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INTERNATIONAL LAW, INTERTEMPORAL PROBLEMS

1. *Types of Intertemporal Problems*

Parties to an international dispute occasionally disagree about the legal significance of acts, situations, or treaties that took place in the distant past. The question thereupon arises whether to apply the international law that was contemporaneous with the acts in question, or whether to apply present international law. Of course, if the relevant legal rules are the same, the question is purely academic. However, often the legal rules have changed or evolved over the course of years. In the latter instances, the outcome of the dispute might well turn upon whether the old law or the current law is applied.

Most of the controversies about whether to apply old (and different) rules or present norms of international law arise with respect to treaty interpretation or questions of title to territory (→ Interpretation in International Law; → Territorial Sovereignty). For these, other than most matters of international law, can relate to matters in the distant past where different norms prevailed. There is no easy answer as to which law applies. Since the matter of treaty interpretation is perhaps less complex than the question of title to territory, it is usefully considered first.

2. *The Doctrine of* contemporanea expositio

The principle of contemporaneity in the interpretation of treaties and other international agreements has two aspects. The first is that language in a treaty must be interpreted in the light of definitions of words that were prevalent at the time the treaty was made. For example, the use of the word "dispute" in a treaty of several centuries ago might have meant to include both civil and criminal disputes, whereas a more modern usage arguably might confine the term to civil disputes on the theory that a crime is an offence against the State and hence is not a "dispute". In the → United States Nationals in Morocco Case, the → International Court of Justice found that both civil and criminal disputes were covered by the term "dispute" in an old treaty (ICJ Reports (1952) p. 176, at p. 189).

However, like most principles of treaty interpretation, the principle of contemporaneity has exceptions which may contradict it and render it an inaccurate guide on any given occasion. One or more parties to a treaty may intend that a given word will take on new content with the evolution over time of international responsibility or with change due to technological advancement. Clearly a → most-favoured-nation clause in a trade agreement will change its content over time, as will the provision of "national" standards of treatment to the nationals of the other parties.

Even apart from the intention of the parties at the time of drafting a treaty, it is well established that the subsequent action of the parties is of important probative value in determining the meaning of treaty provisions. In some instances, the subsequent action of the parties may be quite contrary to the plain meaning of a term in the treaty. In such cases, it is difficult to determine whether the subsequent action is an "interpretation" of the document. Yet because of the importance of such subsequent behaviour in articulating the shared expectations of the parties over time and in promoting international stability, the meaning later ascribed to the terms of the treaty may well be accorded priority by an international tribunal over the meaning that would have been accorded by the principle of contemporaneity.

The second aspect of the principle of contemporaneity is that a treaty should be interpreted in the light of the rules of international law in force at the time the treaty was made. This is not necessarily a matter of interpreting the intent of the parties, because the parties may have been ignorant of the relevant rules of international law. It raises, instead, the general question of intertemporal law. For example, should an old → slavery treaty be upheld because at the time of its conclusion international traffic in slaves was legal? Perhaps this is too easy an example, for the treaty is clearly invalid as a matter of → *jus cogens*. Yet the example poses the general question of a change in the law that renders presently illegal an old treaty that was legal when it was made. Without addressing the theoretical complications, the ICJ in the → Right of Passage over Indian Territory Case accepted the Treaty of Poona of 1779 as valid, even though on the basis of practices and procedures that have developed since that

time the same treaty might be adjudged to have been invalidly made (ICJ Reports (1960) p. 4, at p. 37; → Treaties, Validity).

3. *The So-Called "Intertemporal Law"*

It is a well-settled principle of international law that the rules of law contemporaneous with the acts in the distant past, and not present rules of law, control their legal significance. Otherwise, havoc would be wreaked regarding titles to territory. The → Kellogg-Briand Pact of 1928, for example, solemnly renounced → war as an instrument of national policy (→ Use of Force; → Aggression). If a fair interpretation of this renunciation is that all titles to territory based on → conquest or on cession in the aftermath of a war are invalid, then titles to many territories throughout the world would have been invalidated at a stroke as of 1928. Clearly, when changes occur in rules of international law, the changes are normally expected to apply prospectively and not retroactively. The principle of non-retroactivity of treaties has been incorporated into Art. 28 of the → Vienna Convention on the Law of Treaties, which provides that, unless otherwise specified, treaties "do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party".

Normally, the principle of non-retroactivity of legal rules in international law is called the doctrine of intertemporal law. However, a confusion has arisen because of the use of that term in the influential → Palmas Island Arbitration of 1928. The distinguished Swiss arbitrator Max Huber, referring to "the so-called intertemporal law", proceeded to give that term an extension which, upon analysis, changes its meaning. Although the arbitrator's decision was supported by several independent findings of fact and rulings of law, one issue was the contention that the mere alleged discovery by Spain of Palmas Island in the 16th century, without subsequent occupation, was sufficient to confer title upon Spain (→ Territory, Discovery; → Territory, Acquisition; → Occupation, Pacific). While it is not clear that mere discovery without subsequent occupation satisfied international law as it was in the 16th century with respect to acquisition of territory, the arbitrator, on the assumption that that would have been the applicable rule, drew a distinction between the creation of rights and the existence of rights. Under this reasoning, the Spanish title may have been created in the 16th century, but the continued existence of its title depended upon adherence to the conditions required by the subsequent evolution of international law. By the 19th century, at least, international law required that a claim to territorial sovereignty must be effective (→ Effectiveness). Since the question in the case was whether Spain still had title in 1898, Huber held that, on the "so-called intertemporal law" issue, Spain's title was not in existence at that time.

The arbitrator's reasoning seems to contradict the concept of title. If Spain owned the island in the 16th century, then unless its ownership was displaced by another State, it should continue to be the owner. A mere change in the international rule regarding sovereignty over territories, without a factual change, should not suffice to change title for the reasons previously given. In the → Minquiers and Ecrehos Case, the ICJ in 1953 applied a more sensible approach to a question of intertemporal law. It found that an allegation of title based on feudal rules in 1202 was irrelevant due to supervening events in 1204 and following years that were sufficient either to reaffirm the original alleged title or to dislodge it in favour of a different sovereign (ICJ Reports (1953) p. 47, at p. 56).

Huber's "extension" of the doctrine of intertemporal law, therefore, has not been generally accepted. If it were not for the prominence of the Palmas Island Case, there would probably be no confusion regarding the general principle that, with respect to title and treaty questions arising in the distant past, the rules of international law that are applicable are those contemporaneous with the acts in question.

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