

## INTERNATIONAL INTERTEMPORAL LAW

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## INTRODUCTION

Friedrich Savigny, in *A Treatise on the Conflict of Laws*, indicated that the application or operation of international law is limited in two dimensions: place and time.<sup>1</sup> Arbitrator Max Huber, in the award of *Island of Palmas*, introduced the concept of intertemporal law for the first time in international dispute settlement. Huber found, “[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.”<sup>2</sup>

Admittedly, the system of international law is all about the subjects, events, and disputes occurring within a certain period of time.<sup>3</sup> With the growth and universalization of international law,<sup>4</sup> intertemporal law

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1. FRIEDRICH CARL VON SAVIGNY, *A TREATISE ON THE CONFLICT OF LAWS: AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME* 307–74 (1869).

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

3. JAMES CRAWFORD, *INTERNATIONAL LAW AS AN OPEN SYSTEM: SELECTED ESSAYS* 69 (2012).

4. TASLIM O. ELIAS, *THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS: ESSAYS ON INTERNATIONAL LAW* 119 (1983) (“One of the most important results of this universalisation of international law has been the doctrine of intertemporal law.”).

has gradually developed over the years through case law.<sup>5</sup> However, the concept has developed fragmentally into several topics, such as territorial disputes<sup>6</sup> and treaty interpretation.<sup>7</sup> Additionally, intertemporal law has been studied and viewed as a rule of customary international law,<sup>8</sup> theory,<sup>9</sup> and doctrine.<sup>10</sup>

This Article aims to fix the fragments and build a uniform and consistent system of international intertemporal law. For this purpose, intertemporal law is defined as the temporal application of law or the conflict of law in respect of time.<sup>11</sup> The Article is divided into three parts. Part I is a brief literature review of the previous studies on intertemporal law and explains the motivation for building a uniform and consistent system of international intertemporal law. Part II will carefully analyze intertemporal law as a secondary law rule, its concept, its relationship with critical date, its structure, and the formation of the intertemporal law system. Part II will also explore the four categories of application of intertemporal law respectively: direct active conflict

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5. *See, e.g.*, Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. Rep. 213 (July 13); Rights of Nationals of United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. Rep. 193 (Aug. 27); Island of Palmas, II R.I.A.A. at 845; Grisbadarna (Nor. v. Swed.) XI R.I.A.A. 155 (Perm. Ct. Arb. 1909).

6. *See, e.g.*, Minquiers and Ecrehos (U.K. v. Fr.), Judgment, 1953 I.C.J. Rep. 47 (Nov. 17); Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep. 116 (Dec. 18); Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (Seri. A/B) No. 53 (Apr. 5).

7. *See, e.g.*, Dispute Regarding Navigational and Related Rights, 2009 I.C.J. Rep. 213; Aegean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. Rep. 3 (Dec. 19); Right of Passage over India Territory (Port. v. India), Judgment, 1960 I.C.J. Rep. 6 (Apr. 12); Rights of Nationals of United States of America in Morocco, 1952 I.C.J. Rep. 193; Grisbadarna, XI R.I.A.A. 155.

8. *See, e.g.*, Taslim O. Elias, *The Doctrine of Intertemporal Law*, 74 AM. J. INT'L L. 285 (1980); Louis F. E. Goldie, *The Critical Date*, 12 INT'L & COMP. L. Q. 1251 (1963).

9. WOLFGANG FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 130–31 (1964).

10. *See, e.g.*, YEHUDA BLUM, *HISTORIC TITLES IN INTERNATIONAL LAW* 194 (1965); ROBERT Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 320 (1963); HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 283–85 (1933); GEORG SCHWARZENBERGER, *INTERNATIONAL LAW*, Vol. I, 21–24 (1957-1976).

11. This definition will be justified in Part II. Also, it will be explained whether the two concepts are actually the same.

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of law, to which territorial disputes set an example; indirect active conflict of law—treaty interpretation; procedural negative conflict of law—*ratione temporis*; and substantive negative conflict of law—non-retroaction. During the discussion, relevant cases will be analyzed and the jurisprudence behind the rule be explored. Thus, the law’s *antinomy* of stability and evolution will be explored. Finally, Part III will summarize the rules established throughout the Article regarding intertemporal law.

## I. LITERATURE REVIEW OF INTERTEMPORAL LAW

Before diving into the pool of international intertemporal law, a brief review of intertemporal law at a domestic level is necessary. Being deemed as the non-retroactive nature of law (law does not operate retroactively *ex proprio vigore*), intertemporal law stands the test of time. From Timokrates and the Athenian Ambassadors case in Ancient Greece, Eastern Roman Emperor Theodosius II’s statements, and the Justinian Code, to its broad acceptance in Canon Law and its later incorporation in common law through the medium of Bracton and Coke.<sup>12</sup> We could reasonably presume that today, as Blum concluded, “it is a rule generally recognized by civilized nations that in principle no retroactive application should be given to any legal norm.”<sup>13</sup> Nevertheless, there are two main debates on intertemporal law at a domestic level. First, the classic common law framework, where judges do not *create* law but merely *declare* and *apply* existing law, seems to contradict the reason behind non-retroaction, which is the evolution of law.<sup>14</sup> Second, whether the simple concept of “non-retroaction” is capable of clarifying complex situations concerning intertemporal law.<sup>15</sup> However, even with these debates, intertemporal law at a domestic level has become an essential part of the legal construction.

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12. See Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 776 (1936).

13. BLUM, *supra* note 10, at 194.

14. *Id.* at 196.

15. See, e.g., Hans W. Baade, *Time and Meaning: Notes on the Intertemporal Law of Statutory Construction and Constitutional Interpretation*, 43 AM. J. COMP. L. 319 (1995); Jackie M. McCreary, *Retroactivity of Laws: An Illustration of Intertemporal Conflicts Law Issues through the Revised Civil Code Articles on Disinherison*, 62 LA. L. REV. 1321 (2002); Smead, *supra* note 12.

With respect to international law, the face of intertemporal law seems to be covered with chaos. This chaos may be due to the essential controversy over whether international law is positive or natural,<sup>16</sup> or because of the incomplete and immature situation of the international legal system. It is difficult to determine whether there is sufficient research on the topic of international intertemporal law when nearly all the leading authorities and most relevant topics—territorial acquisition and treaty interpretation—have *mentioned* the issue. The word “mentioned” is highlighted because international intertemporal law tends to be a separate and isolated issue in territorial dispute or treaty interpretation conversations. A uniform and consistent system that explores this essential legal concept independently has yet to be created. Below are the four main approaches to the study of international intertemporal law.

First, from the perspective of the choice of law in respect of time, the topic was early noted by Savigny. Savigny discussed in detail two basic rules: “[n]o retroactive effect is to be attributed to new laws,” and “[n]ew laws leave acquired rights unaffected.”<sup>17</sup> Since the birth of those rules, the concept has always appeared in textbooks and papers on private international law. However, it is brushed lightly upon as the “supporting actor,” simply for the integrity of the concept of conflict of laws. Thus far, no innovative discoveries have been made in this field.

The second approach is by territory law, which likely plays the leading role in the family of international intertemporal law. The milestone decision of *Island of Palmas* brought a blooming period of discussion on temporal factors in territorial disputes. Huber is well-known for two proposals that address these factors. First, “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

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16. On this topic, positivist like Hans Kelsen maintain that “no positive norm restricting the temporal validity of general international law exists.” HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 95 (1952); *see also* PAUL GUGGENHEIM, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC*, Vol. I, 111–12 (1953). However, the author disagrees with this point and will argue against it in the following part of non-retroaction.

17. *See* SAVIGNY, *supra* note 1, at 307–74. It is also interesting to note that Savigny himself discerned the acquisition of rights and existence of rights, though quite different from what Max Huber discussed later in *Island of Palmas*.

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arises or falls to be settled.”<sup>18</sup> Second, “it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical.”<sup>19</sup> While the first proposal won Huber tremendous applause, the latter led to an essential debate in international territorial law. Judge Philip Jessup and Willem Versfelt both incisively criticized the separation of acquisition and maintenance of territorial rights, mainly because of the possible uncertainty and insecurity it would bring to states’ sovereign rights. Their criticism casted doubts on the concept of intertemporal law.<sup>20</sup> Nevertheless, later decisions by international courts and tribunals seemed to adhere to both of Huber’s proposals.<sup>21</sup>

Shortly after the 1950s, Gerald Fitzmaurice and Shabtai Rosenne explored the temporal elements in territorial disputes generally.<sup>22</sup> One of Huber’s most famous proponents is Louis Goldie, who in 1963 further clarified the concept as well as the application of critical date, and provided plausible explanations regarding the two highly controversial rules in *Island of Palmas*.<sup>23</sup> In the same year, leading author Robert Jennings argued on the evolution of territorial law and offered a justification for treating the acquisition and maintenance of title separately in territorial law.<sup>24</sup> After the justification was provided, later works seemed to merely elaborate on Jennings’ view.<sup>25</sup>

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18. *Island of Palmas*, II R.I.A.A. at 845.

19. *Id.* at 839.

20. See Philip Jessup, *The Palmas Island Arbitration*, 22 AM. J. INT’L L. 735 (1928); see also WILLEM JOHAN BERNARD VERSFELT, *THE MIANGAS ARBITRATION* (1933).

21. See, e.g., *Minquiers and Ecrehos*, 1953 I.C.J. Rep. 47; *Fisheries*, 1951 I.C.J. Rep. 116; *Legal Status of Eastern Greenland*, 1933 P.C.I.J. (Seri. A/B) No. 53.

22. See SHABTAI ROSENNE, *THE TIME FACTOR IN THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE* (1960); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-54: Point of Substantive Law, Part II*, 32 BRIT. Y.B. INT’L L. 20 (1955).

23. See Goldie, *supra* note 8, at 1251–84.

24. See JENNINGS, *supra* note 10.

25. See, e.g., BLUM, *supra* note 10; Elias, *supra* note 8; GEORG SCHWARZENBERGER & E.D. BROWN, *A MANUAL OF INTERNATIONAL LAW* (6th ed. 1976); Malcolm N. Shaw, *Title, Control and Closure? The Experience of the Eritrea-Ethiopia Boundary Commission*, 56 INT’L COMP. L. Q. 755 (2007).

Nevertheless, compared to the proximate agreement on the separation of acquisition and maintenance of title, the concept, application, and position of “critical date” and its relationship with intertemporal law, have rarely been deeply discussed.<sup>26</sup> Interestingly, scholars usually leave the concept of intertemporal law and “critical date” highly intertwined and simultaneously call for further study of both.<sup>27</sup>

The third approach is treaty interpretation, which has created two opposing debates. The first major debate was regarding the *prima facie* inconsistency of the methodology of interpretation before and after the 1960s. The second debate was whether treaty interpretation should be considered with the temporal application of law.<sup>28</sup> Regarding the first debate about the inconsistency of the interpreting methodology, in cases before the 1960s, international courts and tribunals seemed to interpret treaties based on the initial intentions of parties at the time of conclusion of the treaties.<sup>29</sup> Alternatively, in cases after the 1960s, international courts and tribunals tended to apply an evolutionary interpretation method.<sup>30</sup> For the second debate, the intertemporal concern became a major issue in drafting the Vienna Convention on the Law of Treaties (“VCLT”), including Article 31’s interpretation rule. Instead of interpreting a treaty’s terms with the relevant international law that existed at the time of the treaty’s conclusion, the VCLT’s Commission decided to officially adopt the evolutionary interpretation approach.<sup>31</sup> Those great scholars, including Shabtai Rosenne, Taslim O. Elias, Rosalyn Higgins, and Don Greig, either reviewed the VCLT’s

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26. Elias concluded it as “not necessary.” ELIAS, *supra* note 4, at 129.

27. *See, e.g.*, IAN BROWNLIE, PUBLIC INTERNATIONAL LAW (2003); LASSA OPPENHEIM, INTERNATIONAL LAW (1955); MALCOLM N. SHAW, INTERNATIONAL LAW (2014).

28. The argument first arose by the Commission in Rights of Nationals Case, *supra* note 5, and was later further argued throughout the drafting process of Vienna Convention on the Law of Treaties.

29. *See, e.g.*, Rights of Nationals of United States of America in Morocco, 1952 I.C.J. Rep. at 193; Grisbadarna, XI R.I.A.A. at 155.

30. *See, e.g.*, Dispute Regarding Navigational and Related Rights, 2009 I.C.J. Rep. at 213; Aegean Sea Continental Shelf, 1978 I.C.J. Rep. at 3; Right of Passage over India Territory, 1960 I.C.J. Rep. at 6.

31. *See* Vienna Convention on the Law of Treaties [VCLT] art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 (“There shall be taken into account, together with the context: [ . . . ] c. Any relevant rules of international law applicable in the relations between the parties.”).

legislative history or further elaborated the treaty interpretation after the VCLT's drafting.<sup>32</sup> In 2014, Eirik Bjorge provided a plausible justification for both the evolutionary interpretation (as part of the traditional intentional interpretation instead of a challenge to that rule) and the consistency of evolutionary interpretation with international intertemporal law.<sup>33</sup> Nevertheless, there has yet to be any consensus on the relationship and interaction between international intertemporal law and evolutionary treaty interpretation.

Fourth, from the perspective of jurisprudence, while non-retroaction is deemed an essential element of law, there seems to be a possibility of breaking through its border under certain circumstances. Great masters of political philosophy, like Thomas Hobbes, Lon Fuller, and John Rawls, emphasized the non-retroactive nature of law (*nova constitutio futuris formam imponere debet non praeteritis*) and its vital position in legal constructions.<sup>34</sup> Contrarily, positivists like Hans Kelsen challenged the non-retroaction of law.<sup>35</sup>

It was a tragic disaster for all humankind when the Nazis utilized the retroaction of law to exert its violence upon innocent civilians during World War II ("WWII"). However, during the Nuremberg Trials, Nazis were tried by laws created after the war; which was highly controversial in regards to the new laws' possible retroactive effect. In response to that concern, Lon Fuller and John Rawls acknowledged a law could be deemed retroactive, under certain limited circumstance, if it were the only remedy available to redress such tremendous harm.<sup>36</sup> Dating back to the nineteenth century, Savigny predictably argued that the doctrine of non-retroaction is not one of universality. First, based on "*tempus regit actum*," the stability and authoritativeness of the law can secure people's reasonable expectation. Second, from the

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32. See generally ELIAS, *supra* note 4; DON W. GREIG, INTERTEMPORALITY AND THE LAW OF TREATIES (2001); Rosalyn Higgins, *Time and the Law: International Perspectives on an Old Problem*, 46 INT'L & COMP. L.Q. 501 (1997); Shabtai Rosenne, *The Temporal Application of the Vienna Convention on the Law of Treaties*, 4 CORNELL INT'L L.J. 1 (1970).

33. EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES 7–8 (2014).

34. See generally LON FULLER, THE MORALITY OF LAW (1964); THOMAS HOBBS, LEVIATHAN (2010); JOHN RAWLS, A THEORY OF JUSTICE (1999).

35. See KELSEN, *supra* note 16.

36. See RAWLS, *supra* note 34.



perspective of equity, the justification of law is the consensus for a whole nation and is part of the evolution of laws. Thus, the latter should not be deemed as a deprivation of people's vested right, like abolitionism.<sup>37</sup> After Nuremberg, it has been broadly acknowledged that "an essential character of laws was held to be [applicable] only in the future."<sup>38</sup> Further, the VCLT stringently restricted the retroaction of *jus cogens* in Articles 53 and 62,<sup>39</sup> and regional tribunals for human rights generally adhere to these non-retroactive principles.<sup>40</sup>

Given all these fragments, admittedly the meaning and necessity to explore the system of international intertemporal law may be challenged. Why should we care about the internal consistency of international intertemporal law? Why should we try to unify the inconsistent system considering the obvious differences in the underlying areas? Why should we not leave the issues isolated and settle the dispute case by case?

It is a physicist's fixed belief that the world must have originated from a simple, uniform, and beautiful formula. The internal consistency of substances' nature and the underlying unity of the physical world are deemed as equally essential as, if not more significant than, the accuracy of the final truths. That is why after quantum mechanics took off the crown of the classic mechanics, it has continuously attempted to reconstruct a uniform system for the four fundamental interactions—gravitational interaction, electromagnetic interaction, strong nuclear, and weak nuclear. For instance, Albert Einstein spent his last thirty years exploring unified field theory.

Similarly, although usually based on plausible preconditions instead of scientific truths, the social science system is also expected to be self-consistent. In the legal system, legitimacy, efficacy, and authority lie not only in the external legality, but also in its internal uniformity and consistency. In that sense, international law never fails to receive criticism, doubt, and challenges on the law's legitimacy,

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37. See SAVIGNY, *supra* note 1.

38. Smead, *supra* note 12, at 777.

39. VCLT, *supra* note 31, arts. 53, 62.

40. See generally Jeffrey B. Hall, *Just a Matter of Time? Expanding the Temporal Jurisdiction of the Inter-American Court to Address Cold War Wrongs*, 14 L. & BUS. REV. AM. 679, 681 (2008).

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authority, and functionality.<sup>41</sup> Nevertheless, if we still deem or intend to build onto international law as real law, we cannot leave the fragments isolated under a “case by case” situation without initially attempting to construct a consistent international legal system. Even on a practical level, the very authority of international courts and tribunals lies in the decisions as well as in the internal uniformity of the rationale behind the decisions. This further explains why as early as the nineteenth century, Savigny explored the theory of the conflict of law in respect of location. Although it was not a practical comparison at the time, Savigny predicted the possible significance and application of conflict of law in respect of time on the international level simultaneously. In Savigny’s eyes, there must be a logical, symmetrical, uniform, and elegant system of the conflict of law.

Consequently, the author’s passion for this topic originates from the simple belief that, coexistent with the diversity of disputes in different areas, there must be a uniform and consistent system behind them, as long as the same concept “intertemporal law” is engaged. Further, in response to Herbert Hart’s argument that international law is a primitive legal system since it is made up only of primary rules and lacks secondary rules,<sup>42</sup> international intertemporal law also contributes to optimize the international legal system—a mature legal system including both primary law rules as well as secondary law rules.

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41. One classical challenge is, is international law real law?:

It is indeed arguable, as we shall show, that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying “sources” of law and providing general criteria for the identification of its rules. These differences are indeed striking and the question “Is international law really law?” can hardly be put aside.

HERBERT HART, *THE CONCEPT OF LAW* 214 (1994).

42. *Id.*

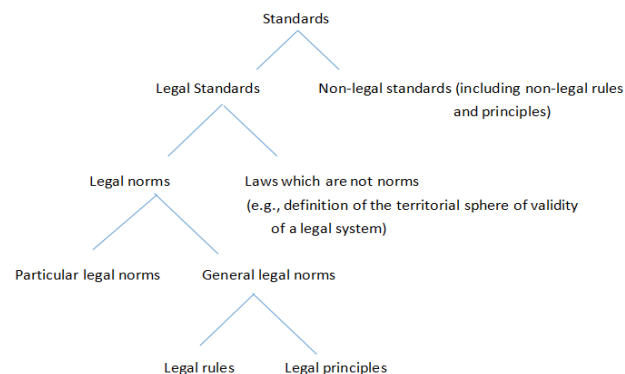
## II. INTERTEMPORAL LAW AS A SECONDARY LAW RULE IN THE INTERNATIONAL LEGAL SYSTEM

### A. *The Concept and Structure of Intertemporal Law*

#### 1. *Concept*

Before introducing the concept of intertemporal law, the author feels obliged to clarify the terminology used in this Article, namely “intertemporal law,” to avoid unnecessary confusion in the later discussion. In the kingdom of jurisprudence, various structures of law have been built by great jurists, including Herbert Hart,<sup>43</sup> Ronald Dworkin,<sup>44</sup> and Joseph Raz<sup>45</sup>. However, similar to other fundamental questions of law, no consensus has ever been reached on this issue. Below is a diagram built by Raz that, while not the only correct answer, provides a persuasive understanding of the structure of law. The point to be drawn from the existence of a certain structure of law, disregarding how controversial it may be, is that there are indeed differences among: the descriptive definition of a legal situation, the regulative rule governing a legal situation; the recognitory rule determining what regulative rule to apply; and the general principle behind the regulative rule or recognitory rule.

Table 1 – Raz’s Diagram of the Structure of Law<sup>46</sup>



43. *See id.*

44. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 45 (1967).

45. *See generally* Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L. J. 823 (1972).

46. *Id.* at 824 n.4.

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It is common that different terminologies would be utilized to refer to the definition of a legal situation, as opposed to the rule governing it or the principle behind it. However, for intertemporal law, there may be mixed terminology that consists of the descriptive definition of the legal situation, the rule governing the legal situation, and the principle behind that. To avoid confusion, “intertemporal law” will be utilized to refer to the whole abstract idea, “the definition of international law,” “the rule of international law,” and “the principle of intertemporal law” for the subsidiary concepts respectively. To clarify, there is no distinct border between the rule and the principle of intertemporal law, as they are usually used interchangeably. The terminology the “nature of intertemporal law” or the “jurisprudence of intertemporal law” may also be used to reveal the rationale behind the legal norm, namely the *antinomy* of stability and evolution.<sup>47</sup>

Now we come to the definition of international intertemporal law. From the perspective of one single international law, intertemporal law might be deemed as the temporal application of law. As Savigny indicated, the operation of law is limited in space and time.<sup>48</sup> From the perspective of the international legal system, intertemporal law could be deemed as the conflict of laws in respect of time. If one looks from a certain point of time in the history of international disputes, intertemporal law might be described as the choice of law at a certain point or period of time. Although the results seem to differ from various angles, it is indeed one legal concept. For the purpose of this study, intertemporal law will be defined as the temporal application of law or the conflict of law in respect to time. As will be explained further below, the “temporal application of law” is more suitable for the negative conflict, while the “conflict of law in respect of time” matches the positive conflict better.

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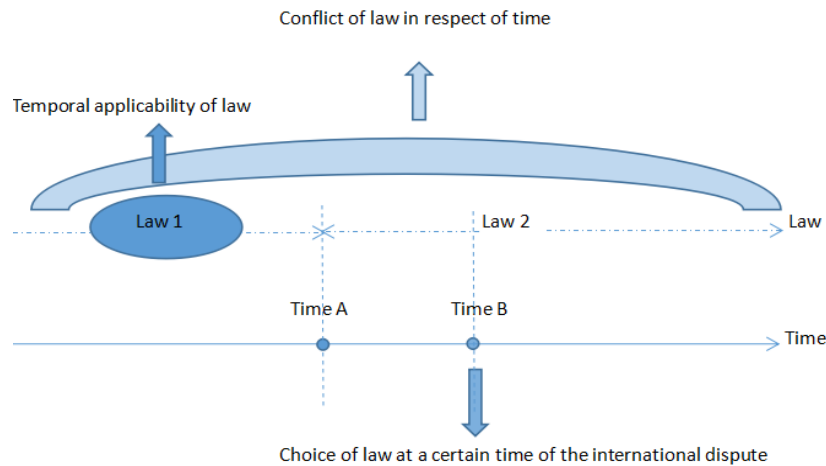
47. Here, the author has to apologize for, to some extent, the chaos and lack of rigor of the terminology, and the consequent confusion that might bring about. Since there is nearly no sample to follow, it is the author’s hope that further studies, challenges, criticism or even alternative modes could be made on this issue.

48. See SAVIGNY, *supra* note 1, at 307–74.

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As indicated above, intertemporal law not only refers to the existence of the legal issue of temporal application, but also to the rule, or doctrine, on how to decide temporal application. In 1928, Huber introduced the rule of intertemporal law for the first time, indicating 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 a dispute in regard to it arises or falls to be settled.”<sup>49</sup> This principle is widely accepted in literature<sup>50</sup> and numerous judicial decisions.<sup>51</sup>

Then the question becomes, what is the position of the rule of international intertemporal law in the international legal system? According to Hart’s theory, legal rules can be divided into primary law rules and secondary law rules; the former of which specifies the rights and standards of acts for the subjects of international law, while the latter establishes the methods for identification and development.<sup>52</sup> The International Law Commission (“ILC”), when drafting the Draft Articles on State Responsibility for Internationally Wrongful Acts,

49. *Island of Palmas*, II R.I.A.A. at 845.

50. *See generally* Fitzmaurice, *supra* note 22; Goldie, *supra* note 8; ROSENNE, *supra* note 22.

51. *See, e.g.*, *Minquiers and Ecrehos*, 1953 I.C.J. Rep. at 47; *Fisheries*, 1951 I.C.J. Rep. at 116; *Legal Status of Eastern Greenland*, 1933 P.C.I.J. (Seri. A/B) No. 53.

52. *See* HART, *supra* note 41.

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regarded such responsibility rules as secondary law rules.<sup>53</sup> Similarly, the rule of international intertemporal law itself does not create rights or responsibilities among states, but provides the settlement of temporal conflicts of laws based on the rights and responsibilities created in different areas of primary law rules. Such characteristics of the rule of intertemporal law successfully explain why the approaches differ substantially, *prima facie*, among different kinds of dispute settlements.<sup>54</sup> Further, it also answers the confusion of leading authors, such as Shaw.<sup>55</sup> Just like the puzzle of “fault” in state responsibility, which is generally due to the ambiguous appraisal of rights and responsibilities in the primary law rules, the inchoate and inconsistent performance of the rule of international intertemporal law is largely based on the uncertainty and immaturity of the primary law rules.

In brief, the findings in this part are concluded as follows:

*Rule 1: (Definition) International intertemporal law is the temporal application of international law or the conflict of international law in respect of time.*

*Rule 1.1: (The rule of) International intertemporal law is a secondary law rule and the settlement of disputes depends on the primary law rules it is based on.*

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53. See Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. Doc. A/56/83 (2001) [hereinafter Draft Articles on State Responsibility].

These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of the substantive customary and conventional international law.

*Id.* at 31.

54. Actually, the conflict of law, be it conflict of law in respect of time or place, is secondary law rule. Such characteristic can be dated back to the origin of private international law centuries before. That is why Savigny used the theory of “seats” to explain the *prima facie* diversity and the internal consistency of conflict of law.

55. See generally SHAW, *supra* note 27.

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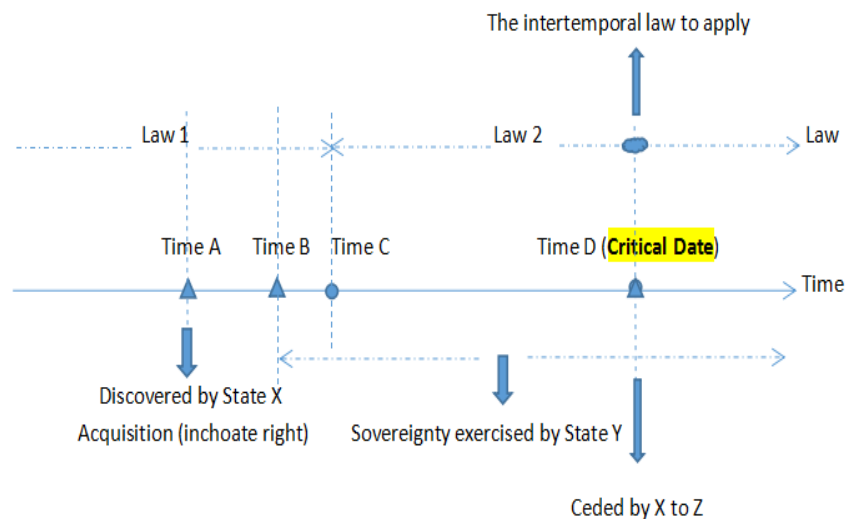
INTERNATIONAL INTERTEMPORAL LAW

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## 2. Intertemporal Law and Critical Date

Before diving into the structure of intertemporal law, one cannot ignore the concept of “critical date.” In *Island of Palmas*, the island was first discovered by Spain in the sixteenth century, and title was legally acquired according to international law at that time. Later, it was occupied by the Netherlands who exercised a “continuous and peaceful display of sovereignty” over the island from 1677. In 1898, it was ceded to the United States from Spain in their Treaty of Paris. Huber deemed that year as the “critical date,” the consolidation time of the dispute.<sup>56</sup>

Mode: Island of Palmas case



Nevertheless, compared to the approximate agreement on the separation of acquisition and maintenance of title and the principle of intertemporal law,<sup>57</sup> the method of “critical date” was not usually discussed seriously,<sup>58</sup> and while sometimes argued by parties,

56. See *Island of Palmas*, II R.I.A.A. at 845.

57. See, e.g., *Minquiers and Ecrehos*, 1953 I.C.J. Rep. at 47; *Fisheries*, 1951 I.C.J. Rep. at 116; *Legal Status of Eastern Greenland*, 1933 P.C.I.J. (Seri. A/B) No. 53; see also JENNINGS, *supra* note 10.

58. Elias concluded it as “not necessary.” ELIAS, *supra* note 4, at 129.

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international courts and tribunal often rejected the concept.<sup>59</sup> On the other hand, some leading authors have made the concepts of intertemporal law and “critical date” highly intertwined, at times even equating them to each other.<sup>60</sup>

Through an analysis of the leading cases by the Permanent Court of Arbitration (“PCA”), Permanent Court of International Justice (“PCIJ”), and International Court of Justice (“ICJ”), there are three common ways critical date has been utilized: (a) the consolidation/solidification of a certain right to exclude subsequent efforts to change that right; (b) the crystallization of a certain dispute in international dispute settlements in order to exclude subsequent facts; and (c) critical date as the concept coincided with the time of the change of law and, consequently, as the concept used interchangeably with intertemporal law.<sup>61</sup>

*a. Critical date used to consolidate and solidify rights  
to exclude subsequent efforts to change those rights*

It is easier as a theory to understand that certain rights do not stay unchanged over time than as a practical solution to answer when the rights are created, consolidated/solidified/vested, or later changed. Thus, a critical date related to the consolidation of a certain right is almost solely theoretical considering that primary international law rules themselves are far from mature. Hence, it is extremely hard to discern the status of certain international rights. Yet, implications can be drawn from case law.

First, in territorial law, one of the significant findings made by Huber in *Island of Palmas* is that “a distinction must be made between the creation of rights and the existence of rights.”<sup>62</sup> Correspondingly,

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59. See, e.g., *Minquiers and Ecrehos*, 1953 I.C.J. Rep. at 47 (where the Court remained silent in choosing critical date); *Frontier (Arg. v. Chile)* XVI R.I.A.A. 109, 120 (Perm. Ct. Arb. 1969) (where arbitral tribunal refused to choose critical date).

60. See, e.g., BROWNIE, *supra* note 27; OPPENHEIM, *supra* note 27.

61. This classification is different from the most famous literature on the critical date, namely Goldie, *supra* note 8, at 1266–67. Goldie made three categories of how critical date is usually used: (1) the evidentiary notion to exclude the subsequent facts concerning a certain dispute; (2) a concept related to *ratione temporis*; and (3) a consolidation of disputes. *Id.*

62. *Island of Palmas*, II R.I.A.A. at 845.



Huber found that the title established through discovery by Spain was merely an inchoate right that was not consolidated by effective sovereign activities.<sup>63</sup> On the other hand, “the Netherlands title of sovereignty, acquired by continuous and peaceful display of State authority during a long period of time going probably back beyond the year 1700, therefore holds good.”<sup>64</sup> This case referred to the Treaty of Paris in 1898 as the critical date for the dispute, but did not indicate a critical date or period for the consolidation/solidification of title. However, it can be implied that since the rights developed over time from creation (inchoate right) to existence, there should be a date or period when the right was consolidated/solidified/vested.

Similarly, in *Legal Status of Eastern Greenland*, Denmark successfully established valid title by effective sovereign activities before Norway’s efforts.<sup>65</sup> Additionally, in *Minquiers and Ecrehos*, the ICJ favored the United Kingdom by giving greater weight to its exercise of jurisdiction and administration to decide the consolidation of the sovereign right.<sup>66</sup> Although when exactly such territorial sovereignty by one state was consolidated has never been explicitly defined in these cases, it is believed that the original understanding of “title” is in the vested facts that international law recognizes as creating a sovereign right.<sup>67</sup> Additionally, these cases show the concept of consolidation/solidification might be utilized to establish a good root of territorial title.<sup>68</sup> Jennings, in his work on the discussion of acquisition of territory, stated that there might be several types of critical dates, and consequently it is probably difficult and even misleading to find its general concept.<sup>69</sup>

In addition to territorial sovereignty, the historic rights in maritime delimitation can serve as another example to discuss the existence of critical date as the time of the consolidation of the right. In *Fisheries*,

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63. *Id.* at 846.

64. *Id.* at 868.

65. *Fisheries*, 1951 I.C.J. Rep. at 116; *see also* *Legal Status of Eastern Greenland*, 1933 P.C.I.J. (Seri. A/B) No. 53.

66. *Minquiers and Ecrehos*, 1953 I.C.J. Rep. at 47.

67. Sir Robert Jennings, *The Acquisition of Territory in International Law*, in *COLLECTED WRITING OF SIR ROBERT JENNINGS*, Vol. 2, 936 (1998).

68. D. H. N. Johnson, *Consolidation as a Root of Title in International Law*, 13 *CAMBRIDGE L. J.* 215 (1955).

69. *See* JENNINGS, *supra* note 10, at 31–35.

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Norwegian fishermen exercised their fishing activities from 1616 to 1618, centuries before the British fishing vessels appeared in the same area in 1906.<sup>70</sup> When the issue of the validity of the delimitation lines of the Norwegian fishery zone came before the ICJ, the Court found that “the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose.”<sup>71</sup> Thus, it can be reasoned that at a certain critical date or critical period, such historic fishing rights were consolidated/solidified/vested. Admittedly, the problem is the same as that for territorial sovereignty—what is the qualitative and quantitative criteria for the consolidation/solidification of a certain right? Perhaps, no one knows the answer.

A third example can be examined from when the right to exercise diplomatic protection was consolidated in *Nottebohm*.<sup>72</sup> The case is heavily criticized for two main reasons. First, that nationality is deemed wholly a domestic issue and, therefore, the Court shall not interfere in a state’s right of deciding diplomatic protection. And, second because there is no such requirement of “genuine connection”<sup>73</sup> in respect of nationality, as subsequently reflected in Article 4 of the Draft Articles on Diplomatic Protection.<sup>74</sup> In the case, *Nottebohm*, a German citizen, went to Guatemala, lived there, and settled his business mainly there since 1905. In 1939, *Nottebohm* returned to Germany and began to visit Liechtenstein frequently. In 1939, *Nottebohm* applied for Liechtenstein nationality and was soon after admitted. In 1940, he returned to Guatemala for business. In 1943, *Nottebohm* was arrested as an enemy, and his property was retained since Guatemala had entered into WWII against Germany. After he was released in 1946, *Nottebohm* began to reside permanently in Liechtenstein. In 1949,

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70. Fisheries, 1951 I.C.J. Rep. at 124.

71. *Id.* at 138.

72. See *Nottebohm (Liech. v. Guat.)*, Judgment, 1955 I.C.J. Rep. 4 (Apr. 6).

73. *Id.* at 23.

74. Draft Articles on State Responsibility, *supra* note 54, art. 4, cmt. (5) (It is elaborated that “Draft article 4 does not require a State to prove an effective or genuine link between itself and its national, along the lines suggested in the *Nottebohm* case,” and that “the Court did not intend to expound a general rule applicable to States but only a relative rule according to which a State in Liechtenstein’s position was required to show a genuine link between itself and Mr. *Nottebohm* in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties.”).

Guatemala expropriated Nottebohm's property.<sup>75</sup> When the issue of whether the situation of Nottebohm entitled Liechtenstein to exercise its right of diplomatic protection came before the ICJ, the Court held that "at the date when he applied for the naturalization" in Liechtenstein, "his actual connections with Liechtenstein were extremely tenuous."<sup>76</sup> Thus, the Court's decision shows that the right to exercise diplomatic protection was not yet consolidated at the Court's chosen critical date, the date of application.

In conclusion, critical date related to the consolidation of a certain right is more theoretical than a practical rule. There is nothing to suggest that any international court, arbitral tribunal, or party has convincingly established when exactly a certain right was consolidated/solidified/vested. This might explain why the ICJ, in *Minquiers and Ecrehos*, left the choice of critical date an open question and depicted the critical date as an evidentiary rule, rather than a substantive one.<sup>77</sup> Further, we should always bear in mind that it might be possible that even if a certain right has been solidified/consolidated/vested, it does not mean that right has not been changed since that point. It might depend on what kind of change occurs and to what extent the change makes a difference.<sup>78</sup> As with many aspects of law, there are always exceptions. The ICJ alluded to this concept in *Minquiers and Ecrehos* when it expressed that, even under the rule of evidential exclusion of the facts after the critical date, there could be "special circumstances" that need to be taken into consideration.<sup>79</sup> This will be discussed in the next part.

*b. Critical date used to crystallize certain disputes in international dispute settlements in order to exclude subsequent facts*

Critical date was first introduced in *Island of Palmas*. Huber deemed 1898, the year of the Treaty of Paris, as the critical date to decide the applicable law and stated that the events in 1898 could not

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75. See Nottebohm Case, 1955 I.C.J. Rep. at 13–18.

76. *Id.* at 25.

77. See *Minquiers and Ecrehos*, 1953 I.C.J. Rep. at 47.

78. CRAWFORD, *supra* note 3, at 69.

79. *Minquiers and Ecrehos*, 1953 I.C.J. Rep. at 59–60.

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indicate the legal situation of the island.<sup>80</sup> The concept of critical date was then elaborated upon in *Minquiers and Ecrehos*. Both France and the U.K. came up with a critical date respectively as indicating the time of the crystallization of the disputes to exclude the subsequent acts by the other state.<sup>81</sup>

*Minquiers and Ecrehos* is of importance in two ways. First, both parties' arguments might be the clearest and most concrete analysis of critical date. In fact, the ICJ and other international tribunals frequently quote those arguments. Second, the ICJ chose not to decide upon the critical date but instead acknowledged it as an evidential rule to exclude evidence while at the same time leaving space for exceptions.<sup>82</sup>

Regarding the parties' arguments, both parties greatly assisted in the discussion of the concept of critical date. For example, one argued that it is "normally, not the date when the dispute was born, but that on which it crystallized into a concrete issue . . . . One object of the critical date is to prevent one of the parties from unilaterally improving its position by means of some step taken after . . . ." <sup>83</sup> Furthermore, the date can only be determined after all the final positions have been taken by the parties.<sup>84</sup> Among the arguments presented, Sir Fitzmaurice, counsel for the U.K., offered the strongest voice. He stated that critical date is "the date on which the differences of opinion that have arisen between the parties have crystallized into a concrete issue giving rise to a formal dispute,"<sup>85</sup> and "[t]ime is deemed to stop at that date. Nothing that happens afterward can operate to change the situation that then existed."<sup>86</sup> As plausible justification for the necessity of such critical date, he argued that justice requires it.<sup>87</sup> For the latter important way, the spaces the Court left for subsequent cases seem to have lead to the

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80. *Island of Palmas*, II R.I.A.A. at 865–68.

81. *See Minquiers and Ecrehos Case*, 1953 I.C.J. Rep. at 47 (France argued for 1839, the date of the bilateral convention, while the UK asked for the date of 1950 of the special agreement.).

82. *Id.* at 64.

83. Pleadings, Oral Arguments, Documents, *Minquiers and Ecrehos* (U.K. v. Fr.), 1953 I.C.J. Pleadings 10, 68 (Sept. 17, 1953 to Oct. 8, 1953, Nov. 17, 1953) [hereinafter Pleadings].

84. *Id.* at 68.

85. *Minquiers and Ecrehos*, 1953 I.C.J. Rep. at 47.

86. Pleadings, *supra* note 83, at 64, 69; BLUM, *supra* note 10, at 208.

87. Pleadings, *supra* note 83, at 67–68.

result of disuse. In *Frontier*, for instance, the tribunal held that it “has considered the notion of the critical date to be of little value in the present litigation and has examined all the evidence submitted to it . . . .”<sup>88</sup>

Since critical date has been utilized in dispute settlement several times,<sup>89</sup> critical date as the concept related to the crystallization of a certain dispute means the exclusionary and terminal date of the disputes.<sup>90</sup> After that date, the subsequent facts or the parties’ acts can no longer affect the disputes.<sup>91</sup> Theoretically, the issue of critical date would certainly arise whenever the question of time constitutes a necessary part of the dispute.<sup>92</sup> However, in practice, only *Legal Status of Eastern Greenland* followed the steps of the sample set forth in *Island of Palmas*. In *Legal Status of Eastern Greenland*, Norway discovered Eastern Greenland in the tenth century; however, the Nordic colonies on the west coast disappeared by the thirteenth or fourteenth century. Prior to 1814, the King of Denmark exercised sovereignty over Greenland for centuries in his capacity as the King of Norway.<sup>93</sup> When the sovereign dispute came before the PCIJ, the Court deemed the critical date as July 10, 1931, when Norway proclaimed its sovereignty against Denmark.<sup>94</sup> The Court’s decision was based on the fact that Denmark had established valid title via

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88. *Frontier*, XVI R.I.A.A. at 167.

89. The cases that explicitly use critical date for the consolidation of the disputes are as follow: *Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.)*, Judgment, 1939 P.C.I.J. (Seri. A/B) No. 77 (Apr. 4); *Legal Status of Eastern Greenland*, 1933 P.C.I.J. (Seri. A/B) No. 53; *Phosphates in Morocco (It. v. Fr.)*, Judgment, 1933 P.C.I.J. (Seri. A/B) No. 74 (June 14); *Island of Palmas*, II R.I.A.A. at 845. However, the author would argue that the critical date or crucial date or material date that mentioned in the cases concerning *ratione temporis* (*Phosphates in Morocco*; *Electricity Company of Sofia and Bulgaria*), is not the same thing that is discussed here. Since the latter does not have exclusionary effect for the subsequent facts. As long as the disputes occur after the time that the temporal jurisdiction is satisfied, it does not matter to which stage the disputes have developed. Usually, subsequent facts would certainly be taken into consideration.

90. *Goldie*, *supra* note 8, at 1251.

91. D. H. N. Johnson, *Acquisitive Prescription in International Law*, 27 BRIT. Y.B. INT’L L. 332, 342 (1950).

92. *Goldie*, *supra* note 8, at 1256.

93. *Legal Status of Eastern Greenland*, 1933 P.C.I.J. at 27–44.

94. *Id.* at 75.

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effective sovereign activities before that date and declared Norwegian occupation after that date unlawful and invalid.<sup>95</sup>

The critical date is commonly difficult to determine and may not always be necessary to do so in a dispute settlement.<sup>96</sup> Often, when a dispute occurs under these circumstances, neither party will have developed any convincing historic title or right. In other words, the element of time does not play a significant role in the dispute. *Dubai/Sharjah Arbitration* by the PCA in 1981 serves as a classic example of where the issues of land and maritime boundary are involved, given that the historic Arab world was unfamiliar with the idea of defined and fixed boundaries.<sup>97</sup>

In *Dubai/Sharjah Arbitration*, the disputed coast was controlled by two confederacies of tribes before the nineteenth century. However, in 1937 and 1951, the U.K. twice intervened and attempted to establish clear boundaries. During those periods, the Arab world was unaware of the idea of defined and fixed boundaries. In 1971, the U.K. withdrew from the coast and at the same time the United Arab Emirates was established. This brought friction concerning territorial boundaries to the two neighbors, Dubai and Sharjah, and finally led to the 1981 Arbitration.<sup>98</sup>

In that arbitration, Sharjah heavily relied on Sir Fitzmaurice's idea on critical date<sup>99</sup> and, accordingly, advanced two alternative critical dates, 1955 and December 2, 1971.<sup>100</sup> Conversely, Dubai made strong arguments to challenge the concept of critical date. First, Dubai pointed out that in cases that decided historic sovereign right over territory—of which *Island of Palmas* and *Legal Status of Eastern Greenland* serve as classic examples—critical date might be meaningful to confirm such preexisting title. Dubai further argued that in cases where no such historic title has been perfectly established, the concept of critical date

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95. *Id.*

96. *See, e.g.*, *Minquiers and Ecrehos*, 1953 I.C.J. Rep. at 47 (ICJ left the question of critical date open); *Frontier*, XVI R.I.A.A. at 167 (tribunal found the critical date of little value in dispute settlement).

97. D. W. Bowett, *The Dubai/Sharjah Arbitration of 1981*, BRIT. Y.B. INT'L L. 103, 104 (1994).

98. *Id.* at 103–07.

99. *See, e.g.*, *Pleadings*, *supra* note 83, at 68–69.

100. Bowett, *supra* note 97, at 111.

has no room to play.<sup>101</sup> Second, there is no such rule in international law that one party is not allowed to improve its right by unilateral action after a certain time. Moreover, the rule is actually based on a foundation of the weight of the evidence, which allows the Court or tribunal's discretion to judge the case in its totality.<sup>102</sup> The tribunal accepted Dubai's arguments and denied the validity of the critical date. The tribunal's reasoning relied on the fact that the issue before it was to decide to whom the disputed boundary areas belonged,<sup>103</sup> and no dispute had been crystallized since both parties changed their positions over time.<sup>104</sup>

*Dubai/Sharjah Arbitration* perfectly reflects the limits and fragility of critical date as the concept related to the crystallization of a certain dispute. On one hand, the crystallization of disputes depends on the development of the underlying rights over time, the regulatory rule of which remains largely uncertain or unknown. On the other hand, such crystallization depends on the parties' behavior over time as well. Since the modes of development of rights were European-centered throughout a majority of history—and the more primitive status of other parts of the world were ignored—there is a huge gap in the methodology of legal analysis in various cases concerning different parties' disputes in different areas.

In conclusion, although critical date as the concept related to the crystallization of a certain dispute is of more practical use compared to critical date used to solidify a certain right, it is still far from certainty.

*c. Critical date as the concept related to uti possidetis*

Neither Huber, Sir Fitzmaurice, nor Goldie would have predicted the following repeated use of critical date interchangeably with intertemporal law in the cases concerning *uti possidetis*.<sup>105</sup> The

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101. *Id.* at 112.

102. *Id.* at 113.

103. Dubai-Sharjah Border Arbitration, 91 I.L.R. 543, 594 (Perm. Ct. Arb. 1981).

104. Bowett, *supra* note 97, at 114.

105. The cases that critical date is used interchangeably with intertemporal law are as follow: Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.), Judgment, 2008 I.C.J. Rep. 12 (May 23); Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar.

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principle of *uti possidetis* was first invoked in Latin America in the context of decolonization to settle boundary disputes.<sup>106</sup> This principle means “when a colony gains independence, the colonial boundaries are accepted as the boundaries of the newly independent state.”<sup>107</sup> *Uti possidetis* was later widely acknowledged in African regimes. The resolution of the Organization of African Unity explicitly established the doctrine that the colonial borders existing at the date of independence became a tangible reality, which should be respected by all member states as consolidated boundaries.<sup>108</sup>

The ICJ and PCA have consistently deemed the date of independence as the critical date and applied the doctrine of *uti possidetis* as the intertemporal law, looking to when the boundaries were consolidated and consequently decided at the time of independence. This may sound like circular reasoning. Indeed, the choice of critical date and the application of *uti possidetis* is a legal fiction, as the result of the maximum consensus in the decolonization context.

In *Frontier Dispute*, the issue before the ICJ was the determination of the line of the frontier between Burkina Faso and the Republic of Mali, both of which used to be part of the French colonies.<sup>109</sup> In this classic case, the Court made the following famous statement concerning *uti possidetis* and the critical date:

The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when

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v. Hond.), Judgment, 2007 I.C.J. Rep. 659 (Oct. 8); *Frontier Dispute (Benin v. Niger)*, Judgment, 2005 I.C.J. Rep. 90 (July 12); *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay)*, Judgment, 2002 I.C.J. Rep. 625 (Dec. 17); *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, Judgment, 1992 I.C.J. Rep. 351 (Sept. 11); *Frontier Dispute (Burk. Faso v. Republic of Mali)*, Judgment, 1986 I.C.J. Rep. 554 (Dec. 22); *Eritrea/Yemen Arbitration*, XXII R.I.A.A. 211 (Perm. Ct. Arb. 1998).

106. See, e.g., *Land, Island and Maritime Frontier Dispute*, 1992 I.C.J. Rep. at 565; *Colombia-Venezuela Boundary Award*, 1 R.I.A.A. 223, 228 (1922).

107. GRAHAM GOOCH & MICHAEL WILLIAMS, *A DICTIONARY OF LAW ENFORCEMENT* (2007), <http://www.oxfordreference.com.ezproxy.leidenuniv.nl:2048/view/10.1093/acref/9780192807021.001.0001/acref-9780192807021-e-3116>.

108. SHAW, *supra* note 27, at 380–81; S.C. Res. 1234 (Apr. 9, 1999).

109. See *Frontier Dispute*, 1986 I.C.J. Rep. at 564–65.



independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.<sup>110</sup>

The Court made it clear the doctrine's objective was "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."<sup>111</sup> And same as the previous usage of the critical date, on the date of independence, the frontiers were consolidated just like "the photograph of the territory" on that date.<sup>112</sup> This means that all actions by the parties after that date would be excluded in settling the dispute.

Following *Frontier Dispute*, the ICJ in *Land, Island and Maritime Frontier Dispute* decided on the boundary and maritime delimitation between El Salvador and Honduras with the same doctrine. Again, the date of independence was deemed as the critical date. However, the Court rejected the argument the date of independence was the only possible critical date. The Court clarified that while the date of independence was indeed decisive and must be the critical date for the *uti possidetis*, there could be other critical dates afterward, for example, one arisen from a boundary treaty.<sup>113</sup>

In *Sovereignty over Pulau Ligitan and Pulau Sipadan*, the ICJ determined the boundary between Indonesia and Malaysia by using 1969, the date of independence, as the critical date. The Court indicated that it would only consider facts that occurred before the critical date, when the dispute was crystallized.<sup>114</sup>

A recent case dealing with these concepts is the *Frontier Dispute* in 2005, where the ICJ decided that the boundary between Benin and Niger was determined by the *uti possidetis* rather than the colonial law

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110. *Id.* at 566.

111. *Id.* at 565.

112. *Id.* at 568.

113. *Land, Island and Maritime Frontier Dispute*, 1992 I.C.J. Rep. ¶ 67.

114. *See Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, 2008 I.C.J. Rep. at 12.

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on the date of independence.<sup>115</sup> Additionally, in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* in 2007, the ICJ chose two critical dates for the land and maritime delimitation respectively, following the *uti possidetis* as the date of independence.<sup>116</sup>

Although the case law of critical date concerning *uti possidetis* as a legal basis appears to be more consistent, and perhaps more convincing than the previous two usages, the examples above are rather ideal. This is especially true given the fact that this usage itself is of the color of legal fiction. In the cases where there was no clear colonial law used to govern the land and the maritime areas, as well as where the titles were interrupted several times before and remained vague at the time of independence, this method alone may provide more questions than answers.

This is exactly the case in *Eritrea/Yemen Arbitration*, which is famous for its complexity and the combination of the methods used to solve the disputes (i.e., historic rights, *effectivités*, *uti possidetis*, and natural unity). For instance, on the question of *effectivités* the tribunal found the situation checkered where the interests and position of the parties constantly changed over the years with several periods of interruption and the legal position of the disputed islands remained indeterminate for most of the time.<sup>117</sup> Ultimately, the tribunal failed to find any critical date and decided to follow the Argentina and Chile Arbitration in 1996, which held that it would examine “all the evidence submitted to it, irrespective of the date of the acts to which such evidence relates.”<sup>118</sup>

#### *d. Critical date and intertemporal law*

Although usually intertwined, critical date does not logically affiliate with intertemporal law. Indeed, the two concepts share the same concerns of the development of rights and disputes on the dimension of time. They are separate and independent rules of recognition (secondary law rules) in the sense that the precondition of

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115. See *Frontier Dispute*, 1986 I.C.J. Rep. at 554.

116. See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, 2007 I.C.J. Rep. at 659.

117. *Eritrea/Yemen Arbitration*, XXII R.I.A.A. ¶ 456.

118. *Frontier*, XVI R.I.A.A. at 115.

critical date is the presumable existence of a rather mature legal system where the evolution of rights and disputes precisely follows a certain mode (i.e. an inchoate situation to a consolidated situation). However, intertemporal law mainly focuses on the application of law on the dimension of time. The two may overlap when the changing modes of the underlying rights are capable of triggering the issue of critical date; otherwise, the issue of intertemporal law can be solved even where such mode of evolution is uncertain or unknown. In other words, the resolution of an intertemporal law problem does not necessarily rely on the discernment of the critical date. Nor does a critical date issue only arise in the context of intertemporal law. Usually, critical date is 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*).

Nevertheless, the study of the critical date is significant to the study of intertemporal law in three ways. First, the two issues both arise when time is a necessary element to the development of rights, disputes, or law. Although the two concepts are both secondary law rules, intertemporal law might be “more secondary,” given the fact that the development of rights/disputes on the dimension of time might serve as a prerequisite when deciding the corresponding applicable law. Second, the reason behind the limits and unresolved areas in both concepts share great similarities; that is, the diversities, fragmentation, and immaturity of the underlying primary international law rules. Third, the theoretically uniform and consistent systems of either concept are usually fragmented. This fragmentation, to some extent, is due to the unbalanced development of, the diverse understanding of, and the different compliance with international law around the world. All these might still leave international law as a rather primitive system, where it is hard to build concrete secondary law rules like intertemporal law.

In conclusion, the rules that can be summarized from this section are as follows:

*Rule 2: International intertemporal law and critical date are separate concepts. Critical date is not an internal or subsidiary concept of intertemporal law.*

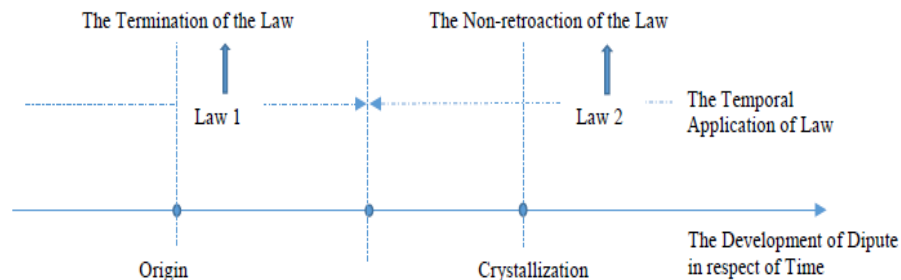
*Rule 2.1: Only part of the international intertemporal law issues can be settled by, but not necessarily, critical date.*

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*Rule 2.2: Critical date is a secondary law rule based on the underlying development of the rights or the disputes.*

### 3. *The Structure of International Intertemporal Law: A Uniform System*

The definition of international intertemporal law can be seen from different angles and in different ways: the temporal application of law, the conflict of law in respect of time, and the choice of law at a certain time or period. However, they are actually in one system of intertemporal law where the basic rule was introduced in *Island of Palmas*. “[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.”<sup>119</sup>



“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.”

Despite the immaturity of primary law rules and the difficulties in establishing secondary law rules, it is worth trying to build a framework for a uniform and consistent system of international intertemporal law. For this purpose, the author will first divide the system into two parts: the positive conflict and the negative conflict. For the former, two laws exist on the dimension of time. For the latter, only one international law was created at a certain time of history, before which there was no rule to govern. For positive conflict, there are two sub-categories: the direct conflict of law, where territorial disputes serve as a classical example; and the indirect conflict of law, namely treaty interpretation. For negative conflict, there are also two sub-categories: non-

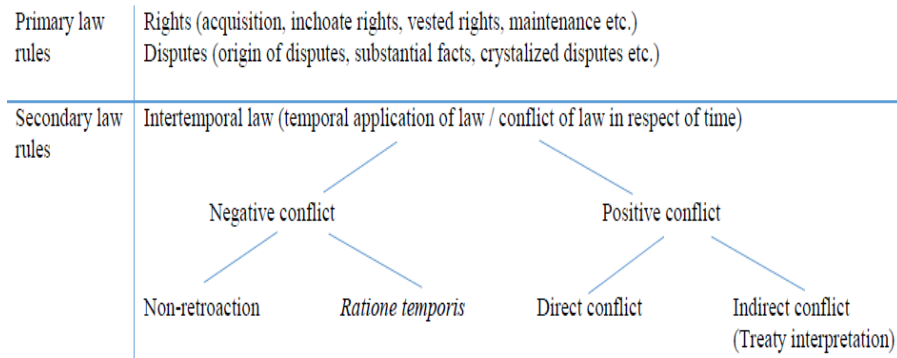
119. *Island of Palmas*, II R.I.A.A. at 845.

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retroaction, which is substantive; and *ratione temporis*, which is procedural.



The following parts will analyze each category of intertemporal law respectively. Although the underlying primary law rules usually remain uncertain or unknown, and the precise rule of intertemporal law varies case by case, the basic rule is concluded as below:

*Rule 3: The basic rule of international intertemporal law: A juridical issue shall be decided in the light of the law contemporary with it.*

### B. Active Conflict

#### 1. Direct Conflict, Territorial Dispute as Example

*a. Several issues in territorial law: title, right, modes of acquisition, effectivities, and uti possidetis*

Over time, leading authors have reiterated the vital role of territory in international law. Jennings indicated, “[T]he mission and purpose of traditional international law has been the delimitation of the exercise of sovereign power on a territorial basis.”<sup>120</sup> O’Connell regards it as “perhaps the fundamental concept of international law.”<sup>121</sup> International law governing territorial acquisition is rooted in Roman

120. Jennings, *supra* note 67, at 934.

121. D.P. O’CONNELL, INTERNATIONAL LAW Vol. I, 403 (1970); *see* Jennings, *supra* note 67, at 935.

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Law dealing with private ownership of property.<sup>122</sup> Before turning to the intertemporal law issue, it is important to discuss several vital, but controversial, issues on territorial law.

Above all, what is the difference between title and territorial rights; and what are the characteristics of international territorial law compared to municipal law? Interestingly, Glanville Williams argued that “title is the *de facto* antecedent, of which the right is the *de jure* consequent.”<sup>123</sup> In *Legal Status of Eastern Greenland*, the PCIJ found title to territory under international law more relative than absolute.<sup>124</sup> Later, in *Minquiers and Ecrehos*, the ICJ held that it would consider all the relevant evidence to decide who owned a *better* title.<sup>125</sup> As Jennings concluded, “the primary meaning of ‘title’ is the vestitive facts that the law recognizes as creating a right.”<sup>126</sup> In *Frontier Dispute and Land, Island and Maritime Frontier Dispute*, the ICJ confirmed that the word “title” not only means documentary evidence used to establish a certain right, but is any evidence of such right.<sup>127</sup>

Second, what are the acquisition methods of territorial sovereignty in international law? Jennings created the following classic categorization: occupation; prescription; cession; accession or accretion; and subjugation or conquest.<sup>128</sup> However, both Jennings and Lauterpacht found that the categorization above to be methods for the existing state as datum, not the case for the creation of a new statehood.<sup>129</sup> Lauterpacht further argued that, although the creation of a new statehood is a matter of law,<sup>130</sup> the method used for territorial

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122. See, e.g., JENNINGS, *supra* note 10, at 935; O’CONNELL, *supra* note 121, at 404.

123. GLANVILLE WILLIAMS, *SALMOND ON JURISPRUDENCE* 378 (1957).

124. See *Legal Status of Eastern Greenland*, 1933 P.C.I.J. (Seri. A/B) No. 53, at 46.

125. *Minquiers and Ecrehos*, 1953 I.C.J. Rep. at 52.

126. JENNINGS, *supra* note 10, at 936.

127. *Land, Island and Maritime Frontier Dispute*, 1992 I.C.J. Rep. at 388; *Frontier Dispute*, 1986 I.C.J. Rep. at 564.

128. JENNINGS, *supra* note 10, at 939.

129. *Id.*; see also OPPENHEIM, *supra* note 27, at 544.

130. On the question whether the creation of a new statehood is a matter of fact or law, the leading scholars divide, for instance, Oppenheim regards it as a matter of fact and deems recognition as the legal issue while Brownlie held the completely opposite view.

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acquisition before state recognition is irrelevant.<sup>131</sup> Jennings summarized this significant phenomenon as follows:

For transfers of territory between existing States the law lays down a series of modes through which alone a valid title to the sovereignty may be passed from one to the other; but for a territorial change coincident with the birth of a new State the law apparently not only fails to provide any modes of transfer but appears to be actually indifferent as to how the acquisition is accomplished.<sup>132</sup>

Jennings further analyzed that the acquisition of territory for a newly created state is more relevant to municipal law, either constitutional law or colonial law, than to the international law.<sup>133</sup> Other scholars supported this view, especially in the context of decolonization.<sup>134</sup> Oppenheim suggested international law is better suited to factually accept the position of a territory at the moment of the creation of a new state.<sup>135</sup>

In response to the differences in territorial acquisition by existing states, and by newly created states, the vital features vary accordingly. For territorial acquisition by existing states, *effectivités* is a common feature.<sup>136</sup> Rooted in Roman law, which requires *corpus* and *animus*,<sup>137</sup> and resembling the private law of property in land,<sup>138</sup> *effectivités* did not come into force until the sixteenth century. Before *effectivités* came into force, a mere discovery with intent to occupy served as the creation of title.<sup>139</sup> Ever since the sixteenth century, as Huber concluded in

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131. OPPENHEIM, *supra* note 27, at 544.

132. JENNINGS, *supra* note 10, at 941.

133. *Id.*

134. See, e.g., Elihu Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment*, V, 7 INT'L & COMP. L.Q. 534 (1958). There the questions are discussed like what legal status in international law of the Indian Independence Order was in 1947, and what the Inheritance Agreements between U.K. and Ghana, U.K. and Malaya were under international law.

135. See OPPENHEIM, *supra* note 27, at 537–44.

136. See JENNINGS, *supra* note 10, at 937.

137. See *The Fama*, 165 Eng. Rep. 714 (1804).

138. See HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* Chap. III (1927).

139. JENNINGS, *supra* note 10, at 937.

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*Island of Palmas*, “the actual continuous and peaceful display of state functions is in case of dispute the sound and natural criterion of territorial sovereignty.”<sup>140</sup> As for territorial acquisition by newly created states, as analyzed above, the date of independence is deemed as the critical date and the doctrine of *uti possidetis* applies as the intertemporal law that boundaries are deemed as consolidated at the time of independence.

At this point, the Article will respond to some misunderstandings in intertemporal law, which confuse the rule of development of territorial right and the rule of intertemporal law. Indeed, when introducing intertemporal law, the two parts in the award of *Island of Palmas* are usually cited together:<sup>141</sup> (1) “[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;”<sup>142</sup> and (2) “[a] distinction must be made between the creation of rights and the existence of rights.”<sup>143</sup> However, the two parts are distinct, not “two branches of intertemporal law,”<sup>144</sup> and the second rule is not an exception to the first one.<sup>145</sup> The first part serves as the general rule of intertemporal law, not limited to territorial disputes. The second rule refers to the primary law rules governing the development of territorial rights, which is subject to certain exceptions. As discussed above, the rule of *effectivités* for existing states is established through centuries of state practice. Comparatively, the rule of *uti possidetis* makes an unclear distinction between so-called creation of rights and existence of rights. This might be partly attributable to the legal fiction in the special context of decolonization,

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140. *Island of Palmas*, II R.I.A.A. at 840.

141. See, e.g., JOHN DUGARD, *INTERNATIONAL LAW: THE SOUTH AFRICAN PERSPECTIVE* 128–29 (2005); ELIAS, *supra* note 4, at 120; Higgins, *supra* note 32, at 516; Paul Tavernier, *Relevance of the Intertemporal Law*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 397 (J. Crawford, A. Pellet, & S. Olleson eds., 2010).

142. *Island of Palmas*, II R.I.A.A. at 845.

143. *Id.*

144. See, e.g., Ulf Linderfalk, *The Application of International Legal Norms over Time: the Second Branch of Intertemporal law*, *NETHERLANDS INT’L L. REV.* 147–72 (2011).

145. See, e.g., A. D’Amato, *International Law, Intertemporal Problems*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 1234–35 (R. Bernhardt ed., 1992).



or partly to the modern customary international law of emphasizing *opinio juris* rather than state practice—which endows customary international law with the capacity to form in a short or even rapid period.<sup>146</sup> This is all for the underlying primary law rules and is logically separated from the rule of intertemporal law as the secondary law rule.

*b. Intertemporal law in territorial disputes*

The basic rule of intertemporal law in territorial disputes is quite clear: “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.”<sup>147</sup> The primary rule in territorial law has also been analyzed sufficiently, namely “a distinction must be made between the creation of rights and the existence of rights.”<sup>148</sup> Thus, for existing states, territorial sovereignty is proved by *effectivités*. Although international law acknowledges the notion of geographical or natural unity of particular areas, the presumption of title always rests on the sovereignty exercised in a certain territory.<sup>149</sup> And, for newly created states, territorial sovereignty is often proved by *uti possidetis*.

To elaborate further on the former, some situations arise far from the perfect model seen in *Island of Palmas* or *Legal Status of Eastern Greenland*, and the crystallization of the dispute cannot be found with

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146. See Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757–91 (2001). Roberts argues:

[T]raditional custom results from general and consistent practice followed by states from a sense of legal obligation. . . . By contrast, modern custom is derived by a deductive process that begins with general statements of rules rather than particular instances of practice. This approach emphasizes *opinio juris* rather than state practice because it relies primarily on statements rather than actions.

*Id.* at 758; see also Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, AUSTL. Y.B. INT’L L. 82 (1988-89).

147. *Island of Palmas*, II R.I.A.A. at 845.

148. *Id.*

149. See *Eritrea/Yemen Arbitration*, XXII R.I.A.A. ¶ 31; see also GERALD FITZMAURICE, *LAW AND PROCEDURES OF THE INTERNATIONAL COURT OF JUSTICE* 46–64 (1986).

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certainty.<sup>150</sup> Under those circumstances, efforts should be made to examine all relevant facts to see whether the sovereign *effectivités* has been established; particularly to determine who owns the better title.<sup>151</sup> In *Eritrea/Yemen Arbitration*, for instance, the parties understood “title” as a clearly established right, which was “absolutely or relatively best right to a thing which may be in dispute,”<sup>152</sup> other than a developing claim. Both parties relied on evidence of possession, following Huber’s statement that “it is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control.”<sup>153</sup> The tribunal elaborated that a historic title is a title “that has been created, or consolidated, by a process of prescription, or acquiescence, or by possession so long continued as to have become accepted by the law as a title.”<sup>154</sup> The tribunal emphasized “there must be some absolute minimum requirement” for the acquisition of territorial sovereignty.<sup>155</sup> When making this emphasis, the tribunal found that historic title had never been solidified, because the chain of titles was interrupted and the situation changed over time.<sup>156</sup>

While the critical date, as analyzed above, is usually used to settle the direct positive conflict of law concerning territorial disputes in respect of time—despite its status as an independent legal concept—the application of the theoretically simple rule of intertemporal law remains complicated. First, the primary law rule variedly applies in how territorial title develops and changes over time. Under this rule, the consolidated period of territorial title can only be determined on a case-by-case basis, with no paradigm to follow. Second, the crystallization

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150. *See, e.g.*, *Minquiers and Ecrehos*, 1953 I.C.J. Rep. at 47; *Eritrea/Yemen Arbitration*, XXII R.I.A.A. at 211.

151. This is the situation that is discussed above in the relationship between critical date and intertemporal law. In such cases, the underlying uncertainty of the evolution of the rights and disputes makes them not capable of triggering the discernment of critical date. The intertemporal law is to apply upon an analysis of totality.

152. FREDERICK POLLACK, *A FIRST BOOK OF JURISPRUDENCE* 177 (6th ed. 1929).

153. *Island of Palmas*, II R.I.A.A. at 867.

154. *Eritrea/Yemen Arbitration*, XXII R.I.A.A. ¶ 106.

155. *Id.* ¶ 118.

156. *Id.* ¶ 125.

of disputes heavily depends on the parties' behavior, with or without awareness of how international law affects such behaviors. One who carefully compares European disputes<sup>157</sup> with Arabian disputes,<sup>158</sup> would probably reach the same conclusion as that in *Rann of Kutch*. That case explains "the rights and duties which by law and custom are inherent in and characteristic of sovereignty present considerable variations in different circumstances according to time and place, and in the context of various political systems."<sup>159</sup>

In summary, given the uncertainties and unsolved controversies above, we can only conclude that intertemporal law's basic rule or principle, namely "a juridical issue shall be decided in the light of the law contemporary with it (Rule 3)," applies in international territorial disputes. With some exceptions, detailed instructions might serve as persuasive reference to explain: (1) for existing states, territorial sovereignty may be proved mainly by *effectivités* and the correspondingly contemporary law; and (2) for newly created states, territorial sovereignty is often proved by *uti possidetis* at the date of independence.

## 2. Indirect Conflict: Treaty Interpretation

### a. From initial intention to evolutionary interpretation

Intertemporal law concerning territorial disputes heavily relies on the understanding of the acquisition and changes of territorial sovereignty. Meanwhile, intertemporal law concerning treaty interpretation relies on the understanding of the evolution of law and the international legal system as a whole. Those who believe that treaty interpretation and its element of time has nothing to do with intertemporal law, argue that application of law (intertemporal law) and interpretation of law should be differentiated. Those who favor homogeneity challenge the consistency of intertemporal law because the evolutionary interpretation approach followed by case law after

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157. *E.g.*, Legal Status of Eastern Greenland, 1933 P.C.I.J. (Seri. A/B) No. 53; Island of Palmas, II R.I.A.A. at 829.

158. *E.g.*, Dubai-Sharjah Border Arbitration, 91 I.L.R. 543, 594 (Perm. Ct. Arb. 1981).

159. *Rann of Kutch (India v. Pak.)*, 17 R.I.A.A. 1, 554 (1968).

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1960<sup>160</sup> contradicts intertemporal law's general principle. The general principal of intertemporal law is 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 a dispute in regard to it arises or falls to be settled."<sup>161</sup> For the latter, Eirik Bjorge argues for consistency by reminding people of the second significant finding in *Island of Palmas*.<sup>162</sup> This second finding states, "[A] distinction must be made between the creation of rights and the existence of rights."<sup>163</sup> However, as discussed above, the second finding is about the underlying primary law rules instead of intertemporal law as the secondary law rule. Hence, this argument is untenable.

Nevertheless, there are two key issues. First, whether, and to what extent, the totality of international law is considered in treaty interpretation. Second, how much weight should be given to the involved parties' intent once the treaty has entered into force and operates as part of the international legal system. Although treaty law—as a living instrument that transcends over long periods of time—customary international law, and perhaps international law as a whole has changed over time. There is indirect conflict of law over time between previous and former customary international law, if they are to be considered to have any interaction with the treaty law at hand. This sort of indirect conflict is *more of a balance than a formula of a single choice*. While contemporaneity, namely the circumstances prevailing at the time of the conclusion of the treaty, must be considered,<sup>164</sup> this does not prevent one from considering the rules of international law as they exist today.<sup>165</sup>

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160. The argument first arose by the Commission in *Rights of Nationals of United States of America in Morocco*, *supra* note 5, and was later argued throughout the drafting process of the VCLT.

161. *Island of Palmas*, II R.I.A.A. at 845.

162. See BJORGE, *supra* note 33; see also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening)*, Judgment, 2002 I.C.J. Rep. 303, 503 (Oct. 10) (separate opinion by El-Khasawneh, J.).

163. *Island of Palmas*, II R.I.A.A. at 845.

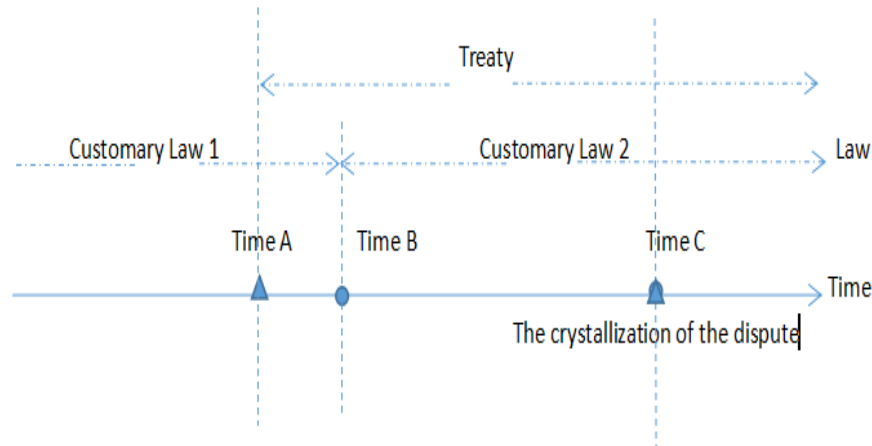
164. *Land and Maritime Boundary between Cameroon and Nigeria*, 2002 I.C.J. Rep. at 346; *Decision Regarding Delimitation of the Border Between Eritrea and Ethiopia*, XXV R.I.A.A. 83 (Apr. 13, 2002); GREIG, *supra* note 32, at 366.

165. *Aegean Sea Continental Shelf*, 1978 I.C.J. Rep. at 77–80.

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It is noteworthy that there has been an evident conversion in treaty interpretation with the element of time involved. In cases before the 1960s, international courts and tribunals tended to interpret treaties based on the initial intentions of parties at the time of conclusion of the treaties.<sup>166</sup> However, one can easily find reason with careful examination that this *does not exclude future development in evolutionary interpretation*.

For instance, before the PCA in 1910, in *North Atlantic Coast Fisheries Arbitration*, the U.K. and U.S. raised a number of disputes concerning the interpretation of Article 1 of the convention between them that entered into force in 1818. The convention provided inhabitants of the U.S. with a series fishing rights, similar to those held by the British in a certain area of British coastline.<sup>167</sup> The tribunal held that the principle of contemporaneity applied to treaty interpretation and, consequently, examined the parties' intentions and the relevant circumstances that occurred at the treaty's conclusion.<sup>168</sup> Although the treaty had been in force for over a century, few changes had occurred in customary international law governing fishing rights. The element of *time did not play a vital role* in the dispute, and *no obvious indirect*

166. See, e.g., *Rights of Nationals of United States of America in Morocco*, 1952 I.C.J. Rep. at 193; *Grisbadarna*, XI R.I.A.A. at 155.

167. See *North Atlantic Coast Fisheries (U.K. v U.S.)* XI R.I.A.A. 167 (1961).

168. *Id.* at 196.

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*conflict of law was involved in this case.* Hence, the only conclusion is contemporaneity plays an important role in treaty interpretation and nothing more.

Moreover, in *Rights of Nationals of United States of America in Morocco* in 1952, the ICJ stated treaties must be interpreted according to the parties' initial intentions at the time of treaty's conclusion.<sup>169</sup> However, the contested treaty was made in 1948, only four years earlier.<sup>170</sup> Thus again, the element of time did not play a substantive role in determining the dispute.<sup>171</sup>

Hence, the situation before the 1960s—that treaty interpretation was mainly based on the contemporaneity consideration and the initial intention of the parties—is largely due to the vacancy of time as an important element. No evolution in relevant customary international law had occurred in those cases. In other words, the treaties stood the test of time merely because time brought nothing to the relevant environment in which they stood. International law remained a primitive status, where state practice and state intention played the decisive role and the pace of evolution of customary international law was rather slow.

The turning point might be the advisory opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (“*Namibia Advisory Opinion*”) in 1971, where the ICJ determined the interpretation of the South West Africa Mandate of 1920.<sup>172</sup> However, the Court struggled to get to that point. Before that advisory opinion, in 1966 the ICJ looked at the obligations of South Africa towards the U.N. in South West Africa in the *South West Africa Cases*.<sup>173</sup> In answering whether apartheid violates the mandate, the Court made the following highly controversial statement:

[T]he Court must place itself at the point in time when the mandates system was being instituted, and when the instruments of mandate

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169. See *Rights of Nationals of United States of America in Morocco*, 1952 I.C.J. Rep. at 193.

170. *Id.*

171. *Id.*

172. *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (S. W. Afr.), Advisory Opinion, 1971 I.C.J. Rep. 16 (June 21).

173. *South West African Cases* (Eth. v. S. Afr.; Liberia v. S. Afr.), Second Phase, Judgment, 1966 I.C.J. Rep. 6 (July 18).

were being framed. The Court must have regard to the situation as it was at that time, which was the critical one, and to the intentions of those concerned as they appear to have existed, or are reasonably inferred, in the light of that situation.<sup>174</sup>

The Court made two mistakes. First, although the mandate was made in 1920, the dispute at hand was new and crystallized at some time after WWII, which is the true meaning of critical date. Second, unlike the situation in *North Atlantic Coast Fisheries Arbitration* or *Rights of Nationals of United States of America in Morocco*, here, international law as a whole went through a major reform after WWII, in particular, the broad recognition of the right of self-determination in the tide of decolonization.<sup>175</sup> Five years later, in an advisory opinion requested by the U.N. Security Council on “what are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970),”<sup>176</sup> the Court rejected the approach in the previous case, and made the following significant statement:

Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—“the strenuous conditions of the modern world” and “the well-being and development” of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the “sacred trust.” The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments

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174. *Id.* at 23.

175. U.N. Charter art. 1(2).

176. S.C. Res. 284, ¶ 1 (July 29, 1970).

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leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.<sup>177</sup>

The *Namibia Advisory Opinion* provides a classic example of evolutionary interpretation. Not only in the sense that it might be the first case to give a concrete elaboration on that point, but also because the Court attached significance to the universality of the international legal system as a whole. That acknowledgement provided a logical precondition of the existence of such a system and the existence of certain interactions among legal instruments within the system. This explains why direct and indirect conflict of law should be considered—for the uniformity and consistency of the international legal system as a whole.

Indeed, the question of priority between customary international law and treaty law is rather complicated.<sup>178</sup> Although there are general rules like *lex posterior derogat priori*, and *lex specialis derogat legi generali*,<sup>179</sup> international law is not a natural science. The application and interpretation of law is based more on the balance of the value of stability and evolution of law than on any strict formula. After the *Namibia Advisory Opinion*, there was a trend in case law that went further in the approach of evolutionary interpretation. In interpreting treaty law, international courts and tribunals tended to attach more significance to the evolution of relevant international law as a whole and, consequently, acted much more progressively in developing international law.<sup>180</sup> Moreover, the intertemporal concern itself presented a major issue in the drafting of the VCLT, including the interpretation rule in Article 31. The result was, instead of interpreting

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177. Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. Rep. at 53.

178. MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES (1985).

179. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 (July 8); Int'l Law Comm'n, Rep. of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, U.N. DOC. A/CN.4/L.682, ¶ 30 (Apr. 13, 2006); OPPENHEIM, *supra* note 27, at 1270, 1280.

180. See, e.g., Dispute Regarding Navigational and Related Rights, 2009 I.C.J. Rep. 213; Aegean Sea Continental Shelf, 1978 I.C.J. Rep. at 3; Right of Passage over India Territory, 1960 I.C.J. Rep. at 6.



a treaty with the relevant international law that existed at the time of conclusion of the treaty, the VCLT Commission decided to officially embrace the evolutionary interpretation approach.<sup>181</sup> Many scholars made the same conclusion from analyzing the VCLT's legislative history.<sup>182</sup>

Case law also shows consistency in evolutionary interpretation. In *Aegean Sea Continental Shelf*, the ICJ held the expression “disputes relating to the territorial status of Greece” in the treaty should be interpreted consistent with the rules of current international law to include the newly created regime, such as the continental shelf, and not with the rules that existed when the treaty was concluded in 1931.<sup>183</sup> In *Dispute Regarding Navigational and Related Rights*, the ICJ explicitly defined evolutionary interpretation as:

Situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used—or some of them—a meaning or content capable of evolving, not one

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181. See VCLT, *supra* note 31, art. 31(3)(c). There is big change in the methodology of interpretation, from initial intention to evolutionary interpretation. This can be seen in the Yearbook of the International Law Commission: “In the light of the rules of general international law in force at the time of its conclusion.” *Report of the International Law Commission to the General Assembly*, 19 U.N. GAOR Supp. No. 9, at 1, U.N. Doc. A/5809 (1964), reprinted in [1964] 2 Y.B. Int'l L. Comm'n 173, U.N. Doc. A/CN.4/SER.A/1964/Add.1, at 199. It also “failed to deal with the problem of the effect of an evolution of the law on the interpretation of legal terms in a treaty and was therefore inadequate.” *Report of the International Law Commission to the General Assembly*, 19 U.N. GAOR Supp. No. 9, at 1, U.N. Doc. A/5809 (1966), reprinted in [1966] 2 Y.B. INT'L L. COMM'N 169, U.N. Doc. A/CN.4/SER.A/1966/Add.1, at 222. And:

[I]n any event, the relevance of rules of international law for the interpretation of treaties in any given case was dependent on the intentions of the parties, and that to attempt to formulate a rule covering comprehensively the temporal element would present difficulties. It further considered that correct application of the temporal element would normally be indicated by interpretation of the term in good faith.

*Id.*

182. See, e.g., ELIAS, *supra* note 4; GREIG, *supra* note 32; Higgins, *supra* note 32; Rosenne, *supra* note 32.

183. *Aegean Sea Continental Shelf*, 1978 I.C.J. Rep. at 77–80.

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fixed once and for all, so as to make allowance for, among other things, developments in international law.<sup>184</sup>

Additionally, in *Pulp Mills on the River Uruguay* in 2010, the ICJ determined whether the obligation of an environmental impact assessment—a newly created customary international law—could be interpreted from the bilateral agreement that came into force in 1976.<sup>185</sup> Again, the Court followed the evolutionary approach to incorporate the newly created obligation as binding on the parties.<sup>186</sup>

Therefore, there is an indirect conflict of law in treaty interpretation. The conflict lies between what customary international law was at the time of the conclusion of treaties, and customary international law at the time of a dispute to which interpretation is required. This situation is called an indirect conflict because it is not the rules governing a certain legal situation that conflict (direct conflict), but rather the sources of determining the exact meaning of the rules that conflict. Accordingly, the basic rule of intertemporal law, namely “a juridical issue shall be decided in the light of the law contemporary with it (Rule 3)” applies here as well, which usually results in evolutionary interpretation. Nevertheless, as indicated above, this sort of conflict is *more of a balance than a formula of single choice*. To an extent, it reflects one of the fundamental rationales of law: the *antinomy* of stability and evolution.

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184. Dispute Regarding Navigational and Related Rights, 2009 I.C.J. Rep. at 242.

185. See *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Rep. 14 (Apr. 20). The Court held:

In this sense, the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.

*Id.* ¶ 204.

186. *Id.*

*b. The rationale behind the antinomy of stability and evolution*

Domestic and international law are, by nature, related to the values of security, expectation, stability, and predictability. Indeed, the nature of law is to prescribe future conduct<sup>187</sup> and, accordingly, to avoid uncertainty, unpredictability, and arbitrariness of the consequence of certain conduct. However, though it may sound self-contradictory, the consideration of stability is not the only value behind law. Instead, stability's opposite value, evolution, is also significant to the legal system; both in the sense that there will always be undiscovered or unregulated areas, and in the sense that law may either develop gradually over time or evolve rapidly in response to certain historic events.<sup>188</sup> In a word, one of the rationales behind intertemporal law is the *antinomy*<sup>189</sup> of stability and evolution of law.

Such *antinomy* can be further explained through significant findings in evolutionary interpretation. Where "situations in which the parties' intent upon the conclusion of the treaty was, or may be presumed to have been . . . a meaning or content *capable* of evolving, not one fixed once and for all, so as to make *allowance* for, among other things, developments in international law."<sup>190</sup> As commonly understood, treaties are primarily created to allow parties to work through uncertain legal relations, subsequent conduct, and possible consequences and events. However, the words "capable" and "allowance" precisely embrace both the pursuit of stability and the realization of the inevitable existence of the uncertainty in future developments, as well as the consequent possibility of evolution. This is a necessary response to the inherent limits of law. There is discordance between the limited recognition of the contemporary

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187. Hans Kelsen, *The Rule Against Ex Post Facto Law and the Prosecution of the Axis War Criminals*, 2 JUDGE ADVOC. J. 3, 8 (1945).

188. This is to be further discussed in the following "non-retroaction" part concerning the development of international criminal law in the thesis.

189. *Antinomy* means the equally rational but contradictory results of applying two laws. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* (John M. D. Meiklejohn trans., 2004); see also SADIQ J. AL-AZM, *THE ORIGINS OF KANT'S ARGUMENT IN THE ANTINOMIES* (1972); Michelle Grier, *The Logic of Illusion and the Antinomies*, in *A COMPANION TO KANT* 192–206 (Graham Bird ed., 2006).

190. *Dispute Regarding Navigational and Related Rights*, 2009 I.C.J. Rep. at 242.

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situation and the unlimited possibility of changes to a situation on the same issue through the passage of time. The *antinomy* of stability and evolution must be considered together with other things for it is one of the rationales behind intertemporal law.<sup>191</sup>

*Antinomy* is clearly reflected in international intertemporal law, especially in evolutionary interpretation. It can also be found in domestic or regional systems, particularly in the findings of legal custom and judicial decisions. For instance, the U.K. successfully abolished the marital defense of rape through case law, rather than through legislation.<sup>192</sup> In *C.R. v. U.K.*, before the European Court of Human Rights, for the first time a man was held to have attempted to rape his wife.<sup>193</sup> This was not based on any legislation, but on changes in legal custom and societal attitudes, where the evolution had reached a level to trigger the reasonable foreseeability of such a development of law.<sup>194</sup>

Many leading authors cast doubt on such judicial decisions. Dworkin, for example, indicated that judicial lawmaking is *ex post facto* law-making, which is unjust.<sup>195</sup> However, Kelsen wrote the rule against retroaction applies only to legislation, not to custom or judicial decisions, and any rule of custom applies retroactively in its first case.<sup>196</sup> Nevertheless, if such judicial decisions are to be understood in this way, then every vital step in the development of law will be deemed as unjust *ex post facto* law-making (i.e. the abolishment of slavery, racial discrimination). However, one of the rationales behind intertemporal law, the *antinomy* of stability and evolution, helps explain how the law as a whole develops over time in a delicate balance between the expectation of stability and the necessity of certain evolution. It is indeed as Crawford said:

International law [as] a system . . . deal[s] with international persons, events, and transactions existing in time . . . . If one is concerned to

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191. This is to be discussed in the following “non-retroaction” part in the article.

192. *C.R. v U.K.*, Judgment, Case No. 48/1994/495/577, Eur. Ct. H.R. at 34, 38 (Oct. 27, 1995).

193. *Id.*

194. *Id.*

195. HART, *supra* note 41, at 276.

196. Kelsen, *supra* note 187, at 9. Kelsen does not believe that the custom or judicial decision is discovery of preexisting law other than creation of new law.

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resolve a problem arising at that time, one applies the international law of that time . . . . If one is concerned to resolve a problem arising after that time, one asks how it is that international law may have changed since then, and whether the change makes any difference.<sup>197</sup>

Therefore a rule that can be concluded is:

*Rule 4: One of the rationales behind intertemporal law is the antinomy of stability and the evolution of law*

### *C. Negative Conflict*

#### *1. Ratione Temporis*

The principle of non-retroaction of treaties constitutes one of the fundamental principles in international law, as reflected in Article 28 of the VCLT.<sup>198</sup> Such principle not only applies to substantive issues, but also to procedural issues like jurisdiction. The ILC indicated that “when a jurisdictional clause is attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroaction principle may operate to limit *ratione temporis* the application of the jurisdictional clause.”<sup>199</sup>

The principle of *ratione temporis* is rarely mentioned with intertemporal law. Through the temporal application of intertemporal law, we can conclude that *ratione temporis* is indeed the temporal application of jurisdiction and, therefore, constitutes an essential part of intertemporal law. Accordingly, the basic rule of intertemporal law also applies here. When a dispute occurs after the establishment of the jurisdiction, the dispute would be admissible under the rule of *ratione temporis*.

In *Phosphates in Morocco*, the PCIJ looked at Italian citizens’ rights to explore phosphates in Morocco, which was a protectorate of

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197. CRAWFORD, *supra* note 3, at 69.

198. VCLT, *supra* note 31, art. 28.

Unless a different intention appears from the treaty or is otherwise established, its provisions 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 the entry into force of the treaty with respect to that party.

*Id.*

199. Int’l Law Comm’n, Draft Articles on the Law of Treaties with Commentaries, 2 Y.B. INT’L L. COMM’N 187, art. 24(2) (1966).

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France at the time.<sup>200</sup> In 1931, France accepted the PCIJ's compulsory jurisdiction, explicitly emphasizing the principle of *ratione temporis* and alleged only to accept the disputes arising after the declaration of such acceptance.<sup>201</sup> The Court found that the main facts that constituted the real cause of the dispute occurred before 1931, especially Morocco's rejection of the Italian citizen's application for recognition. Consequently, the case was held as inadmissible due to the lack of *ratione temporis*.<sup>202</sup>

In *Electricity Company of Sofia and Bulgaria*, there was a previous arbitral award between Belgium and Bulgaria.<sup>203</sup> Bulgaria argued that the Court lacked *ratione temporis* because the dispute was formed before that arbitral settlement and was thus formed before the parties' recognition of the PCIJ's compulsory jurisdiction.<sup>204</sup> However, the Court found that the dispute indeed arose after the arbitral award and the declaration of compulsory jurisdiction. The Court explained that:

A situation or fact in regard to which a dispute is said to have arisen must be the real cause of the dispute. In the present case it is the subsequent acts with which the Belgian Government reproaches the Bulgarian authorities . . . which in itself has never been disputed—which form the centre point of the argument . . . .<sup>205</sup>

Hence, jurisdiction was confirmed. In 1960, *Right of Passage over India Territory* also discussed the principle of *ratione temporis*, following the previous two cases' approach.<sup>206</sup>

In sum, *ratione temporis* indeed constitutes a vital part of international intertemporal law as the procedural negative conflict of law in respect of time, where the basic rule of intertemporal law applies.

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200. See generally *Phosphates in Morocco*, 1933 P.C.I.J. (Seri. A/B) No.74.

201. *Id.* at 22.

202. *Id.* at 27–29.

203. See *Electricity Company of Sofia and Bulgaria*, 1939 P.C.I.J. (Seri. A/B) No. 77.

204. *Id.* at 83.

205. *Id.*

206. See *Right of Passage over India Territory*, 1960 I.C.J. Rep. at 6.

## 2. *Non-retroaction*

### a. *General principle of non-retroaction*

Long before the discovery of international intertemporal law, the principle of non-retroaction of law was established on the domestic level. The first case to highlight this principle might be the Timokrates and the Athenian Ambassadors case in Ancient Greece, or Eastern Roman Emperor Theodosius II's statement, and the Justinian Code.<sup>207</sup> The principle received broad acceptance in Canon Law and was further incorporated into common law through the medium of Bracton and Coke.<sup>208</sup> In 1869, Savigny established two rules concerning non-retroaction of law: (1) “[n]o retroactive effect is to be attributed to new laws;”<sup>209</sup> and (2) “[n]ew laws leave acquired rights unaffected.”<sup>210</sup> He further concluded the principle “ha[d] been transferred into the chief modern code” already by the middle of nineteenth century.<sup>211</sup> Indeed, as Blum indicated, “it is a rule generally recognized by civilized nations that in principle no retroactive application should be given to any legal norm.”<sup>212</sup>

Hans Kelsen explained that such rule established by Roman jurisprudence, in the process of its spread and development, has been replaced by a doctrine of natural law. In such case, the nature of law is prescribing future conduct, while from the perspective of the past it is neither logically nor morally possible.<sup>213</sup> Kelsen clarified and elaborated by explaining the operation of natural law does not rely on permission for contrary conduct—as positive law does—but instead relies on reasons evident to human logic; and consequently, a rule

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207. Savigny quoted the sentences in his book without providing any citation. “*Leges et constitutiones futuris certum dare est formam negotiis, non ad facta preterita revocari, nisi nominatim et de preterito tempore et adhuc pendentibus negotiis cautum sit.*” SAVIGNY, *supra* note 1, at 291.

208. Smead, *supra* note 12, at 776.

209. SAVIGNY, *supra* note 1, at 280.

210. *Id.*

211. *Id.* at 295.

212. BLUM, *supra* note 10, at 194.

213. *See* Kelsen, *supra* note 188, at 8.

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prescribing past conduct is beyond such reason and becomes meaningless.<sup>214</sup>

However, this understanding may be defective in two ways. First, the non-retroaction of law doctrine, based on its natural law consideration, originates not only from the logic of human beings, but also from the sense of justice against the arbitrary restriction and even sanctions by the authority towards individuals. This origination also explains why great masters of political philosophy have addressed this doctrine. For example, Thomas Hobbes and John Rawls emphasized the non-retroactive nature of law (*nova constitutio futuris formam imponere debet, non praeteritis*) and its vital position in legal constructions, as well as in society.<sup>215</sup>

Second, Kelsen's view that "[t]he postulate not to enact retroactive laws cannot be derived from the nature of law in the sense of legal positivism"<sup>216</sup> might be wrong since the non-retroaction of law is also significant to legal positivism. Against Austin's theory of law as the command of sovereignty backed by the threat of sanction, Hart describes the law as a union of primary law rules and secondary law rules, and the general efficacy comes from such union, especially from the rule of recognition.<sup>217</sup> Thus, such union certainly requires stringent legal logic and internal consistency, in which the rule governing the temporal application of law plays an important part, as a rule of recognition does for authority and efficacy. As analyzed at the very beginning of this Article, one of the aims of the Article is to respond to Hart's comment that international law is not real law due to the lack of secondary rules.<sup>218</sup> The rule of intertemporal law, here as the rule of non-retroaction of law, is both a requirement under natural law theory—in the name of justice against arbitrariness—and a requirement under positive law theory—for the sake of legal logic against internal uncertainty and inconsistency.

Under modern international law, the VCLT explicitly established that a treaty does not have retroactive effect unless a different intention

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214. *Id.*

215. See FULLER, *supra* note 34; HOBBS, *supra* note 34; RAWLS, *supra* note 34.

216. Kelsen, *supra* note 187, at 8; see also KELSEN, *supra* note 16.

217. See generally HART, *supra* note 41 (especially Chapter V).

218. *Id.* at 214.



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appears.<sup>219</sup> Although the expression of the rule may sound flexible, and so far despite international criminal law treaties and international human rights law treaties, the clause of non-retroaction can hardly be found in the context of treaties.<sup>220</sup> However, case law shows consistency on the general application of the principle of non-retroaction of international law. For instance, in 1935, when the Council of the League of Nations asked the PCIJ for an advisory opinion on whether a decree was consistent with the constitution of Danzig, the Court held the decree was inconsistent with the constitution due to its retroactive effect. The effects showed that it was in virtue of a law to make it possible for the individual to know, beforehand, the consequence of his conduct.<sup>221</sup> Thus, the principle of non-retroaction was confirmed by the PCIJ.

*b. Possible derogation? From international criminal law to international human rights law*

In the same year of the PCIJ's Advisory Opinion for Danzig, a different story unfolded in Nazi Germany. A retroactive penal law was made on June 28, 1935, establishing that:

Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of the penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act it shall be punished under that law which most closely fits, in regards to fundamental conception.<sup>222</sup>

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219. VCLT, *supra* note 31, art. 28.

220. For example, neither the UN Charter, ICJ Statute, nor the United Nations Convention on the Law of the Sea ("UNCLOS") contains a clause of non-retroaction. The international criminal treaties and international human rights law treaties will be further discussed in the next section.

221. Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935 P.C.I.J. (Seri. A/B) No. 65, at 57 (Dec. 4).

222. Gesetz zur Änderung des Strafgesetzbuches [Law to Amend the Penal Code], June 28, 1935, RGL at 839 (Ger.).

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It might be hard to comprehend to what extent such kind of legislation contributed to the morally “upside-down system”<sup>223</sup> of the Nazi regime and the subsequent atrocities in WWII, but the atrocities indeed ended with a historic debate on legal retroaction. Although there was no explicit conclusion made on the core issue of legal retroaction, both the Nuremberg Trials and Tokyo Trials were justified in two ways. First, the principle of non-retroaction was not absolute, and there was space for derogation. Second, all the international crimes were found in customary international law and, therefore, were not *ex post facto* law.

Above all, the possible derogation from the principle of non-retroaction was established. At the very beginning, the issue of legal retroaction was at the heart of the debate at the London Conference, although no consensus has ever been reached. Later, the famous statement was made in *United States v. Göring* that “the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general, a principle of justice.”<sup>224</sup> Cassese and Gallant clarified in the French version of the Judgment that the word “justice” was absent,<sup>225</sup> which may have led to a more derogatory effect. Nevertheless, such a statement might represent the major view in the Nuremberg Trials. Later, the Tokyo Trials followed this view,<sup>226</sup> particularly when Dutch

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223. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 291–92 (1973) (Arendt described this kind of situation as an upside-down system where “law becomes crime and crime becomes law”).

224. *United States v. Göring* (Judgment), 1 International Military Tribunal: Trial of the Major War Criminals 171, 219 (1946).

225. Henri Felix Auguste Donnedieu de Vabres, *Le procès de Nuremberg devant les principes modernes du droit pénal international*, 70 (I) *Recueil des cours* 477, 503 (1947); see also Antonio Cassese, *Crimes Against Humanity: Comments on Some Problematical Aspects*, in *THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY: L’ORDRE JURIDIQUE INTERNATIONAL, UN SYSTÈME EN QUÊTE D’ÉQUITÉ ET D’UNIVERSALITÉ: LIBER AMICORUM GEORGES ABI-SAAB* 429, 433–35 (Laurence Boisson de Chazournes & Vera Gowlland-Debbas eds., 2001); KENNETH S. GALLANT, *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW* 2 (2008).

226. However, unlike Nuremberg Trial, the Tokyo Trial never reached an internal consensus on the issue of legality and ended up with one joint judgment with three dissenting opinions and two separate opinions.

Justice Röling agreed with the French version.<sup>227</sup> Discussions in the Tokyo Trials took this idea a step further. For example, Philippine Justice Jaranilla stated that *nullum crimen sine lege* did not apply to international law and that retroaction was permissible.<sup>228</sup> Justice Röling indicated that the non-retroaction as “a principle of justice” was too natural of a law and that the cases here should be settled according to positive law, namely the crimes indicated in the International Military Tribunal for the Far East (the Tokyo Charter).<sup>229</sup>

It is worth noting that while the Statement in the Nuremberg Trials theoretically provided possible derogation from the principle of non-retroaction, the judgment was actually made on the findings of customary international law with three special but highly controversial techniques. First, it was left ambiguous whether the Nuremberg Trials were based on the legislative Charter;<sup>230</sup> the authority of the occupied power;<sup>231</sup> or on international law that was merely described in the Charter, and could be decided by judges during the judicial process.<sup>232</sup> Second, each indictment attempted to establish a violation of both the Charter and substantive international law at the time of the crime.<sup>233</sup> Although it was debated whether waging a war of aggression was an

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227. The Tokyo War Crimes Trial, Judgment, 44–45 (1948) (Röling, J., concurring), <http://www.legal-tools.org/doc/462134/>.

228. The Tokyo War Crimes Trial, Judgment, 18–19 (1948) (Jaranilla, J., concurring), <https://www.legal-tools.org/en/doc/2393ff/>.

229. *Id.* at 4–5.

230. The Chapeau of Article 6 of the Charter of the IMT is quite vague:

The Tribunal established by the Agreement referred to in Art. 1 hereof for the trial and punishment of the major war criminals of the European Axis shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes . . . .

*See* Charter of the International Military Tribunal—Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(a), Aug. 8, 1945, 58 Stat. 1544, EAS No. 472, 82 U.N.T.S. 280.

231. Indeed, it could be found in Judgment that Nuremberg Tribunal itself, to some extent acknowledged its sovereign right of legislation as occupied powers. *See* United States v. Göring, *supra* note 224, at 173–74, 218.

232. Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, 378 (London 1945) (He argued strongly: “We must leave the law to the judges to decide.”).

233. GALLANT, *supra* note 225, at 91.

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international crime,<sup>234</sup> there was major support for the war crime.<sup>235</sup> Lord Wright, as an advocate of the Charter, argued all the crimes in Nuremberg were crimes under international law at that time.<sup>236</sup> Of course, there were strong opponents against the Charter, including Otto Pannenbecker for the defendant Wilhelm Frick,<sup>237</sup> and Justice Pal, the Indian Justice in the Tokyo Trials.<sup>238</sup> Third, customary international law tended to be justified in a softened way to keep close consistency with general international law. Justice Bernard's view that the crimes were based on natural law and that natural law was not a retroactive law,<sup>239</sup> was not accepted broadly because of its hard challenge on the then normal understanding of international law. Instead, Kelsen's explanation of international crimes as punishment for non-criminal legal violations or severe moral wrongs to humankind as a whole, might be more persuasive.<sup>240</sup>

Both the methodology and findings in the post-WWII trials received many critiques. Today, after years of exploration and revision, the principle of non-retroaction has gradually become "not only a

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234. *See generally* Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, 378 (London 1945).

235. *See generally id.*

236. Lord Wright, *War Crimes under International Law*, 62 L.Q. REV. 40, 41 (1946).

237. Oral Argument of Pannenbecker, Nuremberg Trial Proceeding Volume 18, 164, Yale L. Sch. Avalon Project, at 164 (July 15, 1946), <http://avalon.law.yale.edu/imt/07-15-46.asp>.

238. Justice Pal wrote a dissenting judgment over 1000 pages and comprehensively argued against the legitimacy, legality, substantive law and the procedure rules in Tokyo Trial, including his strong view against legal retroaction and the application of natural law as source of international law. *See INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST: DISSENTIENT JUDGMENT OF JUSTICE PAL* (1999).

239. The Tokyo War Crimes Trial, Judgment, 10 (1948) (Bernard, J., dissenting), <https://www.legal-tools.org/en/doc/d46836/>. He said "[t]here is no doubt in my mind that such a war is and always has been a crime in the eyes of reason and universal conscience, expressions of natural law upon which an international tribunal can and must base itself to judge the conduct of the accused tendered to it." ROBERT CRYER & NEIL BOISTER, *DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT, AND JUDGEMENTS* 670 (1st ed. 2008).

240. *See* Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT'L L.Q. 153, 165-66 (1947) (However, Kelsen himself deemed such finding an exception to the rule against *ex post facto* law).

principle of justice, [but] . . . embodies an internationally recognized human right.”<sup>241</sup> On December 10, 1947, the U.N. General Assembly unanimously adopted Article 11(2) of the Universal Declaration of Human Rights. Article 11(2) stipulates, “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed . . . .”<sup>242</sup> This principle was later unanimously incorporated into Article 15 of the International Covenant on Civil and Political Rights.<sup>243</sup> It was also utilized in the Third<sup>244</sup> and Fourth<sup>245</sup> Geneva Conventions, Additional Protocols I and II of 1977,<sup>246</sup> and the Convention on the Rights of the Child.<sup>247</sup> Moreover, on a regional level, the principle was emphasized as a vital human right and was incorporated in the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>248</sup> the American Convention on Human Rights,<sup>249</sup> the African Charter of Human and People’s Rights,<sup>250</sup> and the Arab Charter on Human Rights.<sup>251</sup>

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241. GALLANT, *supra* note 225, at 3.

242. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. Doc. A/810 (Dec. 10, 1948).

243. International Covenant on Civil and Political Rights [ICCPR] art. 15, Dec. 16, 1966, 999 U.N.T.S. 171.

244. Geneva Convention Relative to the Treatment of Prisoners of War art. 65, Aug. 12, 1949, 75 U.N.T.S. 135.

245. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 65, Aug. 12, 1949, 75 U.N.T.S. 287.

246. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75(4)(c), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 6(2)(c), June 8, 1977, 1125 U.N.T.S. 609.

247. G.A. Res 44/49, Convention on the Rights of the Child, November, art. 40(2)(a) (Nov. 20, 1980).

248. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, Nov. 4, 1950, 312 U.N.T.S. 221.

249. American Convention on Human Rights arts. 7–9, Nov. 22, 1969, 1114 U.N.T.S. 123.

250. African Charter of Human and People’s Right art. 7(2), June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5.

251. Arab Charter on Human Rights art. 15, May 22, 2004, reprinted in 12 INT’L HUM. RTS. REP. 893 (2005).

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In summary, the principle of non-retroaction, as the rule of negative conflict of law in respect of time, has been universally acknowledged through treaties, customary international law, and case law. However, as Savigny predicted, the doctrine of non-retroaction is not without exception.<sup>252</sup> For the historic post-WWII Trials, Kelsen provided a plausible explanation. Kelsen believed the non-retroaction principle could be put in competition with another principle of justice and should be restricted by another. In the case of the post-WWII Trials, that competitor was the significance and necessity to “bring the war criminals to justice than to respect, in their trial, the rule against *ex post facto* law, which has merely a relative value . . . .”<sup>253</sup>

The *antinomy* of stability and evolution can also be used to understand the relationship between the post-WWII findings and the principle of non-retroaction. This approach may provide a method of understanding the findings in the post-WWII Trials as within the system of intertemporal law. If we recall *C.R. v. U.K.*, where the European Court of Human Rights determined a rule of law was based not on legislation, but on legal custom changes and societal attitudes, the evolution had reached a level triggering the reasonable foreseeability of such development of law.<sup>254</sup> The same results can be found in the Nuremberg and Tokyo Trials. Although the decisions might be deemed as judicial criminalization of the non-criminal illegal actions or severely morally wrong actions, the decisions were made in the special context of WWII, during which the atrocities had been accumulated so much and the justice, reconciliation, and legal remedies were extremely desired by all human beings, all of which were far beyond the expectation of the preexisting legal system. Under such circumstances, it was not stability that was to be expected, but the legal system’s capability to “make allowance for”<sup>255</sup> evolution of law in response to exceptional historic events.<sup>256</sup>

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252. See SAVIGNY, *supra* note 1.

253. Kelsen, *supra* note 187, at 11.

254. *C.R. v U.K.*, Judgment, Case No. 48/1994/495/577, Eur. Ct. H.R. at 34, 38 (Oct. 27, 1995).

255. Dispute Regarding Navigational and Related Rights, 2009 I.C.J. Rep. at 242.

256. It was this evolution that Savigny used to justify abolitionism. “The transition from one of these conditions into the other, in consequence of the very gradual operation of Christian morals and circumstances, has been effected so slowly

## CONCLUSION

Below is a summary of the rules that can be derived from the analysis in this Article. The rules are listed in the order in which they were addressed.

Rule 1: International intertemporal law is the temporal application of international law or the conflict of international law in respect of time. From the perspective of a single international law, intertemporal law might be deemed as the temporal application of law. From the perspective of the international legal system as a whole, it could be deemed as the conflict of laws in respect of time. If one observes from a certain point of time in the history of international disputes, it might be described as the choice of law at that certain point or period of time.

Rule 1.1: International intertemporal law is a secondary law rule and the settlement of disputes depends on the primary law rules it is based on. Therefore, international intertemporal law itself does not create rights or responsibilities among states, but instead provides a settlement of temporal conflicts of laws based on the rights and responsibilities created in different areas of primary law rules. Such characteristics of intertemporal law explain why the approaches differ substantially, *prima facie*, among different kinds of dispute settlements.

Rule 2: International intertemporal law and critical date are separate concepts. Critical date is not an internal or subsidiary concept of intertemporal law. Although usually intertwined, critical date does not logically affiliate with intertemporal law. The two concepts share the same concerns of the development of rights and disputes on the dimension of time. They are separate and independent rules in the sense that the precondition of critical date is the presumable existence of a rather mature legal system where the evolution of rights and disputes precisely follows certain modes, for example, an inchoate situation to a consolidated situation. However, intertemporal law mainly focuses on the application of law on the dimension of time.

Rule 2.1: Only part of international intertemporal law issues can be settled by, but not necessarily, critical date. The two may overlap when the changing modes of the underlying rights are capable of triggering the issue of critical date; otherwise, the issue of intertemporal law can

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and imperceptibly, that we cannot fix with certainty the epoch of history at which the former state of things ceased.” SAVIGNY, *supra* note 1, at 371.

be solved even when the mode of evolution is uncertain or unknown. In other words, the settlement of an intertemporal law problem does not necessarily rely on the discernment of critical date. Nor does a critical date issue only arise in the context of intertemporal law. Usually, critical date is utilized when settling a direct positive conflict of law in respect of time, other than an indirect positive conflict (treaty interpretation) or negative conflict (non-retroaction and *ratione temporis*).

Rule 2.2: Critical date is a secondary law rule based on the underlying development of rights or disputes. There are three common ways that critical date is utilized: (1) critical date as the concept related to the consolidation/solidification of a certain right in order to exclude the subsequent efforts to change that right; (2) critical date as the concept related to the crystallization of certain disputes in international dispute settlement to exclude the subsequent facts; and (3) critical date as the concept coincided with the time of the change of law and, consequently, as the concept used interchangeably with intertemporal law.

Rule 3: The basic rule of international intertemporal law is that a juridical issue shall be decided in light of the law contemporary with it. Intertemporal law not only refers to the existence of the legal issue of temporal application, but also to the rule on how to decide temporal application. The system of intertemporal law can be divided into two major categories and four sub-categories. The two major categories are: positive conflict and negative conflict of international law. For positive conflicts, there are two sub-categories: (a) direct conflict of law, with territorial disputes as a classic example; and (b) indirect conflict of law, namely treaty interpretation. For negative conflicts, there are also two sub-categories: (a) the non-retroaction, which is substantive; and (b) *ratione temporis*, which is procedural.

Rule 4: One of the rationales behind intertemporal law is the *antinomy* of stability and evolution of law. Domestic and international law are, by nature, related to the values of security, expectation, stability, and predictability. Indeed, the nature of law is to prescribe future conduct and, accordingly, to avoid uncertainty, unpredictability, and arbitrariness of the consequence of certain conduct. However, although it may sound self-contradictory, the consideration of stability is not the only value behind law. Instead, stability's opposite value, evolution, is also significant to the legal system; both in the sense that



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there will always be undiscovered or unregulated areas, and in the sense that law may either develop gradually over time or evolve rapidly in response to certain historic events. This is a necessary response to the inherent limits of law. There is discordance between the limited recognition of the contemporary situation and the unlimited possibility of an evolution of the same issue with the passage of time. The *antinomy* of stability and evolution must be considered together with other factors for it is one of the rationales behind intertemporal law.