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EFFECTIVE OCCUPATION IN TERRITORIAL CLAIMS: A LEGAL ANALYSIS AND CRITIQUE

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ABSTRACT

The principle of effective occupation is often used to justify territorial claims based on physical and administrative control; in practice, the application of this principle tends to conflict with fundamental norms in international law such as self-determination and the prohibition of colonization. This article examines the practice and principle of effective occupation that is often used to legitimize territorial claims. This article use normative research with a prescriptive legal approach by analyzing international treaties, international customary law, principles of international law, court decisions, and expert opinions. The Namibia Advisory Opinion and the Western Sahara case illustrates how the principle of effective occupation has marginalized the sovereignty and fundamental rights of indigenous populations. These actions violate peremptory norms, which safeguard human dignity and uphold non-derogable principles such as the prohibition of unlawful occupation and the self-governance of communities. The study's findings highlight the urgent necessity for a robust legal framework governing territorial claims to ensure they respect fundamental rights and adhere to the foundational principles of international law. This would help prevent the misuse of effective occupation as a justification for territorial expansion while protecting the rights of vulnerable communities.

A. INTRODUCTION

The state as a political entity organized in a region Alexander H. Joffe,[1] has sovereignty that shows the highest position in government (internal) and

[1] Alexander H. Joffe. "Defining the state." *Enemies and Friends of the State* 3, no. 3, (2018): 21.

as a legal subject (external).[2] The state's territory is where the state exercises its sovereignty. This is territorial sovereignty, which is the sovereignty that the state has in exercising its territorial jurisdiction and within this territory the state has the authority to apply national law.[3] No state can exist without territory, thus the territory can be obtained and maintained is the most important thing for the state.[4] The idea of sovereignty over territory is fundamental to international law. Sovereignty has supreme and independent authority over its territory and population.[5] The sovereignty possessed by a state is linked to the state's responsibility towards its territory.[6]

According to international law, a change in a government's legal authority coincides with a change in its sovereignty over that territory. There are various methods recognized by international law for a state to obtain land, either in its entirety or in parts. Acquiring territorial sovereignty involves several processes, including conquest, cession, succession, effective possession, and prescription.[7]

The principle of effective occupation established in Berlin and its implementation during colonization in Africa is seen as having an influence in international law.[8] The principle of effective occupation has over time become a practice in international law. It is built on elements of the terra nullius doctrine. Terra nullius refers to land that is not beyond the control of political actors[9] or not under the jurisdiction of any subject of international law. This term developed starting in the 17th and 18th centuries in the context of the colonization of the western world & Europe which spread in most parts of the world. This doctrine became the basis for conquering nations to justify their actions in the colonies by carrying out the mission of civilizing local indigenous peoples who were considered uncivilized (uncivilized people / uncivilized society) by them.[10] Until the late nineteenth century, shortly before the holding of the Berlin Conference, a shifted meaning of both occupation as a State act

[2] Malcolm N. Shaw. *International law*. Cambridge: Cambridge university press, 2017.
[3] Huala Adolf. *Aspek-Aspek Negara Dalam Hukum Internasional*. Bandung: Keni Media, 2011.
[4] Donald R. Rothwell, Stuart Kaye, Afshin Akhtar-Khavari, Ruth Davis, and Imogen Saunders. *International Law: Cases and Materials with Australian Perspectives*. 3rd ed. Cambridge: Cambridge University Press, 2018.
[5] Aneta Stojanovska-Stefanova and Drasko Atanasoski. "State as a Subject of International law." *Us-China Law Review.* 13 (2016): 25.
[6] Hersch Lauterpacht. "Recognition of States in International Law." *The Yale Law Journal* 53, no. 3 (1944): 385.
[7] Hugh Thirlway. "Territorial disputes and their resolution in the recent jurisprudence of the international court of justice." *Leiden Journal of International Law* 31, no. 1 (2018): 121.
[8] Justice Jagot. *Sweden-Norway at the Berlin Conference 1884–85: History, National Identity-Making and Sweden's Relations with Africa*. Sydney: Federal Court of Australia, 2017.
[9] Bohumil Doboš. *New Middle Ages: Geopolitics of Post-Westphalian World*. *World-Systems Evolution and Global Futures*. Prague: Springer, 2020.
[10] Teddy Anggoro. "Kajian Hukum Masyarakat Hukum Adat dan HAM Dalam Lingkup Negara Kesatuan Republik Indonesia." *Jurnal Hukum dan Pembangunan* 36, no. 4 (2006): 489.

and land as unoccupied by a civilized State had been accepted in international legal theory.[11]

In 1884-1885, Portugal encouraged other European countries, namely Britain, France, Germany, Belgium and the United States to hold the Berlin Conference or Congo Conference, a meeting attended by 14 countries agreed on the General Act of the Berlin Conference which basically contained a legal framework and political consolidation to manage colonization and trade in the African region through the concept of terra nullius.[12] Because it recognizes Africa's status as terra nullius, which allows European countries to assert their sovereignty at whim in territories that have not been invaded by other countries, this notion is thought to silence the locals, including their sovereignty. It appeared that this conference opened the door for a military invasion and conquering of all of Africa.[13] The Berlin Conference was merely a sinister conspiracy by European countries to justify their occupation of Africa.

The peremptory rule is broken by European nations' occupation of African territory. The Prosecutor v. Anto Furundzija (1998) ruling and Article 20 of the League of Nations Covenant are just two examples of international practices and procedures that elevate the peremptory norm above international treaties. Because it is a public order norm vital to the integrity of international law as a legal framework intended to safeguard the primary interests and values of the international community as a whole from the interests of various States, this norm is highly significant to international law and relations.

A list of preemptive standards is given in Article 26 of the Draft Article on State Responsibility. These norms include the ban on crimes against humanity, torture, racial discrimination, slavery, aggression, and genocide, as well as the right to self-determination. Furthermore, "the most frequently cited candidates" for peremptory norms are listed in the 2006 International Law Commission (ILC) Report on Fragmentation of International Law: Difficulties Arise From the Diversification and Expansion of International Law. These include the proscriptions against aggression, slavery, the slave trade, genocide, racial discrimination, (political) apartheid, torture, humanitarian law principles applied to armed conflict, and the right to self-determination.

According to the International Criminal Tribunal for the Former Yugoslavia (ICTY), Prosecutor v. Anto Furundzija (1998), the peremptory

[11] Henan Hu. "The doctrine of occupation: An analysis of its invalidity under the framework of international legal positivism." *Chinese Journal of International Law* 15, no. 1 (2016): 121.

[12] Matthew Craven. "Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade." *London Review of International Law* 3, no. 1 (2015): 45.

[13] Kye-Ampadu, Nwando Achebe; Samuel Adu-Gyamfi; Joe Alie; Hassoum Ceesay; Toby Green; Vincent Hiribarren; Ben. "Colonial Rule in West Africa." In *History Text Book: West African Senior School Certificate Examination*, 2018.

standard includes a ban on torture. The ICTY declared in the Kupreskic case that standards in international humanitarian law, such as those pertaining to war crimes, crimes against humanity, genocide, and torture, are among the preeminent norms.

Based on the description of the provisions and practice of the Court's decision, none of them shows that the principle of effective occupation is a peremptory norm. However, when referring to the occupation practices carried out by European and American countries in the African region, the actions of European and American countries are contrary to peremptory norms. It is important to emphasize that there were indigenous people living in the African continent, despite their lack of legal ability, governance, and other necessities. De facto, it did exist, but at the time, neither Europeans nor Americans recognized it, thus it was viewed as uncivilized, terra nulius, still governed by tradition, and without the modern systems found in America and Europe.

This research aims to criticize the principle of effective ocupation in the Acquisition of a State's Territory, which is reviewed according to peremptory norms. This research is a prescriptive normative legal research. Legal materials are obtained through literature studies which include primary and secondary legal materials. In legal research there are several approaches. With this approach, researchers will get information from several aspects regarding the issues they are trying to find answers to.[14] The approaches in this research include first, case approach, this approach is carried out to examine cases that have relevance to the application of the principle of effective occupation in international practice. Second, the historical approach, the historical approach in this research starts from the Berlin Conference as the starting point for the birth of this principle. Third, conceptual approach, this approach is carried out by examining expert views and international decisions related to the principle of effective occupation. Previous research has been published by first, Jeffry A.C Likadja[15] with the title Legitimasi Juridis Effective Occupation Dalam Hukum Internasional. Second, it was published by Marta Lorente,[16] with the title Historical Titles v. Effective Occupation: Spanish Jurists on the Caroline Islands Affair, and the third was published by Bing Bing Jia[17] with the title Law of The Sea, From Grotius to the Internasional Tribunal of the Law of The Sea. The difference with the previous research is that this research focuses on

[14] Peter Mahmud Marzuki. *Penelitian Hukum*. Jakarta: Kencana Prenamedia, 2014.

[15] Jeffry AC. Likadja. "Legitimasi Juridis Effective Occupation dalam Hukum Internasional." *Jurnal Hukum Proyuris* 2, no. 2 (2020): 197.

[16] Marta Lorente. "Historical Titles v. Effective Occupation: Spanish Jurists on the Caroline Islands Affair (1885)." *Journal of the History of International Law/Revue d'histoire du droit international* 20, no. 3 (2018): 323.

[17] Bing Bing Jia. "The Terra Nullius Requirement in the Doctrine of Effective Occupation: A Case Study." In *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea*, edited by Lilian del Castillo. BRILL, 2015.

criticising the principle of effective occupation in the acquisition of a country's territory.

B. RESEARCH METHODS

The research method is systematic approach to address existing problems by collecting, compiling and interpreting data in order to discover, develop or verify the accuracy of a scientific research. The reliability and validity of scientific research outcome are heavily influenced by the suitability of the selected methodology. This research uses secondary data collection collected through literature studies specifically by examining sources that include primary legal materials, secondary, and tertiary legal materials.

C. DISCUSSION

1. The Berlin Conference and the Legalization of African Colonialism

The industrial revolution in Europe encouraged European countries to expand their territory. This demanded resources to support the industrialization activities of European countries.[18] This then led to competition among European countries. The African continent then became a concern for European countries.[19] The African continent is seen as an area that has sources of raw materials and strategic trade routes. This prompted European countries to seize African territories during the 19th to 20th centuries. The seizure of these territories became known as imperialism, where European countries dominated in the political, economic and social fields.

That imperialism, the acquisition and division of territory in Africa in the late 19th century were central to the formation and development of international law.[20] Tensions between European states were rising by the early 1880s. In order to avert the imminent danger of armed confrontation in Africa regarding African territorial disputes, European nations decided to convene a gathering that came to be known as the Berlin Conference.[21] In the conference, Europe set the terms and procedures for annexation in the African region, this was done as an effort so that the division carried out in the African region was carried out without conflict. The Berlin Conference, which later gave birth to the legal concept of effective occupation (effective occuation) [22]

[18] Stephen Ocheni and Basil C. Nwankwo. "Analysis of colonialism and its impact in Africa." *Cross-cultural communication* 8, no. 3 (2012): 51.

[19] Emmanuel M. Gbenenye, "African colonial boundaries and nation-building." *Inkanyiso* 8, no. 2 (2016): 120.

[20] John Iliffe. *Africans: The History of Continent*. Cambridge: Cambridge University Press, 2007.

[21] Merima Ali, Odd-Helge Fjeldstad, Boqian Jiang, and Abdulaziz B. Shifa. "Colonial legacy, state-building and the salience of ethnicity in sub-Saharan Africa." *The Economic Journal* 129, no. 619 (2019): 1049.

[22] Arthur Eyffinger. *The Berlin Conference (1884–1885): The Dice-Play for West Africa*. Leiden: Koninklijke Brill, 2019.

was held at the request of Portugal to overcome a number of diplomatic and political problems arising from European expansion into Africa, including the increasing tensions between European countries.[23]

The conference agreed on the terms used in acquiring a share of territory in Africa and stood on the principle of effective occupation of the claimed territory.[24] The participating countries agreed that states could assert their control over a territory by demonstrating effective occupation, i.e. by building infrastructure for the benefit of the colonial state. This conference is widely seen as the trigger for the rapid colonization of Africa in the late 19th century.[25]

Until 1880, Africa was under European rule.[26] During the period 1880 to 1935, Africa faced a very serious challenge, the challenge of colonialism. During this period, more than 28 million square kilometers of African territory was conquered and effectively occupied by European countries. In some cases, the European presence did not begin with conquest, but through various kinds of interactions with the local population.[27]

The Berlin Conference was the starting point for territorial struggles in Africa.[28] According to Anghie, the Berlin Conference turned Africa into terra nullius, silencing African resistance through European claims to African sovereignty. The conference sought to regulate the future acquisition of colonial territories.[29] The most fundamental of these changes occurred in the period from 1890 to 1910, a period of conquest and occupation of almost all of Africa by colonial powers.[30]

[23] Merima Ali, Odd-Helge Fjeldstad, Boqian Jiang, and Abdulaziz B. Shifa. "Colonial legacy, state-building and the salience of ethnicity in sub-Saharan Africa." *The Economic Journal* 129, no. 619 (2019): 1057.

[24] Juhani Koponen. "The Partition of Africa: A Scramble for a Mirage?" *Nordic Journal of African Studies* 2 (1993): 117.

[25] David Nilsson. *Sweden-Norway at the Berlin Conference 1884–85: History, National Identity-Making and Sweden's Relations with Africa*. *Sweden-Norway at the Berlin Conference 1884–85 History, National Identity-Making and Sweden's Relations with Africa*. Uppsala: Nordiska Afrikainstitutet, 2013.

[26] A. Adu Boahen. *General History of Africa. Africa Under Colonial Domination 1880-1935*. California: University of California Press, 1985.

[27] van der Linden, Mieke. "The Neglected Colonial Root of the Fundamental Right to Property." *Heidelberg Journal of International Law (Zeitschrift für ausländisches* 12, no. 1 (2015): 791-822.

[28] David Nilsson. *Sweden-Norway at the Berlin Conference 1884–85: History, National Identity-Making and Sweden's Relations with Africa*. *Sweden-Norway at the Berlin Conference 1884–85 History, National Identity-Making and Sweden's Relations with Africa*. Uppsala: Nordiska Afrikainstitutet, 2013.

[29] Matthew Craven. "Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade." *London Review of International Law* 3, no. 1 (2015): 54.

[30] A. Adu Boahen. *General History of Africa. Africa Under Colonial Domination 1880-1935*. California: University of California Press, 1985.

European nations employed colonialism as a tactic to annex land and achieve their goals. It is certain that the industrialization of European countries ignited the ambition to conquer new territories. One direct result of the West's dominance over Africa was the exercise of political control through the adoption of specific policies aimed at "impoverishing" the order and economy of the colonial regions.[31] The conference agreed on the territorial division of Africa through a treaty. This agreement came in 2 (two) forms, namely a treaty between Africa and Europe, as well as bilateral agreements between Europeans themselves.[32]

The doctrine of effective occupation made the conquest of Africa a murderous business. For the acquisition of territory to be effective and legitimate, it was necessary to establish sufficient authority over the territory.[33] The Berlin Conference and its agreed rules (the general act) were considered a watershed moment in the scramble for African territory. In order to acquire sovereignty over African land*,* the General Act of the Berlin Conference defines effective occupation and lays out the processes for asserting sovereignty over such claims. The legislation might be interpreted as an effort to provide a set of rules to regulate the previously unjustified and chaotic annexation of African land.

2. Effective Occupation in International Law: Insights from Case Studies

Effective occupation is a doctrine of international law that originated in ancient Roman law.[34] As Max Huber argued, a state must be able to effectively control and be responsible for actions that occur in its territory.[35] The word "occupation" originates from the Roman word "occupatio," which refers to administrative action rather than physical occupation. Only terra nullius, often known as no man's land, or territory that is contested by the state and is regarded as no man's land, may be effectively occupied as an administrative act of control over a territory.[36] Occupation must be effective and intended as a claim of sovereignty over the territory.

[31] Elijah Okon John. "Colonialism in Africa and Matters Arising-Modern Interpretations, Implications and the Challenge for Socio-Political and Economic Development in Africa." *Research on humanities and social sciences* 4, no. 18 (2014): 27.

[32] A. Adu Boahen. *General History of Africa. Africa Under Colonial Domination 1880-1935*. California: University of California Press, 1985.

[33] David Nilsson. *Sweden-Norway at the Berlin Conference 1884–85: History, National Identity-Making and Sweden's Relations with Africa*. *Sweden-Norway at the Berlin Conference 1884–85 History, National Identity-Making and Sweden's Relations with Africa*. Uppsala: Nordiska Afrikainstitutet, 2013.

[34] Malcolm N. Shaw. *International law*. Cambridge: Cambridge university press, 2017.

[35] Max Huber. "Island of Palmas case (Netherlands, USA)." *Reports of International Arbitral Awards* 2, no. 829-71 (1928): 21.

[36] Arif Havas Oegroseno. "Status Hukum Pulau-Pulau Terluar Indonesia." *Indonesian Journal of International Law* 6, no. 3 (2009): 59.

The Palmas Island case (1928) as a reference point for the principle of effective occupation.[37] One of the most important cases in securing territorial rights was the Palmas Island case (1928). The right's content was expressed by Max Huber, the Palmas Island (1928) Arbitrator, as an ongoing, nonviolent expression of territorial sovereignty, also known as effective possession. In a number of cases, this act of sovereignty from the Palmas Island (1928) case is utilized as a benchmark to determine territory; some parties even refer to it as the contemporary law of territory.[38] Max Huber as Arbitrator stated "there is a common core in prescription and occupation, and that is peaceable possession". Huber attributes this possession to the autonomous power to acquire rights. The act of occupation or possession thus becomes a constitutive element of property rights.[39]

The concept of effective occupation has been incorporated into international law over time. Judge Max Huber argued in the 1928 Palmas Island case that "the existence of the right, or rather its continued manifestation, shall follow the conditions required by the evolution of law." Huber emphasized that the continuous manifestation of the right proves its existence.

According to Huber, taking into account the trends that have occurred since the mid-18th century, "occupation, to constitute a claim to territorial sovereignty, must be effective", that occupation as a claim to sovereignty is carried out effectively. The significance of State action or effectiveness will depend on whether or not there is a legal right to the territory. Effectiveness plays an important role in showing how such rights are interpreted.

The Namibia Advisory Opinion issued by the International Court of Justice (ICJ) in 1971 is a landmark case that highlights the tension between the principle of effective occupation and fundamental norms such as self-determination. The ICJ examined South Africa's continued administration of Namibia, which was previously mandated to South Africa under the League of Nations system. The Court declared that South Africa’s continued presence in Namibia was illegal after the termination of the League of Nations mandate and violated the inherent rights of the Namibian people to self-determination.

The ICJ stated unequivocally, “The continued presence of South Africa in Namibia is illegal, and South Africa is under obligation to withdraw its administration immediately. This conclusion emphasized the primacy of self-

[37] Randall Lesaffer. "Argument from Roman law in current international law: Occupation and acquisitive prescription." *European Journal of International Law* 16, no. 1 (2005): 45.

[38] Sookyeon Huh. "Title to territory in the post-colonial era: original title and terra nullius in the ICJ judgments on cases concerning Ligitan/Sipadan (2002) and Pedra Branca (2008)." *European Journal of International Law* 26, no. 3 (2015): 713.

[39] Randall Lesaffer. "Argument from Roman law in current international law: Occupation and acquisitive prescription." *European Journal of International Law* 16, no. 1 (2005): 35.

determination as a jus cogens norm, overriding any claims based on effective occupation. South Africa's justification for remaining in Namibia, citing administrative control and development efforts, was dismissed by the ICJ as inconsistent with the norms of international law, particularly the principle of non-colonization.

The Advisory Opinion also highlighted that Namibia was never terra nullius—a principle often invoked to legitimize colonial expansion under effective occupation. Instead, the indigenous populations had established political and social systems that the international community had a duty to respect and protect. This case demonstrated that the principle of effective occupation, when employed to undermine self-determination, becomes incompatible with contemporary international law.

The Namibia case underscores the necessity for a legal framework that ensures territorial claims respect fundamental human rights. It also serves as a reminder that effective occupation, as a legal doctrine, cannot be divorced from the broader principles of international justice. By prioritizing the sovereignty and dignity of indigenous populations, this case offers a crucial critique of the historical misuse of effective occupation to justify colonial ambitions.

The Western Sahara case further challenges the application of effective occupation in territorial claims. The Court addressed whether Western Sahara was terra nullius prior to Spanish colonization. The ICJ concluded that Western Sahara was not terra nullius, as its indigenous Sahrawi population had established sufficient social and political structures. The Court found, "The materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity".

This case emphasized that the concept of terra nullius could not be applied to justify colonial claims over territories inhabited by organized indigenous communities. The Sahrawi people's right to self-determination was recognized as paramount, superseding any historical claims of sovereignty based on effective occupation. The ICJ's acknowledgment of indigenous rights highlighted the incompatibility of colonial practices with evolving norms of international law.

Moreover, the Western Sahara case illustrates the dangers of misapplying effective occupation in contexts where it undermines self-determination. The ICJ's advisory opinion reinforced the principle that territorial acquisition must align with the foundational norms of human dignity and sovereignty. By rejecting Morocco's claims rooted in historical allegiances, the Court set a precedent for prioritizing the rights of indigenous populations over geopolitical interests.

3. Sovereignty Equality and Territorial Integrity in the International Legal System

International law is based on the concept of the state, the state itself rests on the foundation of sovereignty, which internally demonstrates the supremacy of the state both internally and externally. Sovereignty is an essential element of a state.[40] According to Jean Bodin, "Sovereignty is supreme power over citizens and subjects, unrestrained by the law".[41] The term sovereignty comes from the Latin word superanus which means supreme. Therefore, sovereignty indicates the supreme power of a state. The state is said to be sovereign or "sovereign", because sovereignty is an essential characteristic of a state.[42,43] When it is said that the state is sovereign, it means that the state has the highest power. However, the supreme power has a limit, which is limited to the territory of the state.[44] In international law, sovereignty is the authority of a state to manage its internal affairs without intervention from other jurisdictions.[45] Sovereignty is therefore understood as a state's independence from other states.[46] In general, a state is considered to have independence and "sovereignty" over its people and affairs within its territorial boundaries.[47]

As Bodin, the founder of the concept, argued, sovereignty is supreme, absolute and independent.[48] Sovereignty is a general characteristic of a state that represents the supremacy and independence of a state.[49] Sovereignty as a central concept in international law has meaning in terms of control, autonomy, territory, and power.[50]

[40] Anne Orford. *Internasional Law and Its Orders*. Cambridge University Press, 2006.
[41] Wm. A. Dunning. "Jean Bodin on Sovereignty." *The Academy of Political Science* 11, no. 1 (1896): 101.
[42] Arshid Iqbal Dar and Ahmed Sayed. "The evolution of state sovereignty: A historical overview." *International Journal of Humanities and Social Science Invention* 6, no. 8 (2017): 10.
[43] M. Iman Santoso. "Kedaulatan dan Yurisdiksi Negara dalam sudut pandang Keimigrasian." *Binamulia Hukum* 7, no. 1 (2018): 11.
[44] Samantha Besson. "*Sovereignty. Max Planck Encyclopedia of public international law*." Oxford: Oxford Public, 2011.
[45] Paul Hansen. *Concept of Sovereignty Master of Studies in Legal Research Papers*. London: University Of Western Ontario, 2019.
[46] Charles Edward Merriam. *History of the Theory of Sovereignty since Rousseau*. Ontario: Batoche Books, 2001.
[47] Joseph Gabriel Starke. *Introduction to Internasional Law*. Seventh Ed. London: Butter Worths, 1972.
[48] Karen Gevorgyan. "Concept of state sovereignty: Modern attitudes." *Proceedings of Yerevan State University* 2, no. 4, (2014): 442.
[49] Ion M. Anghel. *Subiectele de Drept Internațional/The Subjects of International Law*. Bucharest: Lumina Lex, 2002.
[50] John Alan Cohan. "Sovereignty in a postsovereign world." *Florida Journal of International Law* 18, no. 5 (2006): 912.

In John Boli's view in terms of sovereignty, a state has the legitimate right to exercise authority.[51] Sovereignty as the highest political authority forms the basis of the modern international legal system and provides legitimacy to states and governments[52] Sovereignty is often used in conjunction with independence, which is an important component of statehood.[53] Over its people and territory, sovereignty possesses ultimate and autonomous power. The state's obligation to its area is correlated with its sovereignty. States are required by law to respect other states' independence and sovereignty.[54] Territorial sovereignty covers all land, inland waters, territorial seas and the airspace above them.[55]

The history and concept of sovereignty cannot be separated and is closely related to the origin and history of a country.[56] Huber said in the Palmas Island case (1928) that "sovereignty in relation to a portion of the globe is a legal condition necessary for the inclusion of such a portion in the territory of any particular state." The state's sovereignty includes issues pertaining to the state's accountability for its area. The state's territory is the area over which it exercises its jurisdiction over all land, people, and activities that take place there. The sovereignty under consideration is territorial sovereignty, which is the state's right to exercise exclusive authority over its territory and the right to enforce its domestic laws there.

At its simplest formulation, sovereignty is the notion of authority that each state is entitled to exercise over its territory.[57] According to international law, the principles of equality and sovereignty serve as the cornerstones upon which the framework for the global legal order is built. The foundation of a state's personality in the framework of international law is its inherent right to sovereignty. In addition, this sovereignty gives rise to a number of rights acknowledged by international law, such as the right to nationalize, the right to equality, territorial jurisdiction, the right to ascertain the nationality of those residing on its territory, the right to permit or forbid entry and exit, and so forth.[58]

[51] Stephen D. Krasner. *Problematic Sovereignty*. New York: Columbia University Press, 2001.
[52] Thomas Prehi Botchway. "International Law, Sovereignty and the Responsibility to Protect: An Overview." *Journal of Politics and Law* 11, no. 4 (2018): 40.
[53] Koesrianti. *Kedaulatan Negara: Menurut Hukum Internasional*. Surabaya: Airlangga University Press, 2021.
[54] Hersch Lauterpacht. "Recognition of States in International Law." *The Yale Law Journal* 53, no. 3 (1944): 385.
[55] Anthony Aust. *Handbook of international law*. Cambridge: Cambridge University Press, 2010.
[56] Francis Harry Hinsley. *Sovereignty*. Cambridge University Press, 1986.
[57] Jakub Grygiel. "The Costs of Respecting Sovereignty." In *Foreign Fighters, Sovereignty, and CounterTerrorism: Selected Essays*, edited by Michael P. Noonan. Philadelphia: Foreign Policy Research Institute, 2010.
[58] Sigit Riyanto. "Kedaulatan Negara Dalam Kerangka Hukum Internasional Kontemporer." *Yustisia* 1, no. 3 (2012): 65.

The principles of international law, such as the equality of fate and rights, the equality of sovereignty and independence for all nations, the prohibition of using force or threats against another nation, and the respect for everyone's human rights and freedoms, are governed by the United Nations Charter. The phrase "The Organization is based on the principle of the sovereign equality of all its members" appears in paragraph 1 of Article 2 of the UN Charter. According to this clause, each nation has sovereign equality. In addition, Article 2 paragraph (4) of the United Nations Charter states "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". That based on these provisions, provides norms related to the prohibition of the use of force, threats, or in other ways against the territorial integrity or political independence of other countries that are not in accordance with the UN Charter.

4. Territorial Acquisition in International Law: Principles and Case Studies

Territory as one of the elements of a state as stated in the Montevidio Convention on the rights and Duties of States 1933. Territory is closely related to sovereignty. As according to Oppenheim, territory is subject to the sovereignty of a state.[59] Sovereignty as the supreme power of a state exercised within the territorial boundaries of a state.[60] In general, under current international law, several territorial acquisitions are recognized in international law. The acquisition of territory is generally used as a means of establishing sovereignty over certain areas.[61] The acquisition of territory includes annexation, occupation, prescription, cession, accretion, and plebiscite. These methods, while recognized in historical contexts, have evolved alongside the international legal system to ensure compliance with jus cogens norms and the principle of self-determination.

Annexation, also known as conquest, is the forcible takeover of territory by one state at the expense of another.[62] Annexation is the physical takeover of conquered territories as part of the expansionist policy of the more powerful state. Generally, annexation begins with the occupation of territory through military possession and ends with formal political recognition. The annexation process is generally carried out by coercion, threats of physical force, intimidation, and other means of direct or indirect pressure. The main

[59] Lassa Oppenheim. *International Law: A Treatise*. London: Longmans, Green, 1905.
[60] Leonid Tymchenko and Valeriy Kononenko. "The legitimacy of acquisition of state territory." *Juridical Tribune Journal= Tribuna Juridica* 10, no. 1 (2020): 154.
[61] Marcelo G Kohen, Mamadou Hébié. "Territory, Acquisition." *Max Planck Encyclopedias of International Law [MPIL]*. Oxford University Press, 2021.
[62] Rainer Hofmann. *Max Planck Encyclopedias of International Law [MPIL]*. Oxford University Press, 2020.

conditions for annexation are that the territory in question has actually been conquered and there is a formal declaration of will from the conquering country to annex it.[63] The conquering state gains dominion over the conquered territory, including the indigenous societies.[64] Such actions are currently not justified because they are not in accordance with the principles of international law. The legal basis for the prohibition of the use of this method in the acquisition of a territory includes the 1928 Brian Kellog Pact, article 2 (4) of the UN Charter which states "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" and the Declaration of Principles of International Law Friendly Relations and Co-Operation Among States in Accordance With the Charter of the United Nations.

Occupation is a way of acquiring territory over territory that does not belong to anyone (terra nullius), and is acquired by a state in certain situations. Only the state is capable of carrying out occupation; individuals are not permitted to do so. It takes a successful occupation to lay claim to the land.[65] Today there is hardly any area of the world that can be considered terra nullius, as most of the world's land area is currently under the territorial sovereignty of a state. However, there are often disputes over territory due to past events when territory was acquired through occupation.[66]

Based on its uninterrupted and peaceful performance of state functions, the Permanent Court determined that the Netherlands possessed sovereignty over Palmas Island in the 1928 dispute of Palmas/Miangas Island between the United States and the Netherlands. numerous administrative measures across numerous centuries serve as evidence of this. The next case, Eastern Greenland between Norway and Denmark (1933), was decided by the Permanent Court. The Permanent Court found that Denmark had exercised state power over the territory and had done so for a long time. Denmark consistently took actions that demonstrated it had power over Greenland and this was recognized by other states, such as administrative and legislative actions.[67]

The Clipperton Island case between France and Mexico (1933) was settled by international arbitration. According to the Arbitrator, France was

[63] Sefriani. *Hukum Internasional Suatu Pengantar*. Depok: Raja Grafindo Persada, 2019.
[64] John C. Duncan Jr. "Following a sigmoid progression: some jurisprudential and pragmatic considerations regarding territorial acquisition among nation-states." *Boston College International & Comparative Law Review* 35 (2012): 12.
[65] Malcolm N. Shaw. *International law*. Cambridge: Cambridge university press, 2017.
[66] Hasjim Djalal. "Penyelesaian Sengketa Sipadan-Ligitan: Interpelasi." *Jurnal Hukum & Pembangunan* 33, no. 1 (2017): 132.
[67] Sri Setianingsih Suwardi, Ida Kurnia. *Hukum Perjanjian Internasional*. Jakarta: Sinar Grafika, 2019.

entitled to Clipperton Island based on the act of a French Naval Officer who made a proclamation of the island's sovereignty, although the act was only symbolic, it had legal consequences. In the Sipadan and Ligitan Island case (2002) between Indonesia and Malaysia, the International Court of Justice declared Malaysia entitled to Sipadan and Ligitan Islands. The United Kingdom, which bequeathed them to Malaysia, was considered to have exercised sovereignty over the islands prior to 1969, compared to the Dutch East Indies, which bequeathed them to Indonesia. The Court ruled that actions taken to establish bird sanctuaries or regulate and manage turtle egg collection should be classified as administrative and regulatory actions.

Similar to occupation, prescription is based on effective control of territory. Effective control over territory is exercised with the intention and willingness to act in a sovereign manner. The thing that distinguishes between prescription and occupation is that in prescription, the acquisition is carried out on the territory of another state, while in occupation, the acquisition is carried out on terra nullius.[68] According to Fauchille, cited by Randall Lesaffer, the terms of prescription are as follows:[69] First, the ownership must be done à titre de souverain. Second, the ownership takes place peacefully and continuously. Third, the ownership must be public, meaning that the ownership must be known by other parties. Fourth, the ownership must be permanent.

Cession is the peaceful transfer of land from one sovereign to another, usually following the conclusion of a conflict and within the parameters of a peace treaty. The transfer of territory is generally carried out based on a treaty.[70] The basis of cession lies in the intention of the parties concerned to transfer sovereignty over the territory concerned. Cession covers all aspects of territorial sovereignty, including airspace, territorial sea, sovereign rights over the continental shelf and rights and jurisdiction over the exclusive economic zone.[71]

An example is the Island of Palmas case, where Spain ceded the Philippine archipelago to the United States through the 1898 Treaty of Paris.[72] Cessions can occur in several ways after a conflict, even though they are typically made via treaty. Examples of this include the United States'

[68] Hasjim Djalal. "Penyelesaian Sengketa Sipadan-Ligitan: Interpelasi." *Jurnal Hukum & Pembangunan* 33, no. 1 (2017): 129.
[69] Randall Lesaffer. "Argument from Roman law in current international law: Occupation and acquisitive prescription." *European Journal of International Law* 16, no. 1 (2005): 29.
[70] Hasjim Djalal. "Penyelesaian Sengketa Sipadan-Ligitan: Interpelasi." *Jurnal Hukum & Pembangunan* 33, no. 1 (2017): 135.
[71] Anthony Aust. *Handbook of international law*. Cambridge University Press, 2010.
[72] Hasjim Djalal. "Penyelesaian Sengketa Sipadan-Ligitan: Interpelasi." *Jurnal Hukum & Pembangunan* 33, no. 1 (2017): 136.

acquisition of Alaska from Russia in 1867 and Denmark's 1916 transfer of territory in the West Indies to the United States.[73]

The acquisition of territory by a nation as a result of geographic shifts is known as accretion. The processes of nature are responsible for this territory acquisition.[74] Accretion is the process by which territory is legitimately formed, through a natural process that takes place over a long period of time. Accretion allows the state to legitimately claim rights to the territory created. Acquisition of territory due to natural factors can include the appearance of islands in the territorial sea, and the addition of land surface areas.[75] Accretion allows the state to legitimately claim the territory formed and no formal action is required for the acquisition of territory by accretion.[76] This can be seen in the case of the new island of Nishinoshima (Japan), which emerged around the old island of Nishinoshima through the natural phenomenon of an underwater volcanic eruption.[77] In addition, the emergence of an island in the sea area of Iwo Jima (Japan) as a result of volcanic activity in 1986.[78]

5. Jus Cogens and The Hierarchy of International Law : Peremptory Norms Defined

According to ICJ statute article 38 paragraph (1), the hierarchy of international law is as follows: (1) international conventions, both general and specific, which set forth rules that are explicitly recognized by the disputing countries; (2) international custom, which serves as proof of a customary practice recognized as law; (3) general principles of law recognized by civilized nations; and (4), subject to the provisions of Article 59, court decisions and teachings of the highest legal experts from various nations, which serve as a complementary means of determining legal rules. Only 2 (two) sources of international law, primary and secondary are distinguished in the context of the International Court of Justice (ICJ) ruling.

In Article 38 of the ICJ Statute, there does not appear to be a hierarchy, having an equal position, but in practice there is a hierarchy. When referring to the interpretation of Article 38 of the ICJ Statute, it is not the same, in the context of real use it is not like that. When referring to Article 38 of the ICJ, in international law the highest position is not an international treaty, but the

[73] Malcolm N. Shaw. *International law*. Cambridge: Cambridge university press, 2017.
[74] Robert Y. Jennings. "The Acquisition of Territory." *International Law* 7, no. 3 (1963): 54.
[75] Giovanni Distefano. "The conceptualization (construction) of territorial title in the light of the International Court of Justice case law." *Leiden Journal of International Law* 19, no. 4 (2006): 1047.
[76] Joseph Gabriel Starke. *Introduction to Internasional Law*. Seventh Ed. London: Butter Worths, 1972.
[77] Susumu Takai. "Debates Concerning the Incorporation of Peripheral Islands into the Territory of Japan." *Japan Review* 3, no. 2 (2020): 22.
[78] James Crawford and Ian Brownlie. *Brownlie's principles of public international law*. Oxford: Oxford University Press, 2019.

groundnorm or peremptory norm itself. There is a hierarchy in international law. In customary international law, when referring to Hans Kelsen's opinion, what is known as the groundnorm, in international law what is the groundnorm in this context is the peremptory norm.

This peremptory norm then becomes the yardstick for others. An international treaty, when it contradicts the peremptory norm, then when referring to the 1969 and 1986 Vienna Conventions, it becomes null and void, so it is not valid and null and void. Any international agreement when it contradicts the peremptory norm becomes null and void, so it cannot be executed, null and void. This analogy must always be built.

The concept of peremptory norms or jus cogens, which in Latin means "compelling law", as a supernorm, a norm that cannot be reduced and has a high position.[79] Norma Peremptory norms are termed as "compelling" laws,[80] and hierarchically have a higher position than other international law provisions. [81] Peremptory norms as norms of international law that have been recognized and accepted by the international community and as norms that cannot be violated.[82]

Peremptory norms have an authority that exceeds other international law, thus having a significant impact on the construction of international law[83]. Peremptory norms are formally enshrined in the provisions of international law through the Vienna Conventions on the Law of Treaties 1969 (VCLT), particularly as contained in Articles 53 and 64.[84] The Vienna Conventions on the Law of Treaties 1969 (VCLT) uses a commonly used term for jus cogen, namely peremptory norms.[85] Peremptory norms as norms of international law have binding force for all states.[86] Peremptory norms are considered part of the general principles of international law that are recognized by states as norms that cannot be violated.

[79] Sue S. Guan. "Jus Cogens: To Revise a Narrative." *Minnesota Journal of International Law* 26, no. 2 (2017): 461.
[80] M. Cherif Bassiouni. "International Crimes:" Jus Cogens" and" Obligatio Erga Omnes"." *Law and contemporary problems* 59, no. 4 (1996): 67.
[81] Kamrul Hossain. "The Concept of Jus Cogens and the Obligation Under the UN Charter." *Santa Clara Journal of International Law* 3, no. 1 (2005): 73.
[82] Hendro Valence Luhulima. "Identifikasi dan Validitas Norma-norma Jus Cogens dalam Hukum Internasional." *Justitia et Pax* 34, no. 1 (2018): 57.
[83] Ulf Linderfalk. "The legal consequences of jus cogens and the individuation of norms." *Leiden Journal of International Law* 33, no. 4 (2020): 899.
[84] Thomas Weatherall. *Jus Cogens: International Law and Social Contract*. Cambridge University Press, 2015.
[85] Karen Parker. "Jus Cogens: Compelling the Law of Human Rights." *Hastings International and Comparative Law Review* 12, no. 2 (1989): 415.
[86] Valeza Ukaj-Elshani. "Historical Overview of Jus Cogens Norms, Their Applicability by International Courts and Necessity for Unification." *Socrates* 3, no. 15 (2019): 69.

The importance of giving a norm peremptory norm standing is recognized by international law.[87] Peremptory norms are fundamental principles of international law that are acknowledged and accepted by the global community. They are unaffected by other principles and can only be altered by another fundamental principle of international law of a similar kind. The definition unequivocally demonstrates the characteristics of peremptory norms, including the requirement that they be universally applicable to all currently in place legal systems, explicitly accepted and recognized by states and the international community, and underived norms that can only be modified by other norms in international law that share the same characteristics.[88]

Because of their unique legal character, preemptive standards have a special place and conceptual significance in the international legal system. A norm in international law must satisfy multiple conditions in order to be considered a peremptory norm. These conditions include double consent, universality, and the standard's fundamental nature, which indicates that it is meant to safeguard the interests of the global community.[89]

The existence of a standard that is superior to all other norms, including international agreements and customs, is the norm enshrined in the jus cogen principle. Therefore, the acceptance or rejection of their enforcement by states is subordinate to the hierarchy of preemptive norms. The standard is required, and the only way its authority may be diminished is by other international standards with equivalent authority.[90] Although they are fundamental rules of international law that cannot be waived, neither the content nor the scope of preemptive standards are governed by Article 53 of the VCLT. Consequently, there is disagreement over whether norms qualify as peremptory norms and what standards apply in determining which norms meet this requirement.[91]

D. CONCLUSION

The application of the principle of effective occupation in international law historically and contemporary demonstrates its complex interaction with fundamental norms of international law such as self-determination and the

[87] Ulf Linderfalk. "The legal consequences of jus cogens and the individuation of norms." *Leiden Journal of International Law* 33, no. 4 (2020): 899.

[88] AAA Nanda Saraswati. "Kriteria Untuk Menentukan Hak Asasi Manusia Sebagai "Jus Cogens" Dalam Hukum Internasional." *Arena Hukum* 10, no. 2 (2017): 168.

[89] Hendro Valence Luhulima. "Identifikasi dan Validitas Norma-norma Jus Cogens dalam Hukum Internasional." *Justitia et Pax* 34, no. 1 (2018): 59.

[90] Rohmad Adi Yulianto. "Integrasi Prinsip Non-Refoulement dengan Prinsip Jus Cogens pada Kebijakan Penanganan Pengungsi di Indonesia." *Jurnal Ilmiah Kebijakan Hukum* 14, no. 3 (2020): 498.

[91] Ignacio Alvarez-RioContreras-Garduno; Diana. "A Barren Effort? The Jurisprudence of The Inter-American Court of Human Rights on Jus Cogens." *Revista Do Instituto Brasileiro de Direitos Humanos* 14, no. 14 (2013): 13.

principles of jus cogens. The cases of Namibia and Western Sahara are examples of how effective occupation has been misused to justify territorial claims at the expense of the sovereignty and rights of indigenous peoples. The Namibian Advisory Opinion shows that effective occupation cannot override the right to self-determination which is a jus cogens norm. The case of Western Sahara thus highlights the limitations of the doctrine of terra nullius which emphasizes the need to respect pre-existing social and political structures in territorial disputes. Effective occupation institutionalized at the Berlin Conference has made this principle a tool of colonial expansion that generates injustice, marginalizes indigenous peoples, and compromises fundamental ideas of international law. Thus, it is imperative to make sure that any territorial claim respects fundamental human rights and justice.

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