universal or Eurocentric authority, along with the admission of new subjects into the international order, created a dynamic legal

²¹ Elias, *supra* note 3, at 285.

²² See generally Benjamin F. Gussen, *On the Problem of Scale: Spinozistic Sovereignty as the Logical Foundation of Constitutional Economics*, 7 J. PHIL. ECON. 2, 2–19 (2013) (arguing that constitutional economics must address the issue of scale by recognizing the importance of different organizational levels (local, national, global) and the interactions between them. The problem of scale arises from the traditional emphasis on the nation-state as the default unit of analysis, which neglects the complexities and dynamics of smaller jurisdictions. Gussen argues for a shift towards polycentric constitutional frameworks inspired by Spinoza's concept of sovereignty, where power is shared among cities rather than centralized in a dominant capital. This approach aims to create a more stable and cooperative political order by explicitly limiting the size of jurisdictions and fostering competition among smaller, more manageable political units); Benjamin F. Gussen, *On the Problem of Scale: Hayek, Kohr, Jacobs and the Reinvention of the Political State*, 24 CONST. POL. ECON. 19, 19–42 (2013) (defining the problem of scale as the challenges and complexities that arise when political entities expand in size. The article emphasizes that as political systems grow larger, they encounter difficulties in maintaining effective governance and stability); Benjamin F. Gussen, *On the Problem of Scale: The Inextricable Link between Environmental and Constitutional Laws*, 13 N.Z. J. PUB. & INT'L L. 39, 39–64 (2015) (defining the problem of scale as a multifaceted issue that arises when the size and complexity of systems grow, leading to potential instability and collapse. It outlines three critical steps in the problem of scale: symmetry breaking, production of scale, and increasing complexity. These steps illustrate how the process of scaling up—whether in ecological, economic, or political systems—can lead to challenges in maintaining stability and coherence. The article emphasizes that sustainability acts as a counterbalance to this problem, promoting resilience by ensuring that systems do not become overly complex and prone to collapse. The problem of scale highlights the importance of managing growth and complexity to prevent systemic failures and ensure sustainable development).

environment. These new subjects often had legal systems which diverged from the Roman-Christian sources that underpinned classical international law. As a result, international law had to adapt to a more pluralistic and evolving set of legal norms.²³ The intertemporal rule, which balances the application of historical legal norms with contemporary standards, provides a framework for this adaptation.

In this context, the right to self-determination is deeply intertwined with the intertemporal rule and is often rendered through the lens of political sovereignty. Self-determination allows peoples to determine their political status and pursue development according to their historical and cultural contexts. The theory of political sovereignty underpins this rendition by emphasizing the importance of a people's control over their own political destiny. The intertemporal rule supports self-determination by ensuring that the historical claims and contexts of these peoples are respected (contemporaneity principle) while also requiring that ongoing legal relationships and rights adapt to current international legal standards (evolutionary principle). The essence of the nexus between self-determination and the intertemporal rule lies in this dual function. The right to self-determination respects the historical sovereignty and cultural contexts of peoples, acknowledging their past struggles and claims. Simultaneously, it ensures that their rights and status remain relevant and valid under current international law, reflecting the dynamic and evolving nature of the global legal order. Thus, the intertemporal rule provides a legal mechanism that integrates the historical and contemporary dimensions of self-determination. It enables a continuous and evolving recognition of peoples' rights, ensuring that historical injustices are acknowledged while adapting to modern legal norms. This relationship highlights how international law can accommodate diverse legal traditions and evolving concepts of sovereignty and self-governance.

If the intertemporal rule is understood as a response to a problem of scale, the rule can be understood as having dual time scales. One can explain this point through the conception of time.²⁴ This idea comes from John McTaggart (1866-1925), a British philosopher best known for his work on the philosophy of time. McTaggart introduced two ways of viewing time, which he called the A-series and the B-series.²⁵ The A-series of time is about the changing aspects of events. According to McTaggart, events move from the future to the present and then

²³ For example, after the Peace of Westphalia in 1648, the independence of Switzerland was recognized, marking a shift towards a more decentralized and pluralistic European order. Similarly, the Holy Roman Empire's structure changed, leading to the de facto independence of various German states, each with its own legal traditions, further challenging the previously dominant Roman-Christian legal framework. For a detailed discussion, see Stephen C. Neff, *Justice Among Nations: A History of International Law* (Harvard University Press, 2014), for an argument that international law has continuously evolved through history, shaped by changing political and social contexts. Neff highlights the dynamic nature of international law, emphasizing its adaptation to shifting power structures and ideologies across different eras.

²⁴ See Steven Wheatley, *Revising the Doctrine of Intertemporal Law*, 41 OXFORD J. LEGAL STUD. 484, 485 (2021) (discussing the dual nature of time).

²⁵ See J. Ellis McTaggart, *The Unreality of Time*, 17 MIND 457, 458–465 (1908) (explaining the A and B series as competing explanations of the machinations of time).

recede into the past. In this view, time is dynamic and characterized by a continual flow. The key terms associated with the A-series are “past,” “present,” and “future.” These terms are tensed positions, indicating that time involves change and events are constantly moving through these positions. For example, what is now the present will become the past, and what is the future will become the present and then the past.

The B-series of time, on the other hand, represents a static view of time. Instead of focusing on the changing properties of events (moving from future to past), the B-series describes events’ relations to each other using terms like “earlier than,” “later than,” or “simultaneous with.” This series removes the subjective experience of time and looks at it as a series of ordered events. In the B-series, the positions of events do not change; an event that is earlier than another will always be earlier, irrespective of any observer’s perception or any passage of “time.”

McTaggart argued that the A-series led to contradictions and was therefore not a valid representation of time, leading him to conclude that time itself is an illusion (a position known as “McTaggart’s Paradox” or the “Unreality of Time”).²⁶ His work sparked extensive debate and further philosophical inquiry into the nature of time.

In applying these concepts to law, one might use the A-series to discuss the changing nature of legal standards, societal norms, or individual perceptions over time. In contrast, the B-series might be used to analyze the sequence of events, legal precedents, or historical records in a more detached, chronological order.

1. As a McTaggart A-series

As a response to a problem of scale, the intertemporal rule engages the perception of the observer, and therefore follows an A-series conception of time,

²⁶ See, e.g., ROSS P. CAMERON, *THE MOVING SPOTLIGHT: AN ESSAY ON TIME AND ONTOLOGY* 51 (2015) (McTaggart claimed that the A-Theory of time is inconsistent, as it requires each moment to be past, present, and future simultaneously. Cameron defends the A-Theory by arguing that moments possess these temporal properties sequentially, not concurrently, addressing concerns of circular reasoning and infinite regress. The discussion then shifts to a nuanced critique of A-Theory variants like the moving spotlight theory, rather than presentism alone. Scholars such as Nicholas Smith, Phillip Bricker, and Kit Fine critique and refine the moving spotlight theory by drawing parallels between temporal and modal dimensions, identifying crucial criteria for a robust version of the theory); see also Daniel Deasy, *The Modal Moving Spotlight Theory*, 131 *MIND* 1195, 1195–1215 (2022) (explaining that the Modal Moving Spotlight Theory (MST) integrates the concept of an absolute present (A-Theory) with the idea that all times are equally real (Permanentism), proposing a unique property called “fundamental presentness.” Unlike other time theories, MST posits that while most fundamental properties are permanent, this singular property changes to mark the passage of the present moment. This “fundamental presentness” distinguishes the current “now” from all other moments, which are equally real but not presently occurring. MST challenges traditional views by suggesting that time’s passage is indicated by this shifting property, not the progression of events. It aims to reconcile the dynamic nature of the present with the scientific view of a four-dimensional, unchanging universe, presenting the present moment as a spotlight moving across time, illuminating different moments without denying the reality of those outside the spotlight).

where events move through time by creating history, namely, from the future to the present, and finally to the past.

Interpreting the rule broadly follows the A-series conception of time, and invites comparisons with other conflict rules, such as “*lex superior*” (a higher law prevails over a lower one), “*lex specialis*” (a more specific law prevails over a more general one), and particularly “*lex posterior*” (a later law prevails over an earlier one). Notably, these maxims not only trace their origins to classical international law,²⁷ but arguably to natural law itself.²⁸

The first limb of the intertemporal rule can be articulated as “*lex priori derogat legi posteriori*” (an earlier law prevails over a later law), which stands in contrast to the well-known “*lex posterior*” maxim. This apparent discrepancy is clarified by the previous discussion of the intertemporal rule as a response to a specific scale problem. Typically, the “*lex posterior*” maxim presupposes that all laws emanate from a singular legal system, usually under the same decisionmaker or legislative body, implying a *continuity* within the legal system. Conversely, the intertemporal rule does not make such an assumption, primarily because, from time to time, international law must accommodate political transitions, somewhat akin to how emerging technologies replace their predecessors. Therefore, conflict resolution must employ the appropriate ‘technology’ to accurately analyze pertinent rights and obligations.

As international law evolves, certain legal principles, or “old technologies,” might no longer align with contemporary legal standards or the current understanding of international obligations, particularly in the context of norms considered to be *ius cogens* (compelling law) or obligations *erga omnes* (towards all). These terms represent foundational principles acknowledged by the international community as universally binding and non-derogable, such as the prohibition of genocide, slavery, and torture.²⁹

²⁷ See, e.g., R.C.H. Lesaffer, *Roman Law and the Early Historiography of International Law: Ward, Wheaton, Hosack, and Walker*, in UNIVERSALITY AND CONTINUITY IN INTERNATIONAL LAW 149, 149 (Thilo Marauhn & Heinhard Steiger eds., 2011) (addressing the historical continuity between Roman ‘international law’ and the modern conception of international law, evaluating how practices and principles from the Roman era have persisted or changed in later times. Lesaffer also examines the impact of Roman private law on the further development of international law, particularly emphasizing how the medieval and early modern law of nations was influenced by Roman legal concepts and practices).

²⁸ J. Stanley McQuade, *Ancient Legal Maxims and Modern Human Rights*, 18 CAMPBELL L. REV. 75 (1996) (discussing the diminished role of ancient legal maxims in modern English law, contrasting their former prominence with their current status as historical curiosities or mere sources of entertainment. McQuade argues for a revival and reevaluation of these maxims due to a renewed interest in morals and human rights within the legal community. He suggests that these ancient principles are part of natural law, and still resonate in modern legal issues, particularly human rights and environmental law).

²⁹ See, e.g., W. A. Schabas, THE CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS 40 (2021) (arguing that national and international courts often reference customary law in a cursory manner, providing only a brief analysis of the evidence. This trend extends to discussions of *ius cogens* or peremptory norms. Schabas suggests that the widespread ratification of human rights treaties aids in recognizing customary law, despite the complication of reservations, adding that data from the Human Rights Council’s Universal Periodic Review mechanism offers valuable insights into both State practice and State perspectives on international legal obligations. Schabas also explores the concepts of regional custom, *ius cogens*, and the role of the persistent).

When such a misalignment occurs due to the evolution of legal standards, these outdated principles or interpretations do not necessarily get discarded entirely. Instead, their application and interpretation might be changed or limited due to new developments. This adjustment is constrained, however, by the principle of non-retroactivity, or the norm against retrospectivity,³⁰ which protects against applying new legal standards to actions taken under the purview of older laws. This principle ensures legal stability and fairness by safeguarding individuals and entities from being judged by laws that were not in effect at the time of their actions.

The second limb of the intertemporal law recognizes that while legal norms evolve, the application of these evolving norms must balance the need for progress and consistency with legal certainty and the protection of legitimate expectations based on prior laws. Therefore, while outdated “technologies” or legal principles may become obsolete and incompatible with current international law, they are not entirely discarded. Instead, they are reevaluated and reinterpreted within the framework of existing legal norms, including contemporary understandings of *ius cogens* and *erga omnes* obligations, while respecting the historical context and the rights established under the legal regime in place at the time of the original actions or agreements.

This approach allows international law to adapt and evolve in response to new challenges and changing moral, social, and political landscapes, promoting the development of a more just and effective legal order while upholding the principles of legal certainty, non-retroactivity, and respect for previously established rights.

2. As a McTaggart B-series

On the other hand, to conceive of the intertemporal rule as B-series conception of time, one can interpret the rule more narrowly, as a version of the concept of the critical date. This concept is usually “utilized when settling a direct positive conflict of law in respect of time, rather than an indirect positive conflict (treaty interpretation) or negative conflict (non-retroaction and *ratione temporis* [jurisdiction limited to specific time period]).”³¹ Both the intertemporal

³⁰ See, e.g., IAN M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 248–49 (1973) (providing a detailed analysis of the Vienna Convention on the Law of Treaties, which codifies the principle of non-retrospectivity in Article 28).

³¹ Zhenni Li, *International Intertemporal Law*, 48 CAL. W. INT’L L. J. 341, 367 (2018) (emphasis in the original); AARON X. FELLMETH & MAURICE HORWITZ, *GUIDE TO LATIN IN INTERNATIONAL LAW* (2nd ed. 2021), <https://www.oxfordreference.com/display/10.1093/acref/9780197583104.001.0001/acref-9780197583104?btog=chap&hide=true&jumpTo=ratione&page=92&pageSize=20&skipEditions=true&sort=titlesort&source=%2F10.1093%2Facref%2F9780197583104.001.0001%2F9780197583104> (explaining *ratione temporis* as “[b]y reason of time,” adding: “Because of the relevant timing or period of time pertaining to the subject under consideration. E.g., ‘Germany contends that the key issue for the purpose of applying Article 27(a) is not the date when this dispute arose, but whether the dispute relates to facts or situations that arose before or after the critical date. Only if these facts or situations took place after the critical date, that is after 1980, would the Court have jurisdiction *ratione temporis* under Article 27(a). But since, in Germany’s view, this dispute relates to facts and situations that predate 1980, the Court lacks the requisite jurisdiction.’ *Certain Property* (Liecht. v. Ger.), 2005 I.C.J. Rep. 6, 20, ¶ 30”) (emphasis in the original).

rule and this concept grapple with similar challenges, including the diverse, fragmented, and immature nature of the primary international law rules they rely upon.³² While both are pivotal when time influences the formation of rights, disputes, or laws, the intertemporal rule often acts as a more nuanced secondary rule. This is because it typically hinges on the chronological development of legal norms, essentially setting the groundwork for selecting applicable laws. The critical date serves as a distinct marker in time, delineating the before and after in legal disputes.³³

Based on the same conception of time, one can understand the intertemporal rule as a rendition of the principle of non-retrospectivity, expressed as the maxim “*tempus regit actum*,” or “time rules events.”³⁴ This maxim is fundamental in maintaining legal predictability and fairness, as it protects against the arbitrary application of new laws to past events. Abrogating the “*lex priori*” beyond the need for alignment conflicts with the “rule generally recognized by civilized nations that in principle no retroactive application should be given to any legal norm.”³⁵ However, the application of the intertemporal rule must be nuanced and sensitive to the evolving nature of international law. The modification of the rippling effects of the original law is thus a delicate balancing act. It requires careful consideration to ensure that any adjustments made are only to the extent necessary to align with these universal principles while respecting the legitimate expectations and rights that were established under the previous legal regime. This approach acknowledges the dynamic and progressive nature of international law, which evolves in response to changes in international norms, values, and understandings, while also upholding the foundational principle of non-retrospectivity to ensure fairness and legal certainty.

In essence, the intertemporal rule as a rendition of the principle of non-retrospectivity represents a critical mechanism in the application of international law. It navigates the tension between respecting the legal norms in force at the time of an act and accommodating the progressive development of overriding principles of international law. This balance is vital for

³² See Li, *supra* note 31, at 367.

³³ Li, *supra* note 31, at 367.

³⁴ FELLMETH & HORWITZ, *supra* note 31 (“[a] maxim meaning that the legality of an act or legal consequences of an event can only be judged according to the law in effect at the time the act or event occurred. *E.g.*, ‘The generally accepted principle of intertemporal law, which is contained in the rule *tempus regit factum*, should therefore be considered as a recognized principle of international law. Consequently, the creation of ties with or titles to a territory must be determined according to the law in force at the time. The same law will also determine the nature and validity of the ties at that time. The rule *tempus regit factum* must also be applied to ascertain the legal force of new facts and their impact on the existing situation. New facts will be subject to the rules of law in force at the time when they occur.’ *Advisory Opinion on the Western Sahara*, 1975 I.C.J. Rep. 12, 169 (separate opinion of Judge De Castro)”) (emphasis in the original).

³⁵ YEHUDA Z. BLUM, *HISTORIC TITLES IN INTERNATIONAL LAW* 194 (1965); see also FRIEDRICH CARL VON SAVIGNY, *A TREATISE ON THE CONFLICT OF LAWS, AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME* 307–374 (1869) (clarifying that new laws should not be applied retroactively and that previously acquired rights should remain unaffected by new legislation).

maintaining the integrity and coherence of the legal system while allowing for the necessary evolution of international norms and standards.

As we will see in the next part, exploration of the intertemporal rule reveals that it is a hybrid conception of time, with the first element being based on B-series time, and the second on A-series time. The resultant conception of time is a punctured equilibrium, where international law changes only in *quanta* after bifurcations, such as the Peace of Westphalia of 1648, the French Revolution of 1789, or World Wars I and II. This nuanced understanding of the way international law changes helps apply both limbs of the rule, especially to the context of balancing the exercise of the right of self-determination vis-à-vis acquiring sovereignty over territories.

B. Legal Significance

The intertemporal rule is a fundamental principle in international law, highlighting the dynamic and evolving nature of legal norms and principles. This rule, which asserts that legal disputes must be assessed under the law that was in force at the time the dispute originated, is essential in ensuring fairness and accuracy in the resolution of international conflicts. However, the rule also acknowledges that laws and their interpretations can change over time, reflecting shifts in political, social, and cultural contexts.

This rule's significance lies in its application to various types of disputes, particularly those involving territorial claims, treaty interpretations, and the retrospective application of new legal standards. By mandating that the legal context at the time of the event or action must govern the resolution of disputes, the intertemporal rule prevents the unfair application of contemporary legal principles to past events. This approach is crucial in cases where the legal landscape has undergone significant changes, such as the evolution of human rights standards or environmental laws. Moreover, the intertemporal rule upholds the principle of legal certainty, ensuring that states and actors are judged according to the legal framework that was applicable at the relevant time. This prevents the retrospective application of laws, which could lead to unpredictability and instability in international relations. Essentially, the intertemporal rule is a key mechanism for balancing the need for legal stability with the recognition that legal systems are not static but evolve over time.

In international jurisprudence, the application of the intertemporal rule requires a nuanced understanding of historical legal contexts, often necessitating an examination of historical documents, treaties, and practices. This makes the rule not only a legal principle but also a bridge between law and history, enabling a deeper and more contextual understanding of international legal disputes. Its application, therefore, is not only a legal exercise but also an exploration of the historical evolution of international law and its impact on contemporary legal issues.

1. Challenges and Criticisms

The application of the intertemporal rule in international law, while crucial, presents significant challenges and has faced various criticisms.³⁶ A primary challenge lies in determining the exact point in time at which the legal norms should be assessed. This is particularly difficult in cases where the relevant legal context has evolved over an extended period. Deciding the precise moment for legal assessment can significantly influence the outcome of territorial disputes or treaty interpretations.

Additionally, the rule is difficult to apply when historical legal norms conflict with contemporary legal principles. This is especially pertinent in areas such as human rights and environmental law, where modern standards and understandings may differ substantially from those in the past. According to Max Huber,

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called inter-temporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the acts creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.³⁷

Such conflicts raise questions about the balance between respecting historical legal rights and meeting current ethical and legal standards. This point becomes especially binding when the relevant rights constitute *ius cogens*:

Ius cogens is an important obstacle as to a strict application of the intertemporal rule. This notion was pointed out by a joint declaration of Judges Shi and Koroma of 26 February 2007 regarding the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro)*. Both judges emphasized that ‘in some respects the interpretation of a treaty’s provision cannot be divorced from developments in the law subsequent to its adoption’ (at para. 2). *Ius cogens* is the most significant of these ‘respects’. Thus, the declaration continues: ‘even though a treaty when concluded did not conflict any rule of *ius cogens*, it will become void if there subsequently emerges a new rule of *ius cogens* with which it is in conflict’ (ibid). Where *ius cogens* is at stake, the stability of a legal title is doubtless outweighed in favour of the present-day concept of law and justice.

³⁶ See generally, e.g., Ulf Linderfalk, *The Application of International Legal Norms Over Time: The Second Branch of Intertemporal Law*, 58 NETH. INT’L L. REV. 147 (2011) (explores the challenges associated with applying the intertemporal rule, especially in the context of evolving legal norms and historical disputes like the Island of Palmas case).

³⁷ Island of Palmas, *supra* note 2, at 845.

Furthermore, in various jurisdictions the intertemporal rule has been modified in order to protect human dignity based on human rights (see e.g. the *South west Africa Cases [Ethiopia v South Africa; Liberia v South Africa] [Second Phase]*, in particular [*Dissenting Opinion of Judge Tanaka*] 293-5 regarding the obsolete mandate system).³⁸

While this quote applies to the interpretation of treaties, the same logic applies to ascertaining the legality of sovereignty claims over territories.

In sum, critics argue that the strict application of historical legal norms can sometimes result in unjust outcomes, particularly in cases where it contradicts contemporary values and principles. There is an ongoing debate among legal scholars and practitioners on how to effectively reconcile respect for historical context with the need to uphold modern legal standards in international law. This debate encompasses the need for possibly reforming the rule to better align with the dynamic nature of international legal norms, especially when these norms are peremptory under modern international law, which include prohibition on crimes against humanity, such as the crime of extermination, and the crime of genocide.³⁹

2. Modern Relevance

The intertemporal rule, despite originating in early 20th Century jurisprudence, continues to hold significant relevance in contemporary international law. Its application is crucial in a variety of legal contexts, particularly in cases involving protracted territorial disputes, complex treaty interpretations, and intricate issues of state succession. This enduring relevance underscores the rule's utility in providing a legal framework for addressing disputes that span across different historical periods.

In the context of longstanding territorial disputes, the intertemporal rule offers a mechanism for determining sovereignty based on historical legal claims, thereby ensuring that decisions are grounded in the context of the period when the dispute initially arose. This approach is vital for resolving conflicts where historical rights and agreements play a central role. Similarly, in treaty interpretation, the rule aids in discerning the original intent and legal understanding at the time of the treaty's creation, thus guiding contemporary applications of often centuries-old agreements. Moreover, the rule's application in issues of state succession illustrates its importance in navigating the complexities arising from changes in statehood and sovereignty. As new states

³⁸ Markus Kotzur, *Intertemporal Law*, in MAX PLANCK, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1, ¶ 13 (2023).

³⁹ See, e.g., MARC BOSSUYT & JAN WOUTERS, GRONDLIJNEN VAN INTERNATIONAAL RECHT 70, 92 (2005) (Ger.) (explaining that “[o]mtrent de vraag welke regels van internationaal recht jus cogens uitmaken, bestaat geen algemene overeenstemming. Wel is er een brede consensus dat dit omvat: het verbod op genocide, op agressie, op onrechtmatig gebruik van geweld, op rassendiscriminatie, slavernij, piraterij en kolonialisme”; in English: “Regarding the question of which rules of international law constitute *jus cogens*, there is no general agreement. However, there is a broad consensus that this includes: prohibition of genocide, aggression, unlawful use of force, racial discrimination, slavery, piracy, and colonialism”).

emerge and borders are redrawn, the intertemporal rule provides a historical lens through which past rights and obligations can be assessed and applied in the present context.

The continuing relevance of the intertemporal rule in modern international law also highlights the tension between evolving legal standards and historical legal contexts. It reflects the need for a balanced approach in international legal practice, one that respects historical legal rights while adapting to the changing landscape of international relations and legal norms. In an era marked by rapid geopolitical changes and a growing emphasis on international legal order, the intertemporal rule remains a key tool for ensuring stability and fairness in the resolution of international disputes.

The rule ascertains whether territorial claims are legal and within existing international human rights framework. “The Huber *dictum*, taken in its entirety, may be taken as providing that by virtue of the principles of intertemporal law a state must continue to maintain a title, validly won, in an effective manner.”⁴⁰

The same understanding of the relevance of this rule for the evolving nature of First Nations rights has also been explained by Chief Justice Marshall:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.⁴¹

This quote from Chief Justice Marshall touches on the principles of discovery and conquest in international law, particularly how they have been historically applied to indigenous populations. This relates to the first limb of the intertemporal rule, which asserts that a legal situation must be assessed in the light of the rules of international law existing at the time. In the context of First Nations rights, the recognition of indigenous rights, including self-determination, can be influenced by historical legal frameworks and interpretations. Chief Justice Marshall suggests that although certain historical

⁴⁰ ROSALYN HIGGINS, THEMES AND THEORIES: SELECTED ESSAYS, SPEECHES, AND WRITINGS IN INTERNATIONAL LAW 868 (2009) (emphasis in the original).

⁴¹ Johnson v. M'Intosh, 21 U.S. 543, 591–92 (1823) (per Chief Justice Marshall).

principles (like viewing indigenous peoples as mere occupants) might contradict modern understandings of natural rights and the practices of civilized nations, they were integral to the legal system under which the country was settled. This historical context can affect how indigenous rights are recognized and exercised today, including claims to land and self-governance.

III. ELEMENTS OF THE RULE

The above analysis helps explain why the intertemporal rule consists of two main elements.⁴² This part explores these elements and introduces the concept of the critical date. The intertemporal rule comprises the principle that actions must be judged according to the legal standards in place at the time they were performed, and the requirement that claims must comply with evolving legal standards to remain valid. Additionally, the concept of the critical date is crucial in determining the specific point in time that locks in the relevant facts and legal context for assessing the legality of actions or claims. This examination will delve into how these components interact and their significance in maintaining legal consistency and fairness over time.

A. *The First Element*

The original statement of this element is as follows: “a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.”⁴³ The first element emphasizes the general principle of assessing legal facts in their temporal context. This element addresses the application of legal norms over time, irrespective of the specific facts involved. When an action occurs or a factual situation exists at a certain time, the question arises whether it should be evaluated under a specific international legal norm. According to this element, international legal norms should not be applied retroactively. Therefore, any legally significant action or factual situation must be assessed based on the law that was in force at the time it occurred. As articulated by the Institute of International Law: “[u]nless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules of law that are contemporaneous with it.”⁴⁴

The first element is the appreciation of legal facts considering contemporaneous law. This aspect asserts that a legal situation or fact must be judged according to the law that was in effect at the time the situation occurred,

⁴² Higgins, *supra* note 40, at 867–68 (noting as the President of the International Court of Justice (ICJ) and the world’s most senior judge, the author shares her expertise covering a broad spectrum of legal areas such as legal theory, United Nations Law, humanitarian law, the use of force, state and diplomatic immunity, human rights, and natural resources law).

⁴³ *Island of Palmas*, *supra* note 2, at 845.

⁴⁴ Institut de Droit International, *The Intertemporal Problem in Public International Law* ¶ 1, (1975) https://www.idi-iil.org/app/uploads/2017/06/1975_wies_01_en.pdf (last visited Sept. 12, 2024).

(Note: The French text is authoritative; the English text is a translation.)

or the fact arose. For instance, if a state claims sovereignty over a territory, the legality of its claim should be assessed based on the international law prevailing at the time the claim was made, not the law at the time of a later dispute.

This first element is applied while considering the following principles:

Whereas the general intertemporal problem both in the international legal order and in national law relates to the delimitation of the temporal sphere of application of norms;

Whereas it is necessary to promote the development of the international legal system whilst preserving the principle of legal stability which is an essential part of any juridical system;

Whereas any solution of an intertemporal problem in the international field must take account of the dual requirement of development and stability;

Whereas a similar problem arises whenever a rule refers to a concept the scope or significance of which has changed in the course of time.⁴⁵

The first is the delimitation of temporal application, The general intertemporal problem, both in the international legal order and in national law, relates to the delimitation of the temporal sphere of application of norms. Second, it is necessary to promote the development of the international legal system while preserving the principle of legal stability, an essential part of any juridical system. Third, any solution to an intertemporal problem in the international field must consider the dual requirement of development and stability. The fourth principle is that whenever a rule refers to a concept whose scope or significance has changed over time, that has also to inform the application of that rule to the conflict at hand, which leads to the second element of the intertemporal rule.

B. The Second Element

The original statement of this element is as follows:

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the acts creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.⁴⁶

⁴⁵ *Id.*

⁴⁶ *Island of Palmas, supra note 2, at 845.*

Unlike the first element, the second element focuses on the legal assessment of *specific* types of facts.⁴⁷ This aspect pertains to the evaluation of facts that can create and define the existence of legal relationships, such as sovereign claims to territory. Emphasis is on differentiating between the creation of a legal relationship and its continued existence over time. For facts capable of creating a legal relationship, they must be assessed based on the law in force at the time of their occurrence. Conversely, for facts that determine the ongoing existence of a legal relationship, they should be evaluated according to the evolving legal conditions. Although the rationale behind this distinction is not entirely clear, it aligns with the general principle of non-retroactivity: legal actions or states of affairs must be judged by the law in effect at their time.

It should also be added that there are at least four distinct interpretations of the second element's meaning.⁴⁸ Firstly, some argue that its inclusion was an error, with Sir Hersch Lauterpacht contending that it marked a significant deviation from the previously established views of numerous international lawyers.⁴⁹ Secondly, according to Dame Rosalyn Higgins, Huber likely did not mean for the differentiation he draws between the inception and the ongoing existence of rights to extend beyond territorial law.⁵⁰ Thirdly, Philip Jessup interprets the intertemporal doctrine as a means to reconcile old and new legal rules by effectively nullifying the former, citing the lack of discussion on Spain's relinquishment of the Island of Palmas as evidence that original sovereignty was nullified under the intertemporal rule.⁵¹ Finally, Huber himself believed that the intertemporal rule is essential for mediating between the legal principles of the 16th Century and those from the 18th Century onwards, determining which legal regime is applicable.⁵²

⁴⁷ See Linderfalk, *supra* note 36, at 154 (challenging two common misconceptions: first, that the second branch is an exception to the first branch of intertemporal law, and second, that it is limited in practical relevance. Linderfalk asserts that both branches of the intertemporal rule are based on the same principle: that actions or factual states must be assessed according to the law contemporaneous with them. He argues that the second branch of the intertemporal rule is not merely relevant to the acquisition of territory but has broader implications across various norms of international law. This branch addresses how evolving laws affect the ongoing validity of legal relationships, emphasizing the importance of assessing facts that create and sustain legal relationships according to the law in force at different times).

⁴⁸ See Wheatley, *supra* note 24, at 488.

⁴⁹ See H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 292 (1933).

⁵⁰ See Rosalyn Higgins, *Time and the Law: International Perspectives on an Old Problem*, 46 INT'L & COMPAR. L.Q. 501, 516 (1997) (explaining that "[t]he [intertemporal rule means that] a state must continue to maintain a title, validly won, in an effective manner—no more and no less").

⁵¹ See Jessup, *supra* note 6, at 740 (highlighting the importance of the principle of effective occupation in international law, emphasizing that sovereignty over a territory is established through continuous and peaceful display of state authority rather than mere historical claims of discovery. Jessup examines the application of the intertemporal law principle, which assesses legal claims based on the laws in effect at the time of the relevant events, illustrating how the Netherlands' effective control over Palmas Island legitimized their sovereignty despite competing claims. The case underscores the necessity of demonstrating actual administrative presence to substantiate territorial claims in international disputes).

⁵² Island of Palmas, *supra* note 2, at 845.

The first and second interpretations do not engage with the second limb of the intertemporal rule, thus suggesting that the nature of international law follows a pure B-series, static, conception of time. Both interpretations, therefore, can be understood as polar positions, that do not admit the hybridity of the intertemporal rule as discussed above. In contrast, the third and fourth interpretations of the second element can be understood as explaining the effects of the hybrid nature of the intertemporal rule, namely combining McTaggart's conception of time as either an A-series or a B-series process. Our earlier analyses suggest that the first element is a B-series, static, conception of time, while the second element is an A-series, dynamic, conception. Notwithstanding, the third interpretation, the one offered by Jessup, remains a polar position. Usually, the result is a transition from one equilibrium to another, but with adjustments only to the extent necessary to align with the non-derogable principles under the new equilibrium. The fourth interpretation, per Huber, is the closest to the hybridity analysis of the intertemporal rule.

The second element has been construed as having two parts. The first part is explained as follows:

The second branch requires that we take into account any change in the law over time. There are two parts to the second branch of intertemporal law. The first part of the second branch confirms that new rules can impose conditions for the continued enjoyment of rights. The intertemporal doctrine does not prevent new customary rules from crystallising, with implications for the established legal positions of states . . . We see this with the impact of the self-determination norm on titles to territories obtained during the period of European colonisation. Following the crystallisation of the right of peoples to self-determination, valid title could only be maintained where the population agreed to the continuing exercise of sovereign power, and any change in the administrative boundaries of the colonised territory was only valid with the free and genuine consent of the people concerned.⁵³

The first part of the second element explains that international law changes through punctured equilibria, where the old equilibrium must be modified to the extent necessary to be compatible with current norms. This aspect focuses on the principle that legal claims and rights must evolve with the law. It implies that for a claim to remain valid, it must align with contemporary legal norms and standards. This aspect is more about the adaptation of historical rights and claims to modern legal frameworks and interpretations.

The second part of the second element of intertemporal law doctrine acknowledges the temporal evolution of states' rights and obligations as our interpretation of relevant laws progresses. This aspect deals with the dynamic nature of international law, acknowledging the need to consider current realities and effective control in legal assessments. It recognizes that while historical

⁵³ Wheatley, *supra* note 24, at 508–09.

legal claims are important, the *current actual control* and administration of territories play a crucial role in determining sovereignty.

The second limb necessitates a determination of whether to enforce preceding or current norms when shifts in customary international law occur. Typically, there is a clear agreement on the timeframe for implementing the former regulation and the point at which the latter becomes the accepted legal standard. During the interim between these two norms, when there is an indication of legal evolution yet insufficient proof of a complete transition, adherence to the original rule is mandated due to the uncertainty of change.

However, as discussed above, the establishment of a new law is no license to applying it retrospectively from its inception. During the span between its initial formation and the juncture of general consensus on its enforcement, only the older rule can apply.⁵⁴

The second element suggests that even if a right was initially acquired lawfully, it might be lost or altered if subsequent changes in international law no longer support the right's continued existence. This aspect underscores the dynamic nature of international law and how evolving standards, especially in areas like human rights, can influence the persistence of historical rights. In the context of human rights treaties, the intertemporal rule is often viewed through a progressive lens. Courts like the European Court of Human Rights have treated human rights treaties as "living instruments," meaning they are interpreted according to the current understanding and conditions of human rights, even if those understandings have evolved significantly since the treaty's adoption. This approach ensures that human rights protections are robust and reflective of contemporary values and norms.⁵⁵

However, when it comes to treaty interpretation and application, the intertemporal rule necessitates a balance.⁵⁶ Typically, the law in force at the

⁵⁴ *Cf.* Wheatley, *supra* note 24, at 509 (suggesting that "[o]nce the law has changed, however, we must apply the new rule from the moment of its crystallisation. This will include the period between the moment of crystallisation (identified with the benefit of hindsight) and the period when there is general agreement that the new rule is to be applied, even though, at the time, we would have applied the old rule"). However, even if we accept this argument, in relation to British the acquisition of sovereignty over Australia through occupation of *terra nullius*, this mode could not have crystallized before the concept of *terra nullius* have reached its final meaning, namely as a statement on legal sovereignty—an event evinced only since the Berlin Conference of 1885.

⁵⁵ *See, e.g.*, Daniel Moeckli & Nigel D. White, *Treaties as 'Living Instruments'*, in CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES 136, 143 (Michael J. Bowman & Dino Kritsiotis eds., 2018) (explaining that "it was the European Court of Human Rights that gave real substance to the notion of an evolutive interpretation of human rights treaties and developed the idea that such treaties should be understood as 'living instruments'. The Court characterised the 1950 European Convention on Human Rights (ECHR) as a 'living instrument' for the first time in 1978, and this notion has now become one of the central features of its approach to the interpretation of the Convention. Although it took two more decades until the bodies supervising implementation of other human rights treaties started to take up the 'living instrument' idea, by today the 'living instrument' label tends to be attached to the category of human rights treaties as a whole").

⁵⁶ *See, e.g.*, EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES 151-54 (2014) (noting especially Ch. 4, "The Intertemporal Law," where Borge critically examines the intertemporal law's significance and application, particularly in light of criticism from figures like Jessup, notably

time of the treaty's conclusion is used for interpretation, while its application may be subject to the law in force at the time of application. This distinction is particularly relevant when international law or societal conditions have changed. It highlights the need for a nuanced approach that considers the original intent of the treaty parties, the object and purpose of the treaty, and the broader principles of international law, ensuring that the application of treaties remains relevant and fair over time.

C. *The Critical Date*

While not always explicitly defined as a separate element, the critical date establishes the specific point in time that locks in the relevant facts and legal context for assessing the legality of actions or claims. This helps to delineate the applicable law and prevent retroactive manipulation of historical facts. For example, in boundary disputes, the critical date may be when the original treaty was signed or when an alleged violation occurred. The critical date refers to the point in time used to determine the applicable legal framework for assessing the legality of an act or claim. This date is crucial because it locks in the factual and legal circumstances relevant to the dispute. This aligns with the first element of the intertemporal rule, which requires actions to be judged by the law in effect when they are taken. The critical date also helps in evaluating whether a claimant has maintained compliance with evolving legal standards up to the present. This is related to the second component of the intertemporal rule, which demands that claimants must continuously adhere to the law to sustain their titles or claims. By fixing the critical date, the rule prevents parties from altering or manipulating historical facts retroactively. It ensures that legal judgments are based on the circumstances and laws existing at the time of the relevant actions. In cases like boundary disputes, the critical date is often used to determine which treaties, agreements, or customary laws were in place when the dispute arose.

The critical date is not always explicitly stated and can be subject to interpretation. Courts and tribunals may consider various factors, such as the date when the dispute crystallized or when the relevant actions took place. Establishing the critical date ensures that parties cannot manipulate historical facts retroactively. It provides a fixed point of reference to assess the legality of actions, helping to maintain legal consistency and fairness.

When the right of self-determination is a live issue in a legal conflict, it plays a pivotal role in determining the critical date. Self-determination claims often involve asserting rights to autonomy or independence based on historical and

regarding its expression by the Tribunal in the Island of Palmas case. Furthermore, the chapter emphasizes the relevance of "*jus cogens superveniens*" (compelling law that supersedes previous norms) as an aspect of intertemporal law, highlighting its importance in understanding and applying treaty law over time). See also *Institut de Droit International*, *supra* note 44, at ¶4 (the English text is as follows: "Wherever a provision of a treaty refers to a legal or other concept without defining it, it is appropriate to have recourse to the usual methods of interpretation in order to determine whether the concept concerned is to be interpreted as understood at the time when the provision was drawn up or as understood at the time of its application. *Any interpretation of a treaty must take into account all relevant rules of international law which apply between the parties at the time of application*") (emphasis added).

contemporary facts. Establishing a critical date in these cases helps to clarify the point at which the facts and legal standards relevant to the right of self-determination are fixed. This is essential because the right of self-determination can significantly influence the legal context of a dispute, impacting the assessment of actions and claims. For example, if a group asserts its right to self-determination based on a particular event or historical moment, the critical date will lock in the circumstances surrounding that assertion, preventing later reinterpretations that could undermine their claim. This ensures that the legal analysis respects the historical context of the right to self-determination, while also considering any subsequent developments in international law.

The critical date is not always explicitly stated and can be subject to interpretation. Courts and tribunals may consider various factors, such as the date when the dispute crystallized or when the relevant actions took place.⁵⁷ Establishing the critical date ensures that parties cannot manipulate historical facts retroactively. It provides a fixed point of reference to assess the legality of actions, helping to maintain legal consistency and fairness.

In summary, the intertemporal rule provides a framework for understanding and applying international law across different time periods, emphasizing the need to respect historical legal contexts while also allowing for the evolution and progression of legal standards, especially in the realm of human rights and territorial claims. In the subsequent part of this article, relevant legal precedents are employed to demonstrate the application of self-determination within the framework of intertemporal rule analysis.

IV. APPLICATION IN TERRITORIAL DISPUTES

In the realm of territorial disputes, the application of the intertemporal rule is fundamental for determining sovereignty and resolving conflicts based on historical legal claims. This approach mandates a thorough assessment of the legal rights and actions of states according to the laws and principles applicable during the relevant historical period, ensuring decisions are grounded in the context of their occurrence.

The cases below underscore the importance of the intertemporal rule in international law, providing a fair and contextually grounded mechanism for resolving complex territorial disputes. By considering the legal status and actions at the time claims arose, the rule offers a historically informed basis for decision-making, respecting both the evolution of legal norms and the continuity of historical claims. The analysis is specifically focused on the role of the right to self-determination in explaining the outcome in each case.

A. *Costa Rica and Panama Arbitration (1914)*

The 1914 arbitration between Costa Rica and Panama was a key instance of resolving territorial disputes through international arbitration.⁵⁸ John Bassett

⁵⁷ See, e.g., *Minquiers and Ecrehos (Fr. v. U.K.)*, Judgment, 1953 I.C.J. 47, 59 (Nov. 17).

⁵⁸ *The Boundary Case (Costa Rica v. Pan.)*, 11 R.I.A.A. 519, 519-547 (Perm. Ct. Arb. 1914).

Moore, commenting on this arbitration process,⁵⁹ emphasized the use of the doctrine of *uti possidetis* in international law to determine boundaries following war or the end of a colonial Administration, by maintaining the territories as they existed at a certain point in time. The case intricately involved the doctrine of *uti possidetis iuris*, or “[s]o that you may (rightly) possess.”⁶⁰ While the doctrine was used to consolidate the *de facto* situation, today it is reflective of the international law’s gravitation towards the *status quo ante*.⁶¹

Originating in Roman law, the *uti possidetis* doctrine dictates that newly formed sovereign states inherit the borders of their preceding dependent areas before independence. In its original form,

[under] Roman law, [it was] a kind of preliminary injunction (*interdictum uti possidetis*) ordering the party in possession of disputed land or buildings who has not obtained such possession by force, fraud, or gratuitous revocable loan (*nec vi nec clam nec precario*) to remain in such possession without interference until the dispute over possession is resolved by the court.⁶²

It was only due to a “misleading analogy” that this doctrine emerged in the 17th Century to legitimize territorial claims made through conflict.⁶³ However, this interpretation of *uti possidetis* has become outdated and untenable.⁶⁴ Modern international norms, particularly those enshrined in the United Nations Charter, strictly prohibit the acquisition of territory through the use of force, rendering the traditional concept of *uti possidetis* incompatible with contemporary international legal standards. Generally, *uti possidetis* furnished a permanent relief in border disputes, especially pertinent in Latin America’s context of decolonization and territorial disputes.⁶⁵ It was frequently employed to uphold existing land and maritime boundaries of former colonies upon their independence, supporting the sovereignty of indigenous populations over historically occupied lands, and has been assertively applied in recent secessionist conflicts.⁶⁶

⁵⁹ See generally JOHN BASSETT MOORE, COSTA RICA-PANAMA ARBITRATION. MEMORANDUM ON UTI POSSIDETIS (1913).

⁶⁰ FELLMETH & HORWITZ, *supra* note 31.

⁶¹ FRANK WOOLDRIDGE, *Uti Possidetis*, in ENCYCLOPEDIA OF PUB. INT’L. LAW, VOL. I, SETTLEMENT OF DISPUTES, 519, 519 (Rudolf Bernhardt ed., 10th ed. 1987).

⁶² *Id.* (def. 4); see also Giuseppe Nesi, *Uti Possidetis Doctrine*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (2023) (article last updated February 2018) (“The expression *uti possidetis* originates in Roman law, where it indicated an interdict by the praetor aimed at prohibiting any interference with the possession of immovable property acquired *nec vi, nec clam, nec praecario* (not by force, nor stealth, nor license). The purpose of *uti possidetis* was to temporarily assign a favourable position in the ownership action to the individual who possessed that property.”).

⁶³ Nesi, *supra* note 62, at ¶ 2.

⁶⁴ Nesi, *supra* note 62, at ¶ 2.

⁶⁵ Nesi, *supra* note 62, at ¶ 10.

⁶⁶ FELLMETH & HORWITZ, *supra* note 31.

This doctrine's relevance was highlighted in the backdrop of the Costa Rica-Panama dispute, which stemmed from the region's political changes. The arbitration was necessary due to Panama's secession from Colombia in 1903, prompting the urgent need to establish clear boundaries with its neighbor, Costa Rica. As both nations grappled with the implications of Panama's newfound independence, the principle of *uti possidetis* served as a crucial legal reference point in determining how the preexisting, albeit vague, colonial administrative boundaries should be reinterpreted and legally solidified for these two independent states.⁶⁷ <https://academia-lab.com/encyclopedia/anderson-porras-convention/> Historically, the boundary between Costa Rica and Panama (then part of Colombia) was vaguely defined, leading to a series of disputes and negotiations. The Porras-Anderson Treaty⁶⁸ attempted to address these ambiguities but left several areas of the border unclear. This resulted in differing interpretations by Costa Rica and Panama and eventually led to the arbitration in 1914.

The arbitration between Costa Rica and Panama, overseen by U.S. Chief Justice Edward Douglass White, reflected America's growing role in Central America and required the evaluation of historical claims, geographical realities, and legal arguments supported by extensive colonial-era documentation. Delivered on September 12, 1914, the award used geographical features to balance historical sovereignty with practical geography, demonstrating the effectiveness of international arbitration in resolving disputes peacefully and highlighting the need for clear treaty language. This award set a precedent for future territorial disputes, reinforcing the principle of peaceful resolution and the role of neutral arbitrators. The challenge of applying *uti possidetis* was addressed by combining it with practical geographic assessments, ensuring a fair and sustainable boundary that respected both historical principles and contemporary realities. This balanced approach was crucial in creating a stable and peaceful boundary, marking a significant step forward in the development of peaceful conflict resolution methods in international law.

It is essential to differentiate this *de iuris* doctrine from *uti possidetis de facto*. This doctrine diverges significantly in its approach to determining boundaries. Unlike the traditional method where boundaries are set by the colonizing states or their administrations, *uti possidetis de facto* focuses on the boundaries that were managed and controlled by colonial and postcolonial authorities. This distinction highlights a shift from theoretical or historical delineations to the practical realities of administration and control on the ground. The doctrines of *uti possidetis iuris* and *uti possidetis de facto*, when considered in the context of the second limb of the intertemporal rule, offer a nuanced understanding of how historical territorial claims and current territorial realities are reconciled in international law. The former, *de iuris*

⁶⁷ The Boundary Case, *supra* note 58, at 531 (explaining that both Costa Rica and Panama agreed to uphold the doctrine of *uti possidetis* as essential for determining their mutual border).

⁶⁸ See generally *Anderson-Porrás Convention*, ACADEMIALAB, <https://academia-lab.com/encyclopedia/anderson-porras-convention/> (last visited Nov. 21, 2024).

rendition, is inherently *retrospective*.⁶⁹ It upholds that upon gaining independence, new states inherit the territorial boundaries that were set during colonial administration. These boundaries are often artificial and were initially intended for administrative convenience rather than reflecting historical or ethnic realities.

The “no violence” proviso fundamentally shapes the doctrine’s application and relevance in the international arena.⁷⁰ This principle underscores the commitment to peaceful and legal means in the establishment and recognition of state boundaries. Particularly relevant in the aftermath of colonialism or conflicts, the doctrine asserts that the determination of borders should not be a result of force or military conquest. Instead, it should reflect a legal continuity that respects historical boundaries established at key moments, such as the point of a nation’s independence. This adherence to non-violent means not only adds legitimacy to the territorial demarcations under *uti possidetis* but also aligns with the core principles of international law. It advocates for the resolution of territorial disputes through diplomatic and legal mechanisms, rather than through conflict and aggression. Consequently, the “no violence” proviso plays a critical role in conflict prevention and the maintenance of international peace and stability, encouraging nations to engage in dialogue and legal processes to resolve boundary issues.

Uti possidetis iuris aligns with the first limb of the intertemporal rule by emphasizing the maintenance of legal continuity and historical territorial boundaries as they were at a specific point, typically the moment of independence, to ensure legal certainty and stability. However, these historical claims may need to be reevaluated or adapted to fit contemporary legal standards under the intertemporal rule. While *uti possidetis iuris* prioritizes historical boundaries, the second limb of the intertemporal rule requires these boundaries to align with current legal contexts and norms. *Uti possidetis de facto*, in contrast, focuses on the actual, effective control and administration of territories, reflecting the evolving nature of international law. This principle highlights the importance of current realities and effective governance in assessing sovereignty and territorial claims. The tension between preserving historical legal claims (*uti possidetis iuris*) and recognizing contemporary realities (*uti possidetis de facto*) illustrates the challenge in balancing respect for

⁶⁹ See, e.g., *Land, Island, and Maritime Dispute (El Salv. v. Hond.)*, Judgment, 1992 I.C.J.388, ¶ 43 (Sept. 11) (stating that “*uti possidetis iuris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes”). See also *Frontier Dispute (Burk. Faso v. Mali)*, Judgment, 1986 I.C.J. 554, ¶¶ 20, 23 (Dec. 22) (stating that *uti possidetis iuris* “is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power . . . The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved”).

⁷⁰ See MOORE, *supra* note 59, at 6 (explaining that “[t]he formula employed by the Praetor was: *Uti eas aedes, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quominus ita possideatis, vim fieri veto*. ‘As you possess the house in question, the one not having obtained it by force, clandestinely, or by permission from the other, I forbid force to be used to the end that you may not continue so to possess it.’”).

historical boundaries with the evolving nature of state control and territorial Administration. The intertemporal rule, particularly its second limb, necessitates a nuanced approach that considers both historical context and current realities to resolve territorial disputes in a legally sound and contextually relevant manner.

Another point on the relationship between *uti possidetis* and the intertemporal rule is the relevance of the concept of the critical date:

The first aspect of the application of *uti possidetis iuris* to be considered is the ‘critical date’, ie, the historic moment when the delimitation is made by taking ‘a photograph of the territory’. The issue of the critical date is intertwined with that of the elements for applying *uti possidetis*: are there only formal elements or also informal elements? By ‘formal elements’ one alludes to all the formal acts issued in the colonial (or pre-independence) era indicating the existence in that period of a delimitation in a certain area. For example, laws and regulations issued by the former sovereign and describing the limits between various administrative entities. Informal elements amount rather to conduct (or acquiescence) of the previous sovereign. Acts adopted and conduct taken prior to independence have a paramount role in determining boundaries according to *uti possidetis*. *Uti possidetis* is in principle based on the legal acts (‘titles’) adopted by the former sovereign before independence, and on the legal relationship between those acts and the *effectivités* (ie, ‘the conduct of the administrative authorities proving the effective exercise of territorial jurisdiction in the region during the colonial period’. Frequently the reference parameters were widened: when this happened, both formal elements and conduct from which the existence of territorial divisions at the critical date could be inferred were taken into consideration.⁷¹

The “critical date” is the point in time when the colonial power asserted sovereignty. This is significant because *uti possidetis iuris* typically considers the status of territories at a specific historical moment—often at the time of independence or cessation of colonial rule.

In addition, the distinction between formal and informal elements is critical in analyzing sovereignty claims. Formal elements include laws, treaties, or regulations indicating territorial delimitation. An important consideration, which is not directly addressed in the above quote but is crucial in the context of post colonization, is the role and recognition of First Nations. If the sovereignty over a territory were asserted without formal treaties or agreements with the Aboriginal peoples, this aspect challenges the application of *uti possidetis iuris*, as it raises questions about the legitimacy of sovereignty claims made without the consent or recognition of indigenous populations. On the other hand, the

⁷¹ Giuseppe Nesi, *Uti Possidetis Doctrine*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INT. L. 1, ¶ 11 (2018) (emphasizes in the original) (citations omitted).

concept of *effectivités* (see the above quote), or the effective exercise of jurisdiction, is another key aspect. Effective control, despite being unilateral and without initial negotiation with Aboriginal peoples, plays a role in establishing sovereignty from the perspective of *uti possidetis iuris*.

In sum, the application of *uti possidetis iuris* raises significant questions about the legitimacy of sovereignty claims made in the absence of recognition or treaties with the indigenous populations, a factor not traditionally accounted for in the *uti possidetis* principle but increasingly recognized in contemporary international law discourse.

Critiques of the doctrine of *uti possidetis*, in both its *iuris* and *de facto* forms, focus on its historical inaccuracy. For example, “Bluntschli has criticised the use of the phrase by writers on International Law as inaccurate, since it denotes, in International Law, (1) not possession under private law but territorial sovereignty, and (2) not merely the recognition of possession but a definitive status.”⁷² Often, the colonial borders were arbitrarily drawn without considering ethnic, linguistic, or cultural realities, leading to long-term conflicts and instability in the newly independent states. More importantly, the doctrine effectively endorses the colonial imposition of borders, ignoring the precolonial socio-political realities and indigenous territorial claims. It also seems to legitimize forceful, although non-violent, control over territories. This rendition can legitimize territorial control gained through force or coercion, potentially encouraging aggressive expansionist policies. By focusing on current control rather than legal historical claims, it can lead to frequent changes in borders, fostering instability and conflict, especially in regions with fluid or contested control.

Critically, both renditions of *uti possidetis* might be seen as undermining the principle of self-determination, as they prioritize historical or current state control over the wishes and identities of the people living in these territories. Nevertheless, it is important to note that this doctrine only applies once a peace treaty has been signed between the parties in conflict.⁷³ The doctrine of *uti possidetis* aims to preserve colonial administrative boundaries upon the independence of new states, intersecting with the right to self-determination by providing a framework for stability and continuity. *Uti possidetis* ensures that newly independent states inherit defined boundaries, thus preventing territorial disputes that could destabilize the region. However, the rigid application of this doctrine must be tempered by the principle of self-determination which prioritizes the will and rights of residents of those boundaries. In the Costa

⁷² See MOORE, *supra* note 59, at 6 (citations omitted) (citing Swiss jurist JOHANN KASPAR BLUNTSCHLI, LE DROIT INT. CODIFIÉ art. 715 (1895)).

⁷³ MOORE, *supra* note 59, at 10 (stating the following: “As between the belligerent powers themselves,’ says a recent writer, ‘it is held that the conclusion of peace legalizes the state of possession existing at the moment, unless special stipulations to the contrary are contained in the treaty. This is called the principle of *Uti possidetis*, and it is of very wide and far-reaching application. Arrangements that seem at first sight to be pedantic in their minuteness are often necessary to carry out the intentions of the parties in the face of the rule that, when there are no express stipulations to the contrary, the principle of *uti possidetis* prevails.” (emphasis in the original) (citations omitted) (citing LAWRENCE, PRINCIPLES OF INT. L. 571–72 (4th ed. 1910)).

Rica-Panama arbitration, the application of *uti possidetis* was informed by the need to respect the self-determination of the peoples of both nations. The arbitrator balanced historical legal precedents with the contemporary realities and aspirations of the populations affected by the boundary decision. By considering geographical features, historical usage, and practical realities, the arbitration process ensured that the boundaries were not only legally valid but also reflective of the socio-political context of the time. The right to self-determination thus informed the application of *uti possidetis* by ensuring that the inherited colonial boundaries were adjusted in a manner that respected the sovereign will of the newly independent states. This approach prevented the rigid imposition of historical boundaries that might have ignored the legitimate claims and needs of the people, thereby creating a more just and sustainable outcome.

The relationship between *uti possidetis*, self-determination, and the intertemporal rule forms a comprehensive framework in international law that balances historical continuity with contemporary human rights norms. The intertemporal rule respects historical legal principles while allowing for their adaptation to contemporary norms, ensuring that historical boundaries established under colonial rule are given legal weight but remain adaptable to contemporary contexts where self-determination is paramount. *Uti possidetis* and the intertemporal rule both emphasize maintaining past legal frameworks for present stability, with *uti possidetis* mandating that newly independent states inherit colonial administrative boundaries to prevent disputes. The intertemporal rule ensures these boundaries are judged by historical standards, avoiding retroactive law application. This overlap balances historical legality with contemporary relevance, ensuring territorial claims are legitimate and adaptable.

In this arbitration, the critical date is 1903. This date is significant because it marks the year when Panama gained its independence from Colombia. The arbitration needed to consider the status of territorial claims and administrative control as they existed up to that point, as Panama inherited the boundary disputes previously held between Costa Rica and Colombia.⁷⁴ Costa Rica, on the other hand, became independent on September 15, 1821, along with the other Central American provinces, following the declaration of independence from Spain.⁷⁵ This date marks the end of Spanish colonial rule in the region.⁷⁶ Initially, Costa Rica joined the short-lived First Mexican Empire and then became part of the Federal Republic of Central America before eventually becoming a fully independent nation in the late 1830s.⁷⁷ Colombia declared its independence from Spain on July 20, 1810. This date marks the beginning of the

⁷⁴ The Boundary Case, *supra* note 58, at 530–32.

⁷⁵ See generally, M.A. RANKIN, THE HISTORY OF COSTA RICA (Frank W. Thackeray & John E. Findling eds., 2012) (provides a comprehensive overview of the independence movements in Latin America, including Costa Rica's independence on September 15, 1821, following the broader Central American provinces' declaration of independence from Spain).

⁷⁶ *Id.* at 35–50.

⁷⁷ *Id.*

process that eventually led to full independence. However, Colombia's struggle for independence was part of a prolonged conflict, and it was not until 1819, after the decisive Battle of Boyacá, that independence was solidified.⁷⁸ The Republic of Gran Colombia was then established, encompassing present-day Colombia, Venezuela, Ecuador, and Panama. Gran Colombia dissolved in 1831, leading to the emergence of the Republic of New Granada, which later became the modern nation of Colombia.

Given this context, a more precise critical date is the late 1830s, when both Costa Rica and Colombia achieved independence, sparking a border conflict between the two nations. Panama inherited this longstanding dispute upon separating from Colombia. Therefore, the resolution of this conflict must be grounded in the historical claims established between Costa Rica and Colombia. Consequently, by the time this dispute was adjudicated in 1914, the right to self-determination was not an active consideration. In the absence of an ongoing issue regarding self-determination, the principle of *uti possidetis juris*—whereby newly formed states inherit pre-existing administrative boundaries—would be the appropriate legal framework for resolving the conflict. This approach maintains continuity and stability by respecting the territorial demarcations that existed at independence.

B *Island of Palmas Case (1928)*

The *Island of Palmas Case* is a classic example where the arbitrator Max Huber applied the intertemporal rule to resolve a sovereignty dispute between the United States and the Netherlands over the Island of Palmas (or Miangas), a small island located in the Celebes Sea, between the Philippines and Indonesia.⁷⁹ Huber's decision, favoring the Netherlands, was based on the legal principles in effect when the territorial claims were originally made, highlighting the importance of early and continuous administration.

In this case, Huber was faced with resolving a sovereignty dispute between the United States and the Netherlands over the Island of Palmas. The United States claimed sovereignty over the Philippines and by extension, Palmas Island, based on Spain's discovery rights confirmed by treaties, including the Treaty of Münster (1648).⁸⁰ Specifically, the United States claim to the island was based on the Treaty of Paris of 1898,⁸¹ wherein Spain ceded its rights of sovereignty in certain regions, presumably including this island. However, the transferability of rights hinges on the extent of Spain's original possession. This

⁷⁸ See generally REBECCA A. EARLE, SPAIN AND THE INDEPENDENCE OF COLOMBIA 1808–1825 (2000) (exploring the political, social, and economic factors that influenced the independence movement, highlighting the impact of Spain's internal conflicts and external pressures. Earle delves into the role of various key figures and events, the influence of Enlightenment ideas, and the interactions between local independence leaders and Spanish authorities. The narrative provides a detailed account of how the struggle for independence unfolded, emphasizing the broader context of Latin American independence movements and the decline of Spanish colonial power).

⁷⁹ See generally *Island of Palmas*, *supra* note 2.

⁸⁰ Treaty of Münster, Neth.-Spain, Jan. 30, 1648, 1 Consol. T.S. 1.

⁸¹ See generally Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754.

principle was highlighted in a 1900 communication from the U.S. Secretary of State to the Spanish Minister regarding islands near the Treaty of Paris' demarcated boundaries.⁸² Additionally, historical maps dating back to the 16th Century, including those from 1554, 1558, and 1590, feature an island corresponding to Palmas, known as "*Ilha das Palmeiras*" or similar names. This suggests early discovery, but the nationality of the discoverer (Portugal or Spain) remains uncertain, as Portuguese names were commonly used for Spanish discoveries in that era.⁸³

The Netherlands, on the other hand, argued based on its effective, continuous, and peaceful display of state authority over the island, which it had been exercising for around two-hundred and fifty years. This doctrine of effective occupation is underscored by historical political experiences, international jurisprudence, and doctrine.⁸⁴ The Netherlands contested Spain's discovery and any Spanish title to the island, arguing instead that the Netherlands had exercised sovereignty since 1677, before the Treaty of Münster, through agreements with local rulers.

Both parties agreed that international law had changed significantly from the end of the Middle Ages to the 19th Century concerning the rights of discovery and acquisition of uninhabited or sparsely inhabited regions.⁸⁵ It was acknowledged that a legal fact should be judged by the law in force at the time of its occurrence, not by the law when a dispute about it arises.⁸⁶ Therefore, Spain's discovery effect must be assessed by the international law of the early 16th Century. The intertemporal rule distinguishes between the creation and the existence of rights.⁸⁷ While the creation of a right is governed by the law at the time of establishment, the right must comply with evolving legal conditions. International law in the 19th Century, recognizing most of the world under sovereign states, implied that the existence of a right depends on the continuous consent of the state.

Huber explained that the island of Palmas was likely discovered on behalf of Spain or Portugal. Given the union of Spanish and Portuguese crowns before the Dutch arrival in the region and considering the Treaty of Münster (1648), which addressed both Spanish and Portuguese possessions,⁸⁸ the distinction

⁸² Island of Palmas, *supra* note 2, at 959 (stating that "[i]t is evident that Spain could not transfer more rights than she herself possessed. This principle of law is expressly recognized in a letter dated April 7th, 1900, from the Secretary of State of the United States to the Spanish Minister at Washington concerning a divergence of opinion which arose about the question whether two islands claimed by Spain as Spanish territory and lying just outside the limits traced by the Treaty of Paris were to be considered as included in, or excluded from the cession").

⁸³ Island of Palmas, *supra* note 2, at 842–44.

⁸⁴ Island of Palmas, *supra* note 2, at 838–40.

⁸⁵ Island of Palmas, *supra* note 2, at 845.

⁸⁶ Island of Palmas, *supra* note 2, at 845.

⁸⁷ Island of Palmas, *supra* note 2, at 846 (per Max Huber).

⁸⁸ Island of Palmas, *supra* note 2, at 844–45 (Huber explaining that "Though the struggle for separation of Portugal from Spain had already begun in December 1640, Spain had not yet

between original Spanish and Portuguese territories is not crucial for this case (which also happens the case for New Holland). The Peace of Utrecht (treaties of 1713 and 1715) supports this view.⁸⁹ The island's European-derived name suggests it was uninhabited, or no landing was made at the time of discovery. There is no record of Spanish possession or administration until recent reports from 1919.⁹⁰

Huber recognized that discovery alone was not sufficient to establish sovereignty unless followed by an actual, continuous, and peaceful display of state authority (effective occupation). He noted that while Spain may have discovered the island first, it was the Netherlands that had continually and effectively exercised authority over it.⁹¹ The Netherlands' administration included activities such as granting concessions, undertaking economic activities, and other aspects of effective administration. Huber stated that in his opinion the Netherlands successfully established that the Island of Palmas was part of two native states since at least 1700, which related to the East India Company and the Netherlands through contracts of suzerainty since 1677. These contracts granted the Netherlands sufficient authority to consider these states part of its territory. Various acts of state authority by the Netherlands or the vassal states regarding Palmas have been recorded from 1700 to 1906. There was no recorded opposition to the Netherlands' exercise of territorial rights over these islands, including Miangas, from the Spanish withdrawal in 1666 until the United States' challenge in 1906.⁹²

The rationale behind Huber's decision underscores two critical aspects. Huber emphasized the principle of effective occupation in international law, noting that sovereignty could not be based merely on rights of discovery or historical treaties. Instead, what mattered was the actual, continuous exercise of sovereign rights, demonstrating effective control and administration of the territory in question. The decision also highlighted the importance of a continued and peaceful display of authority. The Netherlands had managed to maintain an administrative presence on the island, engaging in various state functions without significant interruption or challenge. This consistent and peaceful administration was crucial in establishing a stronger claim than intermittent or nominal control.

recognized the separation when it concluded in 1648 with the Netherlands the Treaty of Munster—the earliest Treaty, as will be seen hereafter, to define the relations between Spain and the Netherlands in the regions in question. This Treaty contains special provisions as to Portuguese possessions, but alone in regard to such places as were taken from the Netherlands by the Portuguese in and after 1641. It seems necessary to draw from this fact the conclusion that, for the relations inter se of the two signatories of the Treaty of Munster, the same rules had to be applied both to the possessions originally Spanish and to those originally Portuguese"); see Treaty of Münster, Spain-Netherlands, Jan. 30, 1648, arts. V & VI, 1 Consol. T.S. 1, 8, 10.

⁸⁹ The Peace of Utrecht consist of 23 treaties. The ones relevant to our discussion are the Treaty of Great Britain-Spain, Gr. Brit.-Spain, July 13, 1713, arts. X & XII, 28 Consol. T.S. 297; Treaty of Peace between Spain and Portugal, Spain-Port., arts. VII & VIII, Feb. 6, 1715, 29 Consol. T.S. 201.

⁹⁰ Island of Palmas, *supra* note 2, at 845.

⁹¹ Island of Palmas, *supra* note 2, at 846.

⁹² Island of Palmas, *supra* note 2, at 867–68.

Effective occupation was not a principle of international law in the 16th Century, when Spain claimed sovereignty over the Philippines after Ferdinand Magellan arrived at the archipelago in 1521. Magellan claimed the islands for Spain and named them after King Philip II of Spain in the later years. The Spanish colonization began in earnest when Miguel López de Legazpi arrived from Mexico in 1565 and formed the first settlements in Cebu. Subsequently, in 1571, Manila was established as the capital of the Spanish East Indies, which included not just the Philippines but also other territories in the Asia-Pacific region. Spain's sovereignty over the Philippines continued until the Spanish-American War of 1898, after which Spain ceded the territory to the United States under the Treaty of Paris.⁹³ As to the peaceful and continuous display of authority, in the context of the Age of Discovery, this condition is inferior to obtaining legal title, first through external sovereignty, and later through internal sovereignty that translates to a peaceful and continuous display of authority.

However, the intertemporal rule explains why effective occupation is relevant to the *Island of Palmas* case. To explain this point, one needs to place the *Island of Palmas* judgment within the effect of the 1885 Berlin Conference, understood as the trigger event to accepting *terra nullius* as based on the principle of sovereignty in its post-Age of Discovery, Euro-centric rendition. Given that the island of Palmas was not occupied until 1906, when the Netherlands took possession of the island based on treaties with local princes, the meaning of *terra nullius* at that time was informed by effective occupation as evidence of a continuous exercise of sovereign rights. By 1906, the legal requisite for acquiring sovereignty through occupation of a *terra nullius* has shifted from an analysis of the profile of First Nations, to an analysis of the sovereignty "portfolio" of the European claimant. All this was according to international law in the 20th Century, or at least, after the Berlin Conference.

Notwithstanding, effective occupation was not *the* critical factor in the decision. The critical factor was the Philippines' Declaration of Independence from Spanish colonial rule on June 12, 1898.⁹⁴ The declaration was made in Cavite at the ancestral home of General Emilio Aguinaldo, at the time the revolutionary leader of the Filipino forces. The declaration was the culmination of a long struggle against Spanish colonialism by the Filipino people and was significantly influenced by the events of the Spanish-American War. The Spanish-American War was a conflict between the United States and Spain that ended Spanish colonial rule in the Americas and resulted in the United States'.

⁹³ See Treaty of Peace Between the United States and Spain, U.S.-Spain, art. III, Dec. 10, 1898, 30 Stat. 1754.

⁹⁴ Cf. *Island of Palmas*, *supra* note 2, at 845–46 (explaining the signing of the Treaty of Peace of 1898 as the "critical date" for establishing sovereignty over the Island of Palmas) (noting also that the doctrine of critical date has been problematic for international courts); see, e.g., *Minquiers and Ecrehos*, *supra* note 57, at 59 (noting the Court remained silent in choosing critical date); *Frontier Dispute (Burkina Faso v. Mali)*, Judgment, 1986 I.C.J. 554, at ¶148 (Dec. 22, 1986) (noting where arbitral tribunal refused to choose critical date); see TEODORO A. AGONCILLO, HISTORY OF THE FILIPINO PEOPLE 200–201 (1990) (noting Agoncillo, a prominent Filipino historian, explains the context leading to the period of the Philippine Revolution and the Declaration of Independence in 1898).

acquisition of territories in the western Pacific and Latin America. The war began after the American demand for Spain's peaceful resolution of the Cuban fight for independence was rejected, and the mysterious explosion of the USS Maine in Havana Harbor contributed to the outbreak of hostilities.⁹⁵

The proclamation is known as "*Araw ng Kasarinlan*" or "Day of Independence" in the Philippines and is celebrated annually as a national holiday. It declared the sovereignty and independence of the Filipino people from Spanish rule by citing their grievances with unjust acts. It also established the First Philippine Republic. However, this declaration did not lead to immediate international recognition of the Philippines as an independent state. Following the defeat of Spain in the Spanish-American War, the Treaty of Paris was signed in December 1898, in which Spain ceded the Philippines to the United States. This led to the Filipino-American War⁹⁶ and a subsequent period of American colonization until July 4, 1946, when the United States formally recognized the Philippine's independence.

The Declaration was an act of self-determination, analogous to the self-help remedy that bought about the French Revolution of 1789. Even though the declared republic was not recognized as a subject of international law at the time, this rule affected only the statehood of this republic, rather than its internal sovereignty, namely, the sovereignty of the Filipino people over their isles.

The Philippine Declaration of Independence is a significant document in the country's history, symbolizing the desire and struggle of the Filipino people for freedom and self-determination. The original text of the declaration was written in Spanish and later translated into Filipino and other languages. The historic flag of the Philippines was officially unfurled for the first time at the proclamation, and the national anthem was played, marking the nation's assertion of its right to self-governance and sovereign rule.

Given the effect of the Declaration on internal sovereignty since 1898, the Spanish cession of the Philippines to the United States would have been illegal. This point follows from the effects of the French Revolution of 1789.⁹⁷ The

⁹⁵ See, e.g., LOUIS A. PÉREZ JR., *THE WAR OF 1898: THE UNITED STATES AND CUBA IN HISTORY AND HISTORIOGRAPHY* 58–64 (1998) (delving into historical narratives surrounding the Maine's destruction, the portrayal of public opinion as a catalyst for war, and the depiction of military operations in Cuba. The author emphasizes how these historical accounts have perpetuated certain notions about America's national identity and foreign policy, many of which originated in 1898).

⁹⁶ See, e.g., BRIAN McALLISTER LINN, *THE PHILIPPINE WAR, 1899-1902* 3, 17–21, 322 (2000) (exploring the extensive military operations and the regional variations of the struggle, challenging previous narratives and correcting historical inaccuracies. Rather than a simple clash between two sides, Linn presents the war as a series of localized conflicts across the archipelago, offering a complete picture of the war efforts).

⁹⁷ See generally LUKE GLANVILLE, *SOVEREIGNTY AND THE RESPONSIBILITY TO PROTECT: A NEW HISTORY* 60–10 (2013) (exploring the rise of popular sovereignty, as articulated by theorists like Locke and Rousseau and manifested by the American and French revolutionaries. It discusses how international society embraced this principle at Versailles in 1919 as a criterion of legitimacy. Popular sovereignty posited that rulers were accountable to their people for ensuring their safety

Revolution had a profound impact on the idea of self-determination and the principle that the people are the sovereign, significantly influencing the development of these concepts in international law. The Revolution emphasized the concept of popular sovereignty, the idea that the legitimacy of the state is created by the will and consent of its people. This was a dramatic shift from the divine right of kings and hereditary rule prevalent in Europe. This concept spurred the growth of nationalism, an essential element of self-determination.

As people began to identify themselves as part of a nation, they sought to create or maintain states that reflected their national identities. This sense of national consciousness became a driving force behind the movements for self-determination in the 19th and 20th Centuries, leading to the formation of nation-states.⁹⁸ These revolutionary ideas spread across Europe and the world, influencing other revolutions and independence movements. This spread occurred much earlier than World War I, particularly U.S. President Woodrow Wilson's advocacy for the principle of self-determination as part of his Fourteen Points in 1918. Nevertheless, the spread of the concept from the American Revolution (1776),⁹⁹ to the French Revolution (1789), and especially in other parts of Europe, suggests a recognition in the structures of international law at the end of the 18th Century. These revolutions resulted in legal sovereignties because of the concept of popular sovereignty. It is the recognized legal legitimacy of these revolutions that underscore this status as a norm of international law.¹⁰⁰ The formal expression of popular sovereignty in the Treaty of Versailles in 1919, ending World War I, reflected some aspects of this concept, leading to the redrawing of maps and formation of new nations in Europe.¹⁰¹

and security. Following the French Revolution, the pursuit of popular sovereignty in Europe shifted focus to the rights of nations to self-governance, rather than individual rights within these nations. At the end of World War I, the principle of national self-determination was established as a legitimacy principle, alongside tentative rights of nations to freedom from external intervention. However, these rights coexisted with an unresolved doctrine of humanitarian intervention and a weak international framework for protecting minority rights).

⁹⁸ See generally Benedict Anderson, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (Verso 2006) (arguing that the concept of nations as imagined communities was central to the rise of nationalism and the formation of modern nation-states in the 19th and 20th centuries).

⁹⁹ See, e.g., L.E. Uzzeel, *Right to Revolution*, in 4 *AMERICAN GOVERNANCE* 316, 318 (Stephen Schechter ed., 2016) (the recognition of the revolutionary principle continues to this date. Hence, Uzzeel states that "America's devotion to the right of revolution continues to be ambivalent. When Marxist ideologues embraced revolutions as a necessary precursor to a communist utopia, it had the effect of dampening, for a time, America's own enthusiasm for the violent overthrow of established governments. But since the end of the Cold War in 1991, Americans have generally greeted the news of foreign revolutions—from the (often bloodless) transformations of the countries in the former Soviet Union in the 1980s and 1990s to the Arab Spring of the 2010s—with an optimism that has not always been justified by the outcome").

¹⁰⁰ See generally DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* 34–44, 67–68 (Harvard Univ. Press ed., 2008) (discussing the influence of the American and French Revolutions on the recognition of popular sovereignty and the emergence of legal sovereignties as norms in international law).

¹⁰¹ See generally MARGARET MACMILLAN, *PEACEMAKERS: THE PARIS PEACE CONFERENCE OF 1919 AND ITS ATTEMPT TO END WAR* 495–98 (John Murray ed., 2001) (noting that the Treaty of Versailles reshaped Europe by creating new nations and altering borders in response to nationalist demands and the principle of self-determination).

However, this was to allow for the peaceful exercise of self-determination without resorting to bloody conflict. Moreover, the establishment of the League of Nations introduced a more formal recognition of the rights of groups to self-governance, albeit limited and inconsistently applied.¹⁰²

The principles of the French Revolution inspired many to fight for self-rule, autonomy, and independence, contributing to the reshaping of the international order and the eventual acceptance of self-determination as a key principle in international law. In particular, the Revolution gave the concept of popular sovereignty legitimacy as a mechanism for the legal transfer of internal sovereignty. Applying this point to the Philippines, after 1898, only the Filipino people were holders of legal sovereignty in that country. The issue of whether their legal internal sovereignty was recognized—specifically, whether their republic was accepted as a subject of international law—should not conflate the analysis. Statehood is an expression of external sovereignty and should not bear on the will of the people.

While the direct codification of self-determination into international law came much later, the revolutionary principle influenced the development of constitutional law and the understanding of human rights. These developments laid the groundwork for later legal recognition of the right to self-determination and popular sovereignty.

The Dutch acknowledged the (popular) sovereignty of the local princes, and entered into treaties with the Sangir to administer the island.¹⁰³ Given that at the time of the judgment, the Philippines was still under United States rule and lacked legal personality under international law, the only available option was to give effect to the exercise of self-determination through the treaties signed with the Dutch. Put simply, in the absence of treaty-making with the people, namely the First Nations—especially once they have become a constituted power,¹⁰⁴ for example through a declaration of independence—the legal

¹⁰² See, e.g., SUSAN PEDERSEN, *THE GUARDIANS: THE LEAGUE OF NATIONS AND THE CRISIS OF EMPIRE* 3–12 (Oxford Univ. Press 2015) (discussing how the League of Nations mandated territories under the guise of self-governance, recognizing the principle but often limiting its application and reinforcing imperial control).

¹⁰³ See, e.g., M.P.H. Roessingh, *Dutch Relations with the Philippines: A Survey of Sources in the General States Archives, The Hague, Netherlands*, 5 *ASIAN STUD. J. CRITICAL PERSP. ASIA* 377, 382 (1967) (explaining that “[a]lmost two centuries later [referring to expeditions by the British to the Archipelago in the 1980s], the treaty with the King of Kandhar again came to the foreground when a dispute arose between the United States of America and the Kingdom of the Netherlands respecting sovereignty over the small island of Palmas (Miangas), lying to the south of Mindanao. The Netherlands could prove that ‘this sovereignty arose out of conventions entered into with the native princes of the Islands of Sangi . . . establishing the sovereignty of the Netherlands over the territories of these princes, including Palmas (or Miangas).’ The earliest relations with the Sulu Archipelago also appear in the light of the struggle against Spain.” (citations omitted)).

¹⁰⁴ See e.g., AOIFE O’DONOGHUE, *CONSTITUTIONALISM IN GLOBAL CONSTITUTIONALISATION* 54 (explaining that “constituted power holders are selected and granted their *licence to exercise their power* within the remit of [a] particular [governance] system”) (emphasis added); see also Benjamin Franklen Gussen, *Urbs ex Machina? On the Hohfeldian Incidence of City Subsidiarity as a Jus Cogens*, 52 *DENV. J. INT’L L. & POL’Y* 1, 10 (2023) (stating the following: “[u]nder self-determination, the ‘peoples’ become the actor that transforms a constitutive power to a constituted power, that is,

sovereignty remains with the people. This was the ‘gospel’ of the law of nations after 1789, and hence at the time the *Island of Palmas Case* was decided in 1928.

C. *Eastern Greenland Case (1933)*

In the *Eastern Greenland Case*,¹⁰⁵ the Permanent Court of International Justice (PCIJ) relied on the intertemporal rule to assess Denmark’s historical claims to sovereignty over Eastern Greenland. The court ruled in favor of Denmark, recognizing their longstanding legal rights and continuous authority over the territory since the early 19th Century, despite Norway’s later claims. To fully understand the effect of the right to self-determination on the outcome of this case, it is essential to begin with the historical contexts of both Sweden and Norway. Denmark has been a unified kingdom since the 10th Century. Consequently, any exercise of self-determination by Denmark occurred well before the modern conceptualization of the right to self-determination, which began to take shape in the 13th Century.

The contextual starting point is the Kalmar Union.¹⁰⁶ This union was a significant political and dynastic union in Scandinavian history, uniting Denmark, Norway, and Sweden under a single monarch from 1397 to 1523. Initiated by Queen Margaret I of Denmark, who became the *de facto* ruler of all three kingdoms following the deaths of her husband, King Haakon VI of Norway, and their son, King Olaf II, the union was formally established in 1397 in Kalmar, Sweden. The agreement allowed the kingdoms to be ruled by a common monarch while maintaining their individual laws and customs. Margaret I aimed to consolidate power and strengthen defense against external threats, particularly from the Hanseatic League and German states. Her grandnephew, Eric of Pomerania, was crowned the first king of the united realms. Despite the union’s intended unity, it was plagued by internal conflicts and power struggles, with the nobility of each kingdom resisting central control, leading to rebellions and civil wars. The union’s decline began in the early 16th Century, driven by Swedish dissatisfaction with Danish dominance and economic exploitation. This unrest culminated in the Swedish War of Liberation, led by Gustav Vasa, who expelled Danish forces and was elected King of Sweden in 1523, effectively ending the Kalmar Union.

move from a position where they are yet to be given an institutional representation in terms of their chosen political organization to a constitutional phase that meets their aspirations. The ‘peoples’ become a constituted power whenever they materialize an institutional (including constitutional) status, regardless of whether they choose to create a new independent state, join an existing one, or remain part of their current nation-state”).

¹⁰⁵ See generally *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgement, 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

¹⁰⁶ Henrik Gustafsson, *A State That Failed? On the Union of Kalmar, Especially Its Dissolution*, 31 SCAND. J. HIST. 205, 206–08 (2006) (exploring the history and historiography of the Kalmar Union, which united Denmark, Norway, and Sweden from 1397 to the early 16th Century. The union, initially intended to strengthen the Scandinavian kingdoms against external threats, faced numerous internal conflicts and power struggles. Gustafsson argues that while the union ultimately dissolved, it was not an inevitable failure but rather a significant political entity that influenced state formation and political culture in Northern Europe. The union’s dissolution led to the formation of the modern states of Denmark-Norway and Sweden, leaving a lasting impact on the region’s political landscape).

Unlike Sweden, Norway's journey to independence culminated in 1905, but it began much earlier. Norway was part of the Danish-Norwegian kingdom from 1380 until 1814. In the aftermath of the Napoleonic Wars, the Treaty of Kiel (1814) ceded Norway from Denmark to Sweden.¹⁰⁷ However, Norway sought to establish its sovereignty. On May 17, 1814, Norway declared independence and adopted its own constitution, but by November 1814, a personal union with Sweden was established under the Convention of Moss, where Norway retained significant internal autonomy but recognized the Swedish king.¹⁰⁸ Tensions persisted over the course of the 19th Century, fueled by Norwegian nationalism and demands for equal status within the union. Key issues included Norway's desire for separate consular services and greater control over domestic affairs. These demands were consistently rebuffed by Sweden, leading to increased friction between the two nations. The situation reached a breaking point in 1905 when the Norwegian parliament, the *Storting*, unilaterally declared the dissolution of the union on June 7, 1905. A referendum held in August showed overwhelming support for independence. The Swedish government initially opposed the move, leading to a tense standoff that included mobilization of military forces on both sides. Ultimately, negotiations led to a peaceful resolution and on October 26, 1905, the Treaty of Karlstad was signed, and Sweden recognized Norway's independence. Shortly thereafter, Norway elected Prince Carl of Denmark as its king, who took the name Haakon VII, thus establishing a new Norwegian monarchy and securing the nation's sovereignty.¹⁰⁹

The third self-determination question, and the one most pertinent to this case, is the self-determination of the Greenlandic Inuit.¹¹⁰ The issue has evolved

¹⁰⁷ See generally Treaty of Kiel, Den.-Swed., Jan. 14, 1814, 15 S.J.H. 259.

¹⁰⁸ See Joseph M. Parent, *The Liminal Union of Sweden and Norway*, in *UNITING STATES: VOLUNTARY UNION IN WORLD POLITICS* 93, 97 (2011) (in this chapter, Chapter 6, Parent explores the unique nature of the Sweden-Norway union from 1814 to 1905. Formed after the Napoleonic Wars under the Treaty of Kiel, this union was marked by a balance between shared monarchy and foreign policy, and separate domestic governance. The union faced challenges due to political, cultural, and economic differences, ultimately leading to its peaceful dissolution in 1905 following a Norwegian referendum favoring independence. This case illustrates the complexities and potential for peaceful resolution in voluntary unions between distinct national entities).

¹⁰⁹ See generally OSWALD EARL DOLVEN, *THE SEPARATION BETWEEN NORWAY AND SWEDEN IN 1905: WITH A CHAPTER SHOWING THE SCANDINAVIAN-AMERICAN ATTITUDE* (1923) (examining the historical and political events leading up to the peaceful dissolution of the union between Norway and Sweden. The book highlights the rising nationalist movements within Norway, which were driven by a desire for self-determination and full sovereignty. Dolven details the negotiations and diplomatic efforts that characterized the separation process, emphasizing the role of both internal pressures and international influences. The final agreement in 1905 resulted in Norway's peaceful independence, showcasing a significant example of resolving nationalist aspirations through diplomatic means rather than conflict. Additionally, the book includes a chapter on the Scandinavian-American perspective, reflecting the broader international interest and support for Norway's quest for independence. Dolven's analysis underscores the importance of political will, national identity, and diplomatic negotiation in achieving peaceful state separations).

¹¹⁰ See generally Ulla Jakobsen & Hans Larsen, *The Development of Greenland's Self-Government and Independence in the Shadow of the Unitary State*, 14 *POLAR J.* 9, 9 (2024) (examining Greenland's political evolution over the past 40 years through the framework of historical

significantly from the 1933 PCIJ decision to the present day. In the 1933 ruling, Denmark's sovereignty over Greenland was affirmed against Norwegian claims. This decision reinforced Danish control over Greenland, which had been a Danish colony since the 18th Century. Significant change came in 1979 when Denmark granted Greenland home rule.¹¹¹ This shift allowed Greenland greater autonomy over internal matters while Denmark retained control over foreign affairs, defense, and constitutional issues. The Home Rule Act was a crucial step toward self-determination, reflecting Greenlandic demands for greater control over their affairs and recognition of their unique cultural and ethnic identity. The Self-Government Act (2009) further expanded Greenland's autonomy,¹¹² transferring additional powers from Denmark to the Greenlandic government. This Act recognized Greenlanders as a distinct people with the right to self-determination under international law. Importantly, it allowed Greenland to take control of its natural resources, including potential oil and gas reserves, which has significant economic implications. The Act also set the stage for potential future independence, stipulating that any decision on independence would be made by the people of Greenland. The contemporary political landscape in Greenland is characterized by ongoing discussions about full independence from Denmark.¹¹³

However, the issue of Greenlandic Inuit self-determination was not present when the 1933 was decided by the PCIJ. In this case, Denmark claimed sovereignty over Eastern Greenland based on historical control and various legal acts, while Norway argued that parts of Eastern Greenland were *terra nullius* when it undertook expeditions and made claims there.¹¹⁴ The PCIJ ruled in favor

institutionalism. The authors argue that Greenland's transition from home rule in 1979 to self-government in 2009 can be understood as a combination of path dependency and critical junctures, particularly influenced by the 1972 EC referendum and the endogenous growth of Greenlandic political identity. They highlight a tension between the established gradual transfer of powers (path dependency) and the increasing expressions of Greenlandic political identity, which may challenge the existing political framework and drive further shifts towards independence).

¹¹¹ See generally Greenland Home Rule Act, 29 November, Stb. 1978 (Den.).

¹¹² See generally Greenland Self-Government Act, 12 June Stb. 2009 (Den.).

¹¹³ See, e.g., A.M. Hansen & J.D. Tàbara, *Confronting Local and Global Tipping Narratives: Green Energy Development in the Arctic and Why Greenland Is Not for Sale*, in POSITIVE TIPPING POINTS TOWARDS SUSTAINABILITY 297 (J.D. Tàbara et al. eds., 2024) (arguing that Greenland's path to green energy development embodies a critical confrontation between local and global environmental narratives. The authors argue that while global calls to keep fossil fuels in the ground aim to prevent a climate catastrophe, there is also a pressing need to exploit Greenland's alternative mineral resources for the global green energy transition. This duality creates a complex dynamic, especially for local communities, who must balance their traditional resource practices and rights with global sustainability goals. The chapter advocates for integrating principles of Natural Resource Justice and Earth System Justice, emphasizing that local cultural and institutional traditions, such as the communal ownership of land in Greenland, offer valuable insights for global sustainability practices. It highlights the necessity of innovative and inclusive governance to navigate these tensions and ensure equitable benefits for local communities while contributing to global sustainability efforts).

¹¹⁴ Legal Status of Eastern Greenland (Denmark v. Norway), Judgement, 1933 P.C.I.J. (ser. A/B) No. 53, at 46–47 (Apr. 5) (“On a fait valoir, au nom de la Norvège, qu’après la disparition des deux établissements nordiques, la souveraineté norvégienne s’était perdue et le Groënland était devenu une *terra nullius*. La conquête et l’abandon volontaire sont les considérations sur lesquelles se fonde cet argument.” English translation: “It has been argued on behalf of Norway that after the

of Denmark, utilizing the intertemporal law rule. The court acknowledged Denmark's longstanding and continuous claim over Eastern Greenland dating back to the early 19th Century and earlier treaties and acts of occupation.¹¹⁵ In effect, the court rejected Norway's claims that were based on activities conducted later in time.

The PCIJ examined the historical evidence presented by both sides. Denmark provided evidence of its continuous and exclusive assertion of rights over Greenland as a part of the Danish realm from the early 18th Century onwards. This included references to treaties, royal decrees, and other legal acts asserting Danish sovereignty. Denmark also argued that it had effectively occupied Eastern Greenland, even if not by a physical presence throughout the entire territory, through various activities and the appointment of officials, including the administration of justice and other aspects of governance. There was also the contention that other states had recognized its sovereignty over Greenland, including Eastern Greenland, through diplomatic correspondence and international acts.

Norway presented several arguments to support its claim over Eastern Greenland, attempting to counter Denmark's longstanding sovereignty claims. Norway contended that Eastern Greenland was *terra nullius* when Norwegian activities commenced in the early 20th Century. Closely related to the *terra nullius* argument, Norway challenged the effectiveness of Danish claims and control over Eastern Greenland, suggesting that Denmark's activities and presence in Eastern Greenland were too sporadic and minimal to constitute real sovereignty. Norway argued that mere claims or nominal assertions of sovereignty without effective occupation and administration did not comply with the international law standards of the time. They also presented evidence of its own expeditions, hunting activities, scientific research, and the establishment of weather stations in Eastern Greenland. These activities, according to Norway, demonstrated a real, effective occupation and administration of the territory, which they argued was more substantive and consistent than Danish efforts, especially in the early 20th Century. Moreover, Norway attempted to demonstrate that third parties, including other nations, had recognized or acted in a manner consistent with Norwegian claims to Eastern Greenland. This included references to specific actions or omissions by other states that might

disappearance of the two Nordic settlements, Norwegian sovereignty was lost and Greenland became a *terra nullius*. [p. 47] Conquest and voluntary abandonment are the grounds on which this view is put forward") (emphasis in the original).

¹¹⁵ *Id.* at 50–51 (“La conclusions à laquelle est amenée la Cour est que, si l'on garde présentes à l'esprit l'absence de toute prétention à la souveraineté de la part d'une autre Puissance et la nature arctique et inaccessible des régions non colonisées du pays, le roi de Danemark et de Norvège, durant la période qui s'écoula depuis la fondation des colonies par Hans Egede, en 1721 jusqu'en 1814, manifesta son autorité dans une mesure qui suffit à conférer à son pays un titre valable de souveraineté, et que ses droits sur le Groënland n'ont pas été limités à la région colonisée.” English translation: “The conclusion to which the Court is led is that, bearing in mind the absence of any claim to sovereignty by another Power, and the Arctic and inaccessible character of the uncolonized [p. 51] parts of the country, the King of Denmark and Norway displayed during the period from the founding of the colonies by Hans Egede in 1721 up to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area”).

imply recognition of Norwegian interests or activities in the region. In addition, Norway argued that Denmark had, at times, failed to assert or effectively exercise its sovereignty over Eastern Greenland, which might be interpreted as abandonment or at least a weakening of its claim. They pointed to periods of Danish inactivity or lack of enforcement in Eastern Greenland as evidence.

By applying the intertemporal rule in the absence of any exercise of the right of self-determination on the part of the Greenlandic Inuit, the PCIJ concluded that Denmark's historical claims and exercises of sovereignty conformed to the legal standards in place during the relevant periods and that Norway's later activities could not override the preexisting legal rights of Denmark. Thus, Denmark's sovereignty over Eastern Greenland was upheld.

It is also instructive to explain the dissenting opinions in this case. Out of 14 justices, two dissented. Justice M. Anzilotti's dissenting opinion emphasized the need to first determine whether there was a valid agreement between Denmark and Norway based on the 1919 exchange of communications.¹¹⁶ He criticized the court for not prioritizing this assessment, arguing that it should have been the primary basis for resolving the dispute. Anzilotti pointed out that Denmark's claims to sovereignty over Greenland were historically inconsistent and lacked effective occupation, particularly in uncolonized regions. He underscored that Denmark's requests for recognition from other states in the early 20th Century indicate that its sovereignty was not universally acknowledged or effectively exercised. He concluded that without a clear historical title or effective occupation, Denmark's sovereignty claims over the entire Greenland were not legally substantiated.

In particular, Justice Anzilotti underscored the importance of two facts, the first relates to the right to self-determination, while the other puts more emphasis on the acquisition of sovereignty over territories. The first fact related to

the existence of an ancient claim to sovereignty over the country known as Greenland . . . the origin of this claim resides in the authority which the ancient kings of Norway had acquired over the political organization which inhabitants of Iceland, of Norwegian origin, had founded at the end of the Xth century in South-West Greenland and which, at first independent, did homage to the King of Norway in 1261 and became tributary to the Kingdom of Norway.¹¹⁷

Justice Anzilotti discussed an ancient claim to sovereignty over Greenland, rooted in the authority that the ancient kings of Norway acquired over the political organization founded by Icelandic settlers of Norwegian origin in South-West Greenland. This historical claim to sovereignty reflects how past political arrangements and allegiances can influence modern interpretations of self-determination. The initial independence of the Greenlandic political

¹¹⁶ Legal Status of Eastern Greenland (Denmark v. Norway), Judgement, 1933 P.C.I.J. (ser. A/B) No. 53, at 76 (Apr. 5) (dissenting opinion by Justice M. Anzilotti).

¹¹⁷ *Id.* at 82.

organization and its later subordination to Norwegian authority highlight the complexities of historical sovereignty claims. In the context of self-determination, such historical claims are often scrutinized to understand whether the current inhabitants of a region have a legitimate and historically grounded right to self-governance or independence. The text illustrates how historical relationships and sovereignty claims can impact the arguments and legal foundations for contemporary self-determination movements. It emphasizes the importance of historical context in understanding and resolving modern issues of sovereignty and self-determination.

The second fact related to “the disproportion between the claim to sovereignty over all Greenland and the effective exercise of that sovereignty.”¹¹⁸ This fact seems to be in opposition to the first fact in that it puts more emphasis on the acquisition of sovereignty, although in this case, it was not determinative of the outcome, according to Justice Anzilotti.

Similarly, the second dissenting opinion, from Justice M. Vogt, contended that Denmark’s claim to sovereignty over the entire territory was unsubstantiated.¹¹⁹ He emphasized that Greenland was historically a Norwegian dependency and that Denmark’s actions and statements between 1915 and 1921, seeking international recognition for its sovereignty, indicate that it did not have clear and uncontested sovereignty. Justice Vogt argued that Denmark did not establish effective occupation or continuous exercise of sovereignty, especially in disputed areas frequented by Norwegian hunters, and concludes that Denmark did not prove an inchoate title to the disputed territories. In essence, Justice Vogt’s dissent was based on sovereignty rights flowing to Norway from Eric the Red’s discovery in the 10th Century.¹²⁰ This was followed by an act of self-determination on the part of the Greenlandic Inuit: “[i]n 1261, the Greenlanders submitted themselves of their own free will to the King of Norway, who promised to maintain regular navigation to the colonies in Greenland.”¹²¹ Another act of self-determination, this time on the part of the Norwegian people, rejected the Kiel Treaty that ceded Norway to Sweden.¹²² Hence, upon finally securing its own independence from Sweden in 1905, Norway revived its colonial claims over Greenland.

In this case, unlike in the case of Guatemala and Honduras (see above), there was no exercise of self-determination on the part of the indigenous population in Greenland, the Kalaallit.¹²³ This case was about whether the colonial claims of Norway, based on the doctrine of *terra nullius*, would be upheld in the early 20th

¹¹⁸ *Id.* at 83.

¹¹⁹ Legal Status of Eastern Greenland (Denmark v. Norway), Judgement, 1933 P.C.I.J. (ser. A/B) No. 53, at 97 (Apr. 5) (dissenting opinion by Justice M. Vogt).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 98.

¹²³ See, e.g., Dina C. Cambou, *Disentangling the Conundrum of Self-Determination and Its Implications in Greenland*, 56 POLAR REC. 1, 3 (2020) (explaining that since the Treaty of Kiel in

Century or whether such claims no longer had an active role to play in establishing fresh colonial claims.

The *Eastern Greenland Case* can also be distinguished from the *Island of Palmas Case* in that the indigenous population had not exercised its right of self-determination at the time of the adjudication, unlike the Filipino people, who made their Declaration of Independence in 1898, prior to the case determination in 1928. Regardless, just like the declaration by the Filipino people—which was not recognized by the subjects of international law until their independence from the United States in 1946—the “dormant” self-determination of the Greenlandic Inuit played a direct role in preventing fresh colonial claims on their territories. The principle of self-determination, although not actively exercised in Greenland at the time, had an implicit influence in undermining Norway’s colonial claims, as international law increasingly recognized the importance of indigenous populations’ rights to self-determination and sovereignty over their lands.

In summary, the principle of self-determination played varying roles in these cases. In *Eastern Greenland*, it was an implicit factor undermining colonial claims based on *terra nullius*. In Guatemala and Honduras, active self-determination was crucial in the application of *uti possidetis juris* in the aftermath of legal recognition of indigenous territories. In the *Island of Palmas Case*, the exercise of self-determination by the Filipino people, although not immediately recognized, was a significant factor vitiating the effect of colonialism and the eventual international acknowledgment of their independence. As seen earlier in the case of Guatemala and Honduras, the exercise of self-determination by the indigenous populations was a critical factor in the adjudication process. The indigenous populations had actively asserted their rights and sovereignty, which played a significant role in the legal recognition of their territories. This contrasted with the situation in Eastern Greenland, where the indigenous population’s right to self-determination was not actively asserted but still influenced the outcome by highlighting the diminishing acceptability of colonial claims based on *terra nullius* in the context of evolving international norms. This evolution of international law crystallized in the 1975 ICJ advisory opinion on Western Sahara.¹²⁴ Similarly, in the *Island*

1814, when Denmark ceded Norway to Sweden, it has been understood that the Norwegian dependencies of Greenland, the Faroe Islands, and Iceland were not part of this cession. Consequently, Denmark took sovereign control over all of Greenland. In the 1933 case, the PCIJ focused on the legal status of Eastern Greenland territories and did not address the rights of the Inuit people, who were deemed irrelevant to the proceedings. As a result, Greenland was treated as a Danish colonial possession, and the Inuit were denied the right to self-determination despite their long-standing occupation of the land).

¹²⁴ Advisory Opinion on Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16) (noting Spain’s decolonization of Western Sahara prompted Morocco and Mauritania to lay claims, leading the UN General Assembly to seek the ICJ’s opinion on the territory’s legal status at the time of Spanish colonization. The ICJ concluded that Western Sahara was not *terra nullius* as it was inhabited by socially and politically organized tribes exercising authority over the land. This finding reinforced the principle of self-determination, asserting that the inhabitants had the right to determine their political status and pursue their development. By recognizing the indigenous populations’ rights and organizational structures, the ICJ challenged the notion that lands could be considered ‘empty’ based on European norms. The case also highlighted legal ties between Western Sahara and both Morocco and Mauritania but emphasized that these ties did not negate the right to self-determination.

of *Palmas Case*, the Filipino people had declared their independence in 1898, demonstrating an exercise of self-determination. Although this declaration was not immediately recognized internationally, it signified the Filipino people's assertion of their rights and sovereignty, which influenced the arbitration outcome in 1928. The recognition of the Filipino Declaration of Independence and subsequent independence from the United States in 1946 underscored the growing international acknowledgment of self-determination as a fundamental principle in international law.

D. *Temple of Preah Vihear Case (1962)*

In the *Temple of Preah Vihear Case* (1962),¹²⁵ between Cambodia and Thailand, the ICJ used the intertemporal rule to uphold Cambodia's claim to the temple based on maps drawn during the French colonial period, demonstrating historical control. The case underscored the importance of historical maps and agreements in determining territorial sovereignty, especially when these have been accepted and used by the parties over a significant period.

The decision highlights the intertemporal principle's role in assessing historical claims based on the law and understanding at the time the relevant acts occurred. The ruling considered the cultural and historical connections of the temple to Cambodia, reflecting an understanding of the significance of cultural heritage in territorial disputes. This case remains a reference point in discussions of territorial sovereignty, the significance of historical documentation, and the application of international law principles in resolving complex disputes. The case also illustrates the impact of self-determination in the aftermath of colonial-era decisions and the challenges they can pose for modern international relations and border determinations.

The Temple of Preah Vihear is situated atop a cliff in the Dângrêk Mountains, on the border between Cambodia and Thailand. The case was brought before the ICJ to determine which country held sovereignty over the temple and the surrounding area.

The decision is notable for its reliance on colonial-era maps and agreements regarding the temple built during the Khmer Empire in the 11th and 12th

Consequently, the Western Sahara case played a crucial role in eroding colonial justifications based on terra nullius, reinforcing the legitimacy of indigenous sovereignty, and advancing the broader decolonization movement. This advisory opinion underscored the importance of respecting indigenous rights and contributed to the decline of terra nullius as a valid legal doctrine in international law, promoting the recognition of self-determination as a fundamental principle).

¹²⁵ Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6 (June 15); see also Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 2013 I.C.J. 281, 318 (Nov. 11) (confirming Cambodia's sovereignty over the entire Preah Vihear promontory, specifying the geographical limits and requiring Thailand to withdraw its forces from the area. This decision aimed to resolve disputes over the temple's vicinity and enforce Cambodia's rights over the territory as determined in the 1962 judgment).

centuries, an important cultural and religious site.¹²⁶ During the French colonial period, France, on behalf of its protectorate Cambodia, and Thailand (then Siam) engaged in treaties to delineate their borders.¹²⁷ Thailand, unique in Southeast Asia for never being colonized, used diplomacy to avoid direct colonization.¹²⁸ However, the temple's proximity to colonial borders remained contentious. After gaining independence in 1953,¹²⁹ Cambodia claimed the temple had historically been part of its territory, citing a 1907 map placing it within Cambodian borders, emphasizing its cultural heritage.¹³⁰ Thailand argued the boundary was inaccurately represented in the map, instead citing their administration and upkeep of the temple as evidence of sovereignty.¹³¹ Both nations presented colonial-era maps and documents to support their claims, with the 1907 map, agreed upon by French and Siamese commissioners, becoming central to the case.

The ICJ applied the intertemporal rule, examining the legal rights and acts at the time they occurred.¹³² The court considered the colonial-era agreements and how the territories were understood and administered during that period. The ICJ ruled in favor of Cambodia, recognizing its sovereignty over the Temple of Preah Vihear. The decision was significantly based on the 1907 map, which both parties had used for some time without serious challenge, and which showed the temple within Cambodian territory. While the court recognized Thailand's administration and activities at the temple, it noted that such activities occurred under the assumption of the boundary indicated by the 1907 map. The court emphasized that Thailand did not contest this map's delineation for many years, lending weight to Cambodia's claim.¹³³

Note, however, that the decision in favor of Cambodia was not unanimous. Three of the justices on the twelve-judge bench ruled favor of Thailand. Justice

¹²⁶ Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 2013 I.C.J. 281, 309 (Nov. 11) (stating that "The real question, therefore, which is the essential one in this case, is whether the Parties did adopt the Annex 1 map, and the line indicated on it, as representing the outcome of the work of delimitation of the frontier in the region of Preah Vihear, thereby conferring on it a binding character").

¹²⁷ *Id.* at 291.

¹²⁸ Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6, 91 (June 15) (dissenting opinion of judge Wellington Koo) (citing Princess Phun Phitsamai Diskul explanation of the nature of Siam's relationship with France); see also Prabhakar Singh, *Of International Law, Semi-Colonial Thailand, and Imperial Ghosts*, 9 ASIAN J. INT'L L. 46, 46 (2019) (explaining the nature of Siam's independence).

¹²⁹ Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 2013 I.C.J. 281, 291 (Nov. 11).

¹³⁰ *Id.* at 299.

¹³¹ Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6, 22 (June 15).

¹³² See Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6, 67 (June 15) (dissenting opinion of judge Moreno Quintana).

¹³³ See Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6, 67 (June 15).

Moreno Quintana based his dissent on interpreting the 1904 treaty.¹³⁴ Specifically, Justice Quintana explained that Article 1 of the treaty

provides that the frontier between the two countries at the point at issue ‘follows the watershed between the basins of the Nam Sen and the Mekong, on the one hand, and the Nam Moun, on the other hand, and joins the Pnom Padang chain, the crest of which it follows eastwards as far as the Mekong’. No reference is made to the temple of Preah Vihear.¹³⁵

On the other hand, Justice Wellington Koo, while he reserved his final conclusion in the case due to the lack of answers to certain technical points relating to the nature of the disputed boundary,¹³⁶ explained that the French government, never made a decision on the sovereignty rights over the temple, and therefore the maps showing the temple to belong to Cambodia were wrong.¹³⁷ Moreover, his honor explains that Thailand did not raise any objections to the maps for fear of further French encroachment on their border.¹³⁸ As to the last dissenting judge, Sir Percy Spender, the majority arrived at the wrong decision due to “a misapplication” of the “concepts of recognition or acquiescence” in relation to the French maps.¹³⁹ In essence, his honor was echoing the objection by Justice Moreno Quintana based on an interpretation of the treaty.¹⁴⁰

In this case, the critical date is generally considered to be 1904, which corresponds to the Franco-Siamese Treaty of 1904.¹⁴¹ More specifically, this date coincides with the communication to the Thai government of the maps produced by the French government showing the temple within the Cambodian borders. Given “that the maps were communicated to the Siamese [Thai] government as

¹³⁴ *Papers Relating to the Foreign Relations of the United States, With the Annual Message of the President Transmitted to Congress December 5, 1905*, Office of the Historian, <https://history.state.gov/historicaldocuments/frus1905/d927> (last visited Sept. 30, 2024) (noting the text of the Franco-Siamese Treaty, art. 1.).

¹³⁵ Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6, 67 (June 15) (dissenting opinion of judge Moreno Quintana).

¹³⁶ Temple of Preah Vihear (Cambodia v. Thailand), Judgment, 1962 I.C.J. 6, 69 (June 15) (dissenting opinion of judge Wellington Koo).

¹³⁷ Temple of Preah Vihear (Cambodia v. Thailand), Judgment, 1962 I.C.J. 6, 77 ¶ 7 (June 15) (dissenting opinion of judge Wellington Koo).

¹³⁸ Temple of Preah Vihear (Cambodia v. Thailand), Judgment, 1962 I.C.J. 6, 91 (June 15) (dissenting opinion of judge Wellington Koo) (citing statements from the Thai royal family showing fear from seizing of more Thai territory by the French).

¹³⁹ Temple of Preah Vihear (Cambodia v. Thailand), Judgment, 1962 I.C.J. 6, 146 (June 15) (dissenting opinion of judge Percy Spender).

¹⁴⁰ Temple of Preah Vihear (Cambodia v. Thailand), Judgment, 1962 I.C.J. 6, 103 (June 15) (dissenting opinion of judge Percy Spender) (explaining that “[w]hatever the delimitation made [] it was not a delimitation at large, it was controlled by Article I of the Treaty which ‘determined’ the frontier”).

¹⁴¹ *Papers Relating to the Foreign Relations of the United States, With the Annual Message of the President Transmitted to Congress December 5, 1905*, Office of the Historian, <https://history.state.gov/historicaldocuments/frus1905/d927> (last visited Sept. 30, 2024) (noting the text of the Franco-Siamese Treaty).

purporting to represent the outcome of the work of the delimitation; since there was no reaction on the part of the Siamese authorities, wither then or for many year, they must be held to have acquiesced.”¹⁴²

The 1904 treaty and subsequent activities, including the 1907 map produced by French surveyors, played a crucial role in determining the boundary between Cambodia (then under French protection) and Siam (modern-day Thailand). The ICJ based its decision on this critical date, examining the legal status and actions taken around the time of the treaty and the creation of the map. The ICJ ruled in favor of Cambodia, stating that Thailand (then Siam) had accepted the map and its depiction of the boundary, which included the Temple of Preah Vihear as part of Cambodian territory.

However, the conflict over the Temple of Preah Vihear intensified in the 1950s. In 1954, after the French withdrew from Cambodia, both Cambodia and Thailand began to assert their claims more strongly over the temple. The dispute reached a critical point in 1958 when Cambodia brought the case to the ICJ after failed diplomatic negotiations and increased tensions between the two countries.

Given the centrality of the right to self-determination within the intertemporal rule, the critical date for applying the rule is 1953 rather than 1904. This is especially pertinent since the conflict arose soon after Cambodia gained its independence. In this context, any effective control over the temple by Thailand while Cambodia was still under French occupation is irrelevant to sovereignty rights, as Cambodia had not yet exercised its right to self-determination. Once Cambodia did exercise this right, the issue of effective control became relevant. Therefore, had Cambodia delayed its challenge to Thai sovereignty over the temple, it would have been less likely for Cambodian sovereignty to be upheld.

Moreover, unlike the *Costa Rica and Panama Arbitration*, where self-determination was exercised by both parties, this case involves self-determination exercised by only one party, necessitating a different approach from the *uti possidetis juris* principle that recognizes post-colonial realities on both sides of the border. This situation is more analogous to the *Island of Palmas Case*. In the *Island of Palmas Case*, despite the continuing claims of colonial rule on both sides of the border, the self-determination of the Filipino people was as critical as Cambodia’s independence in resolving the dispute. Thus, the effective exercise of self-determination by Cambodia in 1953 is crucial in determining the sovereignty over the temple, underscoring the importance of timely challenges to territorial claims in post-colonial contexts.

V. CONCLUSION

The intertemporal rule is a fundamental principle in international law, serving to bridge historical legal contexts with evolving contemporary standards. Central to its application is the right to self-determination, which acts as both a historical anchor and a dynamic force in shaping legal interpretations and sovereignty claims. The cases discussed, such as the *Island*

¹⁴² Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6, 23 (June 15).

of *Palmas*, *Eastern Greenland*, and the *Temple of Preah Vihear*, illustrate how the right to self-determination is deeply embedded within the intertemporal rule, guiding the assessment of historical legal claims and ensuring their alignment with modern legal principles.

The right to self-determination ensures that the voices and aspirations of peoples, particularly those emerging from colonial rule or seeking recognition of their sovereignty, are integral to legal judgments. This principle necessitates that legal situations be evaluated not only based on the laws in force at the time of their occurrence but also in light of the evolving standards that recognize and uphold the self-determination of peoples. The intertemporal rule, therefore, requires a nuanced approach that respects historical claims while adapting to contemporary norms that prioritize human rights and the autonomy of peoples.

The right to self-determination may not have been explicitly mentioned as the rationale for the *ratio decidendi* in the aforementioned cases due to several factors. At the time these cases were decided, the right to self-determination was not as fully developed or universally recognized as it is today, with significant evolution occurring post-mid-20th Century. Judges focused on the established legal principles of effective control, historical sovereignty, and the intertemporal rule, which were more prominent in international jurisprudence. These cases primarily addressed questions of sovereignty and territorial integrity, which were traditionally resolved through these established doctrines rather than through the emerging concept of self-determination. Additionally, judicial decisions were often based on the most directly applicable legal principles to ensure clarity and adherence to existing norms. As international law has evolved, the explicit recognition and integration of self-determination have become more prominent, but earlier cases laid the groundwork within the context of the legal and historical norms of their times.

As international law continues to evolve, the relationship between the intertemporal rule and the right to self-determination will remain crucial. This dynamic interaction ensures that historical contexts are respected while legal standards progress to reflect contemporary values. By maintaining this balance, the intertemporal rule supports the legitimacy and adaptability of sovereignty claims, reinforcing the importance of self-determination as a cornerstone of international law.

In closing, the right to self-determination is not merely an aspect of the intertemporal rule but its driving force, its *ratio evolutionis*, ensuring that the application of international law remains just, relevant, and attuned to the aspirations of all peoples. This relationship underscores the importance of integrating historical and contemporary legal realities, fostering a more equitable and stable international legal order.