Territorial Change, Effects of

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A. Introduction and Historical Background

1 The general regime applicable in different situations of territorial change varies depending on the manner in which this change has come about. Sir Robert Jennings identified five traditional 'modes' whereby territorial → *sovereignty* was acquired or changed: (1) occupation (→ *Occupation, Pacific*) of territory that is *res nullius* or under the sovereignty of no one; (2) → *prescription*, whereby effective possession over a sufficient period of time is constitutive of legal title; (3) → *cession*, the transfer of territory from one sovereign to another through a legal instrument; (4) accession or → *accretion*, which considers natural processes affecting or modifying the shape of land (and is of limited practical importance); and (5) subjugation, known also as → *conquest* and discredited as a way of acquiring land (see also → *Territory, Abandonment*; → *Territory, Discovery*; → *Territory, Lease*).

2 To these five traditional modes one may add the transfer of land following adjudication or → *arbitration*. Strictly speaking, however, it is not a different mode, as most territorial changes occurring in this manner followed from the treaty instrument that allowed for the judicial or arbitral institution to dispose of the land; or the parties concerned disposed of territory pursuant to the judicial or arbitral decision by way of a subsequent treaty of cession, which established the modalities for such territorial change (→ *Arbitration and Conciliation Treaties*). Far more significant, especially in the post-World War II context of → *decolonization* and in the aftermath of the → *Cold War (1947–91)*, has been the emergence of new States as a new mode of territorial change, thus adding a sixth important mode for territorial sovereignty, State creation, be that in the context of decolonization or of State → *secession*. These modes, whereby territorial change has been effected, are important. For most of the traditional modes of territorial change, the general regime of non-succession is said to apply, whereby the new sovereign acquires full control over a new territory and, as much as possible, is free to dispose and treat his new territory as he wishes. However, in the case of State succession, a general regime of succession is said to apply, whereby any new State must maintain a certain continuity with the legal situation on the ground and with the previously-existing situation, and it is only through its own positive acts that it may gradually distinguish the situations (→ *State Succession in Treaties*; → *State Succession in Other Matters than Treaties*).

3 Traditionally, a private law analogy to domestic land law has been applied. This analogy is apposite in some respects: for example, where rights *in rem* have been created that attach to a particular territory, these will subsist even if sovereignty over that territory is changed, whether by cession, → *annexation*, or even the birth of a new State. However,

given the increased focus in international law on the right to → *self-determination* and an increased recognition of → *human rights*, one should always bear in mind that the effects of territorial change are not merely changes in the occupation of territory, but changes in the right to territorial sovereignty. This vital distinction has important incidents.

4 This entry will focus primarily on the changes wrought for a population in the context of territorial change, noting in particular the changes entailed for → *nationality*. Other aspects, such as the continued validity of legislation, administrative acts, and economic → *concessions*, will be treated as secondary aspects in the context of the changes to the population. Finally, the effects of unlawful territorial change will be summarily explored.

B. Changes for the Population

5 Traditionally, the relationship between nationality and territorial change was governed by the principle of an automatic change of nationality to reflect the change in sovereignty. When a territory of a State would be acquired by another State, the nationals of the first State, who continued to remain domiciled there, would become nationals of the successor State. Nationality was an incident of territorial change, as inhabitants were regarded as an appurtenance of territory (*Pertinenztheorie*). In the 18th and 19th centuries, option clauses began to be adopted in treaties of cession and annexation to allow inhabitants some measure of freedom and choice. These were rare, and proved the prevalence of automatic change by providing the opportunity to diverge from the norm by option, as they were written to provide an exception to what was presumed as the general practice. This was made possible on a practical scale as there was a relatively high degree of homogeneity within territorial units.

6 After World War I, an alternative conception began to emerge whereby questions of nationality remained within the domestic jurisdiction of a State, in particular with the signing of the → *Peace Treaties after World War I* and Minority Treaties. Several important innovations occurred during this period. First, certain inhabitants of territories, such as those in former German territories held by Poland (→ *German Minorities in Poland, Cases concerning the*), had to reside in a territory for a certain time to acquire the new nationality of the territory. Second, non-residents who shared a same → *ethnicity* or language were given an option to a new nationality despite not being residents (this clause was in most of the Peace Treaties). Third, plebiscites were held in certain districts (such as Schleswig and Klagenfurt), which represent a dramatic reversal of the relationship between nationality and territorial change. The changes in the attribution of nationality reflected the new principle of national self-determination for 'ethnic nations', and the idea of 'cession of territory', and suggested that the disposability of both a territory and its inhabitants had lost its purchase. Although the Peace Treaties still treated changes in nationality as automatic upon a change in territory, this was now stipulated explicitly. It was also during this period that the principle of 'domicile' began to emerge, to distinguish long-term residents—who were entitled to opt for the nationality of the new sovereign—from those inhabitants who were not entitled to such option and therefore often did not retain the right of continued residence. This is consonant with the traditional dyad of nationals and → *aliens*, two classes of persons with different rights under domestic law.

7 Following World War II, the defeat of the Axis powers meant the liberation of many subjugated people. Therefore, the principle of national self-determination came very much to the fore in the re-drawing of borders and the transfer of territories. In some cases, the inhabitants of territories formerly held by the defeated powers were often given the option to opt for the nationality of the new sovereign or retain their previous nationality.

8 During the period of decolonization, especially intense during the 1960s, the rise of self-determination within international law and the concept of human rights came further to challenge the traditional framework of changes in nationality. By giving legal effect to the desires and actual lives of those whose status is affected by territorial change, these two particular concepts have very much influenced the acquisition and change in nationality. This was justified ideologically by the reality that the majority of nationality changes came about through attainment of independence of former colonies. Although most former colonies gaining independence had full control over the grant of nationality over its inhabitants, nationality settlements for many former colonies wove a complex set of rules and principles designed to give certain flexibility, especially with regard to those persons who would otherwise remain → *stateless persons*. Another important shift, based on the essential character of self-determination, was the rejection of the determination of nationality through treaties between the former colonial master and the newly independent State and a move towards the use of domestic legislation, one which new States could tailor according to their concepts of nationhood and their histories. One can here see a basic change in the status and meaning of the principle of automatic change, and a particular emphasis on the sovereign and constitutive character of the determination of nationality. The justification for this approach was the constitutive significance of the change of nationality, which meant almost the original acquisition of nationality, given that the 'colonial' nationality was in many ways bereft of legal value.

9 In the post-decolonization period, with secession becoming the principal mode of territorial change, and especially with the dissolution of the Soviet Union (→ *Commonwealth of Independent States [CIS]*; → *Russia*), Yugoslavia (→ *Yugoslavia, Dissolution of*), and Czechoslovakia (→ *Czechoslovakia, Dissolution of*), other principles began to emerge as well. In those three situations, an individual's genuine link to the seceding State was considered, although the discretion left to the new State was relatively significant. In particular, because in those three cases a federal structure of sorts existed, the criterion retained was the legal link of the individual to the sub-entity giving rise to the new State (so-called 'secondary citizenship'). In fact, the successor State is held to be under an obligation to grant its nationality not only to the persons habitually residing within the succeeding territory, but also to the persons who had an appropriate legal connection to the constituent unit that has become part of the successor State (see eg Art. 24 Draft Articles on Nationality of Natural Persons in relation to the Succession of States). Where the predecessor State ceased to exist, as was the case with the former Yugoslavia, that tendency was broadly followed, consonant with Art. 22 (b) (i) Draft Articles on Nationality of Natural Persons in relation to the Succession of States. The guiding principle in this has generally been the undesirability that any person becomes stateless as a result of a change of sovereignty, although no positive duty on successor States to grant their nationality to individuals exists. The obligation of the successor States is limited only to the non-deprivation of nationality and does not extend to its withholding.

10 Finally, some contemporary examples of cession/re-incorporation such as → *Walvis Bay*, → *Hong Kong* and → *Macau* demonstrate that the inhabitants of those territories did not necessarily change nationality upon the consummation of the territorial change. In the case of Walvis Bay, South Africa did not immediately strip residents in Walvis Bay of their South African nationality; in the case of Hong Kong, the United Kingdom created a new status of British overseas, which did not grant certain rights; and in Macau, Portugal extended full-fledged Portuguese nationality to the inhabitants.

C. Secondary Effects

1. Ownership of Public Property and Debts

11 That the ownership of State property passes alongside changes in territorial sovereignty is well-established under international law, as State property is often necessary for the exercise of territorial sovereignty, especially in the case of the creation of a new State or the secession of a State (see eg Art. 11 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts). Especially as regards immovable property in the territory, this occurs without compensating the former sovereign, who is not justified in removing or alienating a substantial proportion of State property in the territory prior to the passing of title, as it would derogate from the transfer. However, as regards movable property, the law is less clear, and the general rule seems to reflect Art. 17 (1) (c) Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, whereby only such movable property of the predecessor that is connected with the activity of the predecessor State in respect of the seceding territory falls to a successor State.

12 Negotiated settlements between the former and new sovereign are also possible, which would favour an equitable solution, although relevant State practice is relatively rare in this regard (exceptions include the break-up of the Soviet Union, Czechoslovakia, and eventually Yugoslavia). It should also be noted that the guiding principle is generally that of an overall equitable outcome, not that each category of assets be equitably divided.

2. Continued Validity of Laws

13 A distinction should be drawn between two major categories of legislation that might be affected by a change in territorial sovereignty. Those promulgated for the effective administration of the country constitute its administrative or public law; being political in character, these concern the relations of the people to the State and the effective exercise of sovereign authority. By contrast, those with reference to the private relations of the inhabitants of a territory generally fall within the category of private law.

14 Understanding this distinction is essential for understanding the manner in which laws are affected by a change in territorial sovereignty, especially as the traditional doctrine of State succession or change stipulates that the private law will survive a change in sovereignty, but that the public law will evolve to reflect the change in territorial sovereignty. This division between public and private functions is not particularly well-developed under international law. Accordingly, political and administrative continuity must be appreciated through a factual, case-by-case appraisal, rather than through any broad generalizations.

15 Thus, identifying a general practice is problematic, as in some cases (Burma) a complete break has taken place with regard to the previous legal system, whilst in other cases (Ceylon, Slovenia), continuity with the old legal system is expressly maintained for a transitional period. An interesting case is that of Alsace-Lorraine: changing hands as it did between France and Germany between 1871 and 1945, there was often a gradual introduction of the laws of the new sovereign, with domestic courts on both sides recognizing the validity of laws from the previous *régime* for several years after the transfer of sovereignty had actually taken place.

3. Continued Validity of Administrative Acts

16 Administrative acts such as marriages and the operation of a State generally continue, especially in the case of State succession, whereby the new constitutional structure of the State generally interposes changes with the passage of time. As these laws attach to individuals and will continue to apply after the passing of territorial sovereignty, there is a presumption that such laws continue in effect so as not to negatively affect the population, as was decided by the → *International Court of Justice (ICJ)* in its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* ([1971] ICJ Rep 16; → *South West Africa/Namibia [Advisory Opinions and Judgments]*), where it held that marriages and similar administrative acts, which were meant solely for the benefit of the population, could not be annulled and were not invalidated.

17 With regard to the traditional modes of territorial change, State practice is highly inconsistent. The English common law was held to take effect in territories ceded to the United Kingdom only when promulgated, with the former law continuing until alteration by the new sovereign (Ceylon, South Africa, Quebec, etc). United States practice upon the acquisition of territory was to substitute the public law, but for the inhabitants to remain free to use their private law until alteration. When Austria was annexed to the Third *Reich* in 1938 (see also → *Munich Agreement [1938]*), its law remained in force until modification by the *Reich* Chancellor. Although under the terms of the → *Versailles Peace Treaty (1919)*, Poland had respected certain residual rights granted under German rule, albeit not without difficulty (see the → *Permanent Court of International Justice [PCIJ]* advisory opinion in *Questions relating to the Settlers of German Origin in Poland* and judgment in *Certain German Interests in Polish Upper Silesia* [→ *German Interests in Polish Upper Silesia, Cases concerning the*], and compare with the practice after World War II, when Poland acquired former German territory in East Prussia and Silesia and immediately applied Polish law). Conversely, the Syrian courts upheld Ottoman private law well after independence.

18 As regards the formation of new States or the restoration of States, State practice has been generally pragmatic, avoiding a situation whereby a new State is expected to spring fully equipped with a body of laws and regulations covering all possible issues. The independence of colonial territory was generally followed by the incorporation of a provision for the preservation of existing laws from a specific date onwards. With some exceptions, the former colonies of imperial States have followed this rule, including Indonesia, Burma, → *Israel*, the Philippines, Senegal, and the Congo (Léopoldville; → *Congo, Democratic Republic of the*). Whilst some of these States have only maintained such legislation on a transitional or temporary basis, there was a sense that some continuity in the legal order was required. Even the → *Baltic States*, being a 'restoration' of the pre-World War II republics, gradually restored their previous legislation, with Soviet-era laws continuing to apply for well over a decade. With some parts of the former Yugoslavia which had never been independent, the post-Communist legal regime also maintained the legislation of the former, Communist regime on a provisional basis, although legislation which had been so maintained subsequently underwent a period of rapid modification.

4. Continued Validity of Economic Concessions

19 Economic concessions, broadly defined as a contract between public authorities and a concessionaire (generally a private person), involve the investment of capital by the latter in an undertaking for the erection of public works or the exploitation of the public domain

in exchange for a share in the profits or the award of certain subsidies. They have been likened to contracts constituted in the first instance under public law, but have given rise to rights of a private nature.

20 As the concept of a concession is highly dependent on the choices made by the parties, the effects of a change in territorial sovereignty cannot easily be generalized. As most concessions use as their governing law the law of the conceding State, that law will characterize the concessionaire's legal interest. However, in the first place, it is necessary to enquire to what extent the practice of States establishes the duty of the new territorial sovereign to respect the interest of a concessionaire as an acquired right. An analysis of pre-World War I cessions and annexations (eg the Ionian islands to Greece, Peruvian territory to Chile, Madagascar to France, → *Cuba* and the Philippines to the United States, the annexation of the Boer republics, the annexation of → *Korea* by Japan) demonstrates that during that period, concessions generally survived the transfers of territory (the new sovereign would be 'subrogated' as regards the previous grant), although in many cases the survival of the concession was not granted on the basis of law. Following the dissolution of the Ottoman Empire after the end of World War I, a series of disputes led to the re-affirmation of the general principle of subrogation, despite claims that concessions could be validly adapted to the 'new economic conditions' of the country. Following World War II, certain deviations from the general principle of subrogation began to emerge, both due to the immediate post-war settlement and to decolonization. Italian concessions in Albania and Ethiopia were cancellable after one year; similarly, Japanese concessions in Indonesia were subject to review by the newly-independent Indonesia if they were in the public interest. In later cases of decolonization, practice became more mixed, with an increased emphasis on the public interest of the newly-independent State. Although States such as Algeria, Zambia, and Mali guaranteed the concessions given to foreign companies prior to independence, the former Belgian Congo was notable in that it sought to 're-appropriate' all mining concessions throughout the territory, which did not constitute outright → *nationalization*, but in effect adapted concessions to the new financial situation. This line of reasoning was consistent with the wave of nationalizations of oil concessions in the Middle East, although it should be noted that some nationalizations were declared by States where there had been no territorial change whatever (such as Iran) or where any such change was immaterial to the substance of the nationalization itself (see also → *Oil Concession Disputes, Arbitration on*). Finally, in the post-decolonization period, agreements to continue concessions were made in the wake of the dissolution of the former Soviet Union and Yugoslavia, and the general rule remains the maintenance of the concessions, but with some regard towards the new economic situation faced by the new sovereign.

D. Unlawful Territorial Change

21 Unlawful territorial situations have been addressed by the ICJ in respect of Namibia and by the → *European Court of Human Rights (ECtHR)* with respect to the Turkish Republic of Northern Cyprus ('TRNC'). In both those situations, the principles of self-determination and of human rights have operated, so that the above-mentioned legal effects would—to the furthest possible extent—be considered invalid. These are somewhat different to the forcible incorporation of territory, such as what happened to the Baltic republics in 1940 or the Austrian *Anschluss* of 1938, where a return to the *status quo ante* was promoted as much as possible.

22 There are different legal consequences resulting from different forms of invalidity. Several different modalities apply to a territorial change resulting from an unlawful act under international law, in so far as it lacks some fundamental elements so as to be lawful, such as the secession of a territory in contravention of the principle of self-determination. First, the legal act itself will be seen as invalid. If that condition is met, most domestic acts pursuant to that initial unlawful act will be null *ab initio*. It is quite different in the case where the initial act is invalid under international law, ie the enacting of legislation in breach of customary human rights norms (→ *Customary International Law*). In the latter case, the execution of such legislation may breach international law and give rise to → *State responsibility*, yet its validity will not be put into question as its legal effects are produced by the domestic system where it has been enacted (this is under a dualist perspective of international law; a monist perspective would make it null absolutely). Within international law, the internal acts of the administering powers are received as mere facts, and international law will not control the production of their legal effects, which are the province of domestic law. That said, it should also be noted that in the → *Land and Maritime Boundary between Cameroon and Nigeria Case (Cameroon v Nigeria)*, Nigeria's occupation of the disputed Bakassi and → *Lake Chad* areas was declared unlawful by the ICJ, although it refused to determine whether the injury was the result of any unlawful conduct entailing Nigeria's international responsibility. Therefore, Nigeria's withdrawal from the disputed territory was considered a sufficient and effective remedy, and there was a particular emphasis on maintaining the least disruption possible for the inhabitants.

SELECT BIBLIOGRAPHY

LP Bloomfield *Evolution or Revolution?: The United Nations and the Problem of Peaceful Change* (Harvard University Press Cambridge 1957).

J de Burlet *Nationalité des personnes physiques et décolonisation: essai de contribution à la théorie de la succession d'Etats* (Bruylant Bruxelles 1975).

H Cattan *The Evolution of Oil Concessions in the Middle East and North Africa* (Oceana Publications Dobbs Ferry 1967).

J Crawford *The Creation of States in International Law* (2nd edn Clarendon Press Oxford 2006).

P Develle *La concession en droit international* (Enault Paris 1936).

PM Eisemann and M Koskenniemi (eds) *State Succession: Codification Tested Against the Facts* (Nijhoff The Hague 2000).

U Fastenrath T Schweisfurth and CT Ebenroth *Das Recht der Staatensukzession: Referate und Thesen mit Diskussion* (Müller Heidelberg 1996).

RY Jennings *The Acquisition of Territory in International Law* (Manchester University Press Manchester 1963).

AM Kacowicz *Peaceful Territorial Change* (University of South Carolina Press Columbia 1994).

K Marek *Identity and Continuity of States in Public International Law* (Droz Geneva 1968).

E Milano *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (Nijhoff Leiden 2006).

MA Mughraby *Permanent Sovereignty over Oil Resources: A Study of Middle East Oil Concessions and Legal Change* (Middle East Research and Publishing Center Beirut 1966).

DP O'Connell *State Succession in Municipal Law and International Law* (CUP Cambridge 1967) vols 1–2.

Y Onuma 'Nationality and Territorial Change: In Search of the State of the Law' (1981) 8 YaleJWorldPubOrd 1–35.

S Toriguian *Legal Aspects of Oil Concessions in the Middle East* (Hamaskaine Press Beirut 1972).

P Weiss *Nationality and Statelessness in International Law* (2nd edn Sijthoff Noordhoff Alphen aan den Rijn 1979).

A Zimmermann 'Secession and the Law of State Succession' in M Kohen (ed) *Secession: International Law Perspectives* (CUP New York 2006) 208–30.

A Zimmermann 'State Succession and the Nationality of Natural Persons: Facts and Possible Codification' in PM Eisemann and M Koskenniemi (eds) *State Succession: Codification Tested Against the Facts* (Nijhoff The Hague 2000) 611–61.

SELECT DOCUMENTS

Access to German Minority Schools in Upper Silesia (Advisory Opinion) PCIJ Series A/B No 40.
Affaire de l'île de Clipperton (Mexiko v France) (1931) 2 RIAA 1105.
Arbitral Award of the Lord Ausquith of Bishopstone made on 28 August 1951 (Petroleum Development [Trucial Coast] Ltd v Sheikh of Abu Dhabi) (1952) 1 ICLQ 247–61.
Certain German Interests in Polish Upper Silesia (Germany v Poland) (Merits) PCIJ Series A No 7.
COE 'European Convention on Nationality' (done 6 November 1997, entered into force 1 March 2000) CETS No 166.
Conference on Yugoslavia Arbitration Commission (Opinion No 9) (1992) 31 ILM 1523.
Convention on the Reduction of Statelessness (concluded 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.
Factory at Chorzów (Germany v Poland) (Claim for Indemnity) (Merits) PCIJ Series A No 17.
General Treaty for Renunciation of War as an Instrument of National Policy (signed 27 August 1928, entered into force 25 July 1929) 94 LNTS 57 (Kellogg-Briand Pact).
Iloilo Claims (Case No 254) (19 November 1925) (1925–26) 3 AnnDig 336.
Island of Palmas (Netherlands v United States of America) (1928) 2 RIAA 829.
Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening) [2002] ICJ Rep 303.
Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16.
Lighthouses Arbitration (France v Greece) (1956) 12 RIAA 155.
Lighthouses Case between France and Greece (Judgment) PCIJ Series A/B No 62.
Loizidou v Turkey (Merits) (ECtHR) Reports 1996-VI 2216.
Mavrommatis Palestine Concessions (Greece v Great Britain) (Jurisdiction) PCIJ Series A No 2.
Mavrommatis Palestine Concessions (Greece v Great Britain) (Merits) PCIJ Series A No 5.
Minquiers and Ecrehos (France/United Kingdom) [1953] ICJ Rep 47.
Nationality Decrees Issued in Tunis and Morocco (French Zone) (Advisory Opinion) PCIJ Series B No 4.
Questions relating to the Settlers of German Origin in Poland (Advisory Opinion) PCIJ Series B No 6.
Reparation Claims Commission v German Government (Case No 199) (3 September 1924) (1923–24) 2 AnnDig 341.
Right of Passage over Indian Territory (Portugal v India) (Merits) [1960] ICJ Rep 6.
Sopron-Köszeg Local Railway Company Arbitration (Case No 34) (18 June 1929) (1929–30) 5 AnnDig 57.
Sovereignty over Certain Frontier Land (Belgium v The Netherlands) (Judgment) [1959] ICJ Rep 209.
Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) [2002] ICJ Rep 625.
Temple of Preah Vihear (Cambodia v Thailand) (Merits) [1962] ICJ Rep 6.
Territorial and Maritime Dispute (Nicaragua v Colombia) (Judgment) (13 December 2007) ICJ Doc 2007 General List No 124.
Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras) (8 October 2007) ICJ Doc 2007 General List No 120.
UN ILC 'Draft Articles on Nationality of Natural Persons in relation to the Succession of States' (1999) GAOR 54th Session Supp 10, 15.
Union of India v Jain and others (2 August 1954) (1954) 21 AnnDig 256.
Vienna Convention on Succession of States in respect of State Property, Archives and Debts (signed 8 April 1983, not yet entered into force) (1983) 22 ILM 306.
Western Sahara (Advisory Opinion) [1975] ICJ Rep 12.