INTERNATIONAL LEGAL ISSUES OF TERRITORY

DOI: 10.24833 / 0869-0049-2019-3-47-58

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Received 14 August 2019
Approved 26 September 2019

THE SOUTHERN KURIL DEADLOCK: EFFECTIVENESS V. PROTEST

INTRODUCTION. *For 74 years, Russia and Japan have both claimed legal title over the four Southern Kuril Islands, paralysed by their controversy from making a post-WWII peace treaty and realising the full potential of their bilateral relations. This entire time, the islands have been governed in all aspects of their legal, political, and economic life, by the Russian side. This entire time, Japan has made diplomatic protests contesting the legality of Russian jurisdiction. With no international authority to determine which of the countries prevails, one wonders if the effective Russian control has not or should not have, by now, overcome Japanese protests – almost the only tool international law provides for states to prevent another's title.*

MATERIALS AND METHODS. *The international legal principles and doctrines at play are the overarching notions of effectiveness and stability, governing the resolution of any territorial disputes, the related doctrines of prescription and acquiescence, and the maxim ex injuria jus non oritur that aims to preclude territorial change if it originates in illegality – these are studied on the basis of contemporary works on the international law of territory and the general scientific methods of analysis, synthesis, description, and deduction.*

RESEARCH RESULTS. *Effectiveness and stability lie at the heart of territorial change. Their derivative doctrines of prescription and acquiescence serve as tools for legitimizing title of dubious origins through long, peaceful and effective possession of territory absent protests from the former sovereign (and subject to the self-determination of the territory's inhabitants), and, possibly, with the help of recognition by third states. Whether the opposing notion of ex injuria jus non oritur is an international legal principle remains debatable. The international law, however, in the politically sensitive matters of territory is too meek to provide a definite answer to when these concepts clash within the reality such as that of the Southern Kuril dispute.*

DISCUSSION AND CONCLUSIONS. *In weighing the Russian effective control over the islands against Japan's demands that the territories be returned to Japan, the key question is: does effective possession override protests, given the duration and quality of such effectiveness and such protests? It is argued here that such an answer would benefit the aim of stability sought by the international law and that in the situation at hand it should be a carefully qualified, but emphatic yes.*

KEYWORDS: *Kuril Islands, territorial disputes, Russo-Japanese relations, international law of territory, effectiveness, prescription, acquiescence, diplomatic protest, ex injuria jus non oritur, recognition*

FOR CITATION: Neverova E.V. The Southern Kuril Deadlock: effectiveness v. protest. – *Moscow Journal of International Law.* 2019. No. 3. P. 47–58. DOI: 10.24833/0869-0049-2019-3-47-58

МЕЖДУНАРОДНО-ПРАВОВЫЕ ВОПРОСЫ ТЕРРИТОРИИ

DOI: 10.24833 / 0869-0049-2019-3-6-47-58

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Поступила в редакцию: 14.08.2019
Принята к публикации: 26.09.2019

ЮЖНО-КУРИЛЬСКИЙ ТУПИК: ЭФФЕКТИВНОСТЬ И ПРОТЕСТЫ

ВВЕДЕНИЕ. *Вот уже 74 года Россия и Япония заявляют правовые притязания на титул над четырьмя южными Курильскими островами. Эти разногласия не дают двум государствам заключить мирный договор по итогам Второй мировой войны и реализовать полный потенциал их двусторонних отношений. В течение всего этого периода острова во всех правовых, политических и экономических аспектах их жизни контролировались российской стороной, тогда как Япония заявляла дипломатические протесты, оспаривая законность российской юрисдикции. В международном праве нет органа, который бы мог определить, какая из сторон права. Это заставляет задаваться вопросом: преодолел ли или должен ли был преодолеть российский эффективный контроль к настоящему времени японские протесты, практически единственный инструмент, который международное право предусматривает для препятствования формированию титула другого государства?*

МАТЕРИАЛЫ И МЕТОДЫ. *Применимыми международно-правовыми принципами и доктринами являются базовые понятия эффективности и стабильности, которые регулируют разрешение территориальных споров, связанные с ними доктрины приобретательской давности и молчаливого признания, а также максима ex injuria jus non oritur, направленная на исключение территориальных изменений, если они основаны на нарушении. Все эти принципы и доктрины исследуются на основе современных работ по международно-правовому регулированию территории с применением общенаучных методов анализа, синтеза, описания и дедукции.*

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. *Эффективность и стабильность лежат в основе территориальных изменений. Производные от них доктрины приобретательской давности и молчаливого признания служат инструментами легитимации правового титула сомнительного происхождения через длительное, мирное и эффективное владение территорией в отсутствие протестов со стороны бывшего суверена (а также с учетом самоопределения проживающих на территории лиц) и, возможно, с помощью признания нового положения третьими государствами. Остается нерешенным вопрос о том, является ли противостоящая таким изменениям концепция ex injuria jus non oritur принципом международного права. Вместе с тем приходится заключить, что международное право в политически чувствительных вопросах территории остается слишком неопределенным, чтобы дать четкий ответ в ситуациях, когда разные концепции сталкиваются в реальности, как в споре о южных Курильских островах.*

ОБСУЖДЕНИЕ И ВЫВОДЫ. *При оценке российского эффективного контроля над островами в контексте японских требований вернуть эти территории Японии ключевой вопрос состоит в том, превосходит ли по весу эффективный контроль протесты, учитывая дли-*

тельность и качество таких эффективных контроля и протестов. В статье проводится мысль о том, что ответ на этот вопрос послужил бы цели стабильности, которую преследует международное право, и что в рассматриваемой ситуации этот ответ должен быть (при условии его осторожной формулировки) положительным.

КЛЮЧЕВЫЕ СЛОВА: *Курильские острова, территориальные споры, российско-японские отношения, территория в международном праве, эффективность, приобретательская давность, молчаливое согласие, дипломатический протест, ex injuria jus non oritur, признание*

ДЛЯ ЦИТИРОВАНИЯ: Неверова Е.В. 2019. Южно-курильский тупик: эффективность и протесты. – *Московский журнал международного права.* № 3. С. 47–58.
DOI: 10.24833/0869-0049-2019-3-47-58

1. Introduction

The Southern Kuril Islands controversy between Russia and Japan is a long story of vague or controversial historical records, disregard for the indigenous population, treaties and statements, settlement and resettlement, and a host of legal, economic, political, strategic and other nuances enough to make anyone's head reel. These are a proper subject of other studies; we, however, will focus on the now of the Southern Kurils viewed through the lens of the international law.

The effective, that is, actual and persisting situation for 74 years has been that of a deadlock [Streltsov 2016]. After the Soviet troops occupied the islands of Iturup, Kunashir, Shikotan and a group of islets called Habomai in 1945, these territories have existed in the state of international legal uncertainty. Russia has secured, including by military and legislative means, control over the islands to the exclusion of other nations, while Japan has been, starting from 1949 (when the central Japanese Government issued its first resolution denouncing the Yalta Agreements [Streltsov 2017:198–199]), making protests against the consolidation of the former's legal title over what it deems her "inherent" "Northern Territories". There have been times of mutual willingness to resolve the problem (driven largely by the USSR's need for economic and other assistance), culminating in the 1956 Joint Soviet-Japanese Declaration, ratified and therefore a treaty in all but name, where the USSR promised to transfer two smaller islands (Shikotan and Habomai, *i.e.* 7% of the South Kurils) to Japan after the two states conclude a formal peace treaty[1]. There have been times of coldness, the Soviet party refusing to even admit the existence of a territorial problem, trying, as it were, to 'will' it away. And, finally, there have been numerous joint statements and action plans announcing the parties' resolve to put an end to the controversy and enter an era of untainted peace with each other.

It is hard, however, to see any real development in this territorial conundrum. The result of the most recent optimistic negotiations at three levels – Russian President and Japanese Prime Minister; "2+2" talks between the heads of foreign and defence ministries; and discussions between their deputies – in January to April and then June 2019, squarely fall into the usual pattern: Russia is adamant on not abandoning its *de facto* sovereignty, and Japan, its call to return these territories to Japan's jurisdiction. Both countries have voiced an aspiration for a peace treaty based on the 1956 Joint Declaration[2], albeit interpreted differently. The economic cooperation – joint development of the islands and their rich fisheries, though a lucrative and reasonable idea, is stalled by the dispute and, as yet, is planned, as the Russian Foreign Minister admits[3], in by far not the most am-

[1] Deklaratsii, zayavleniya i kommyunike Sovetskogo pravitel'stva s pravitel'stvami inostrannykh gosudarstv 1954–1957 gg. [Declarations, statements and communiqués of the Soviet Government with the Governments of Foreign States for 1954–1957]. Moscow: Gospolitizdat Publ. 1957. P. 313–316. (In Russ.).

[2] Press statements following talks with Prime Minister of Japan Shinzo Abe. January 22, 2019. URL: http://en.kremlin.ru/events/president/news/59714 (accessed date: 11.06.2019).

[3] Russia's sovereignty over Kuril Islands not negotiable, says Lavrov. – *TASS*. January 22, 2019. URL: https://tass.com/politics/1039800 (accessed date: 11.06.2019).

bitious five areas: aquaculture, greenhouses, tourism, wind energy, and waste recycling (although scholars argue that economic cooperation and investment are potentially the most successful avenue for pacifying any tensions in the Russian-Japanese relations [Streltsov 2016:94].

Thus, the reality remains unchanged. The object of this article, then, is to see if and how the legally relevant facts of this reality – the existence of decades-long effective control over protests –affect the legal title over the Southern Kuril Islands. We will discuss the principle of effectiveness that permeates the international law of territory, its derivative doctrines of prescription and acquiescence, recognition, and the often-advanced maxim *ex injuria jus non oritur,* meaning that, however effective an unlawful situation, it cannot solidify into title.

The following discussion rests on a number of assumptions.

First, regarding the proper context for this exercise. The legal arguments by both the Russian and Japanese sides span across centuries, from the first 17th century attempts to venture into that hostile corner of the globe, followed by the treaties of Shimoda (1855) and Saint-Petersburg (1875), purportedly relevant for establishing the scope of the term "Kuril Islands" in the 1951 San Francisco Peace Treaty. Yet, we will concentrate on the modern-day facts and law, beginning in August – September 1945, when the Soviet troops secured control over the islands. Although it can be argued that the countdown for the new international legal status of those territories did not emerge until 1951 with the San Francisco Peace Treaty and its Art. 2(c),[4] what concerns us is the effective – that is, physical – change of control. The first Japanese protests, albeit on the regional level of the prefecture of Hokkaido, were reported in 1946 [Stephan 1974:198; Williams 2003:27], that is, also before 1951.

We will also eschew the arguments [Biriukov 2014:667–668] related to the validity of the 1945 Yalta Agreements. It is impossible to fully isolate any discussion of the Southern Kurils from the wartime and post-war international legal instruments, but for the sake of focus on the title-creating power of *effectivités* (acts for the effective administration and occupation of land) and on whether it is swerved by protests, we will try, as much as possible, to do that. The relevant scenario, therefore, is close to Japan's contentions that the 1945 Yalta Agreements, containing an unqualified promise to hand the Kuril Islands to the USSR in exchange for its joining the war against Japan and therefore relied upon by Russia in support of its title[5], fail as a valid treaty[6], thus leaving a legal vacuum with respect to the islands. The 1951 San Francisco Peace Treaty did not expressly nominate a "successor" of title to the Kuril Islands after mandating that Japan give them up, and, further, in its Art. 25, stated that non-parties to the Treaty (and the USSR, a *de facto* Allied Power, pulled out of the negotiations) could not derive rights from it[7]. The islands were thus legally relinquished by Japan, became *terra nullius,* and were taken over by the USSR. Japan therefore claims that the territories were unlawfully occupied and annexed by the USSR. Leaving aside an analysis of the concepts of just war (*bellum justum*) and annexation, we will confine ourselves to saying that from 1945, the taking of land by armed force has been prohibited by international law [Jennings 1963:53–54]. It is then a question of whether, in spite of illegality, a title could still form given the longevity and effectiveness of occupation.

Finally, but nonetheless importantly, we assume that the Southern Kuril Islands controversy is a legal dispute, since it is "a disagreement on a point of law or fact"[8] and, unlike a political dispute, it involves claims made by reference to the existing international law [Kelsen 1952:373–374, 382–383; Gavrilov 2016:304].

2. Exposition of Law

Although the international law of territory is a rather reticent area of law (due to considerations of

[4] San Francisco Peace Treaty 1951. Art. 2(c). URL: https://treaties.un.org/doc/publication/unts/volume%20136/volume-136-i-1832-english.pdf (accessed date: 11.06.2019).

[5] Agreement Relating to Prisoners of War and Civilians Liberated by Forces Operating under Soviet Command and Forces Operating under United States of America Command dated February 11, 1945. Washington, DC: Government Printing Office. 1950. URL: http://avalon.law.yale.edu/wwii/yalta.asp (accessed date: 11.06.2019).

[6] Joint Compendium of Documents on the History of Territorial Issue between Japan and Russia, Preface. – *Ministry of Foreign Affairs of Japan.* https://www.mofa.go.jp/region/europe/russia/territory/edition92/preface.html (accessed date: 11.06.2019).

[7] San Francisco Peace Treaty 1951. Article 25. URL: https://treaties.un.org/doc/publication/unts/volume%20136/volume-136-i-1832-english.pdf (accessed date: 11.06.2019).

[8] Mavrommatis Palestine Concessions. Judgment No. 2. – *P.C.I.J. Series A.* 1924. No. 2. P. 11.

stability discussed below), there have been changes, and the doctrine of *intertemporal law* [Jennings 1963:28; Schwarzenberger 1957:309; Elias 1980:286] articulated famously in the *Island of Palmas* award[9] would require us to apply the post-1945 international law as contemporary to the period of Russian-Japanese relations discussed.

Whether there should be a cut-off date not only for the law, but also for the facts we can review without according an unjust advantage to either party[10], is the matter of the doctrine of *critical date*. Featured in the *Island of Palmas, Eastern Greenland* and *Minquiers and Ecrehos* cases, critical date requires the adjudicator to confine itself to evidence of title pre-dating the time when the dispute "crystallized"[11]. Although the parties are silent on their preferred critical dates and several workable dates have been suggested by doctrine [Lee 2001:11], as we are focusing on a situation where effective control and protests have not ceased, fixing a critical date would be counterproductive.

Turning now, at last, to the core notions mentioned above, that is, *stability* (or *quieta non movere*) and *effectiveness* (or *effective control*). One might not find them in the textbook "rules" that govern territorial change, but they are the backbone of this system [Jennings 1963:70; Kelsen 1952:213], underlying all modes of acquisition of territory (save for cession and accretion) [Title to Territory... 2005:xxix; Shaw 1982:81–82]) and explaining why, for example, a change brought upon by conquest and disrupting the existing state of affairs, is frowned upon, or why effective occupation overrides inchoate titles based on discovery and symbolic acts.

Stability (that encompasses the principles of inviolability of boundaries and territorial integrity [Shaw 1982, 81]) was aptly described as early as by the PCIJ in its 1909 *Grisbadarna case* [Kaikobad 1985:119]: "… it is a well-established principle of the law of nations that the state of things that actually exists and had existed for a long time should be changed as little as possible"; and was further confirmed in the *Eastern Greenland* and *Temple* cases[12].

Effectiveness conveys the idea that only *effective* control, that is, real possession and administration of a territory, secures the *corpus* of title and that the claim of the effective peaceful occupant takes priority [Title to Territory... 2005:xiv; Schwarzenberger 1957:324; Elias 1980:292]). It is important that both the spatial and temporal aspects of effectiveness are relative. Thus, an inhabited territory will require more effective control than uninhabited land contiguous with the mainland, as confirmed in the *Island of Palmas*[13], *British Guiana* [Sharma 1997:56–58], and *El Salvador v. Honduras* [Sharma 1997:55–57] cases. As to the temporal aspect, effectiveness is a more stringent test in case of creation of title than where the state already has title and needs to merely maintain it.[14]

Based on effectiveness is, among other modes of acquiring sovereignty, the principle of *acquisitive prescription* (covering the notions of immemorial possession and *usucapio*) that rests on lasting actual and uninterrupted possession of a territory already belonging to another state [Jennings 1963:6–7, 20, 21–23; Title to Territory... 2005:xiv; Sharma 1997:107–119; Johnson 1951:332, 334–335; Munkman 1973:103, 337–338, 339; Kelsen 1952:214; Vylegzhanin, Sokolova 2014:37–58]. According to scholars, the gradual passing of title to another state, where the original sovereign is indifferent or takes no action, corresponds to the aims of stability: *see* the *Island of Palmas, Eastern Greenland, Alaska Boundary, Grisbadarna* and *Chamizal* cases [Johnson 1951:333–334, 336; Sharma 1997:107–108, 113]. Effective control thus "cures" the defects of title subject to absence of protest on the part of the former sovereign, implying its consent to or a lack of interest in the new situation [Johnson 1951:350]). It should be noted, however, that, although there is no one opinion on which defects are thus curable and which are not, it is widely believed that breaches of *jus cogens* rules (such as the prohibition of force), are incurable.

Prescription requires open, peaceful and uninterrupted possession [Kozlowski 2010:76–77] for

[9] Island of Palmas Case (or Miangas). United States v. Netherlands. Award. 1928. – *Reports of International Arbitral Awards.* 2006. Vol. II. P. 845–846.

[10] The Minquiers and Ecrehos case. France v. UK. – *I.C.J. Pleadings.* 1953. Vol. II. P. 62, 68–69.

[11] Island of Palmas Case (or Miangas). United States v. Netherlands. Award. 1928. – *Reports of International Arbitral Awards.* 2006. Vol. II. P. 845; Legal Status of Eastern Greenland. Denmark v. Norway. Judgment. – *P.C.I.J. Series A/B.* 1933. No. 53. P. 45.

[12] Legal Status of Eastern Greenland. Denmark v. Norway. Judgment. – *P.C.I.J. Series A/B.* 1933. No. 53. P. 22; Case Concerning the Temple of Preah Vihear. Cambodia v. Thailand. Merits. 1962. P. 6. URL: https://www.icj-cij.org/files/case-related/45/045-19620615-JUD-01-00-EN.pdf (accessed date: 11.06.2019).

[13] Island of Palmas Case (or Miangas). United States v. Netherlands. Award. 1928. – *Reports of International Arbitral Awards.* 2006. Vol. II. P.840.

[14] Ibid. P. 845–846.

a long, though undefined period of time, with the former sovereign making no protests or acquiescing to such possession [Munkman 1973:106; Schwarzenberger 1957:322; Johnson 1951:340][15]. It is therefore "a surrogate term for some general judgment of the international community that the new situation is peaceful and in accordance with international order, despite its origins in unlawful conduct" [Crawford 2007:704]. The possession can manifest in acts of authority aimed at administering the territory as an integral part of the occupying state, effective settlement and development of the land, defence, taxation, etc.

The time needed for the title to consolidate through prescription is undefined. Scholars note that there is no use in fixing the exact time [Jennings 1963:21; Klimenko 1982:165], if only to avoid unjust formalism. They do, however, offer some guidance: Grotius suggested a century (three generations of men), E. de Vattel suggested setting a term by treaty or custom, and L. Oppenheim elusively proffered a term allowing a belief to form that the new situation corresponds to the international order [Johnson 1951:336–337, 340, 347; MacGibbon 1956:166–167). The term in the *Island of Palmas* was 200 years; in *Alaska Boundary,* 60 years; and the Treaty of Arbitration between Great Britain and the US in the *Venezuela Boundary* dispute provided for the term of 50 years [Klimenko 1982:163–165]. The prevailing view is that the term depends on "the intensity with which the claim is manifested; on the publicity surrounding its promulgation or enforcement; on the nature of the right claimed; on the position and condition of the territory affected; and so on" [MacGibbon 1956:164–165; Title to Territory... 2005:xix][16].

Acquiescence to the new title takes place where circumstances require protest, but none is made, or it is made too late [Title to Territory... 2005:xxv; MacGibbon 1956:143, 182]. The doctrine of acquiescence is effectiveness at work, where, as is often seen, facts are ahead of the international law, which does not imbue a particular situation with legality or illegality, and legality depends on the extent to which the situation is *perceived* as lawful. It is therefore a precondition of prescription that applies to titles that are "either originally invalid or whose original validity it is impossible to prove" [Johnson 1951:332; Title to Territory... 2005:xix].

In spite of the deceptive air of passivity, acquiescence requires rigorous proof, since at times the lack of protest will be due to factors such as unrest or armed conflict, rather than the lack of the former sovereign's interest. Thus, if the original sovereign "keeps its claim alive by protest, or the bringing of an action, there will not be that undisturbed or 'peaceable' possession" which constitutes prescription [Jennings 1963:23]. It is also argued that to require states to constantly protest against claims would contradict stability in international relations, thus acquiescence is to be construed restrictively and should cover only those matters where proof of acquiescence indeed exists [MacGibbon 1956:169–171, 175, 183]. Absent such proof, silence does not amount to acquiescence [Munkman 1973:79; Schwarzenberger 1957:321; Kaikobad 1985:126].

To constitute acquiescence, conduct must be *official* and originating from the state's *competent* authorities, and must *clearly* demonstrate a change of their attitude [Munkman 1973:46–47]. Thus, the *Rahn of Kutch* arbitrators took account of administrative reports, newspaper publications, Indian maps and proof of attempts to collect grazing fees (as evidence for India), statements of British authorities, proof of efforts to maintain public order, and registrations of births, deaths and pandemics (as evidence for Pakistan), ultimately dividing the territory at issue into the respective Indian and Pakistani parts [MacGibbon 1956:160; Untawale 1974:827–829]. In the *Certain Frontiers Dispute,* the ICJ, faced with the issue of whether Belgium acquiesced in the putative Dutch sovereignty, looked, *i.a.,* at the maps, surveys and registers that included those lands into Belgian territory, and found that the opposing acts of the Netherlands were insufficient to overcome the presumption that Belgium retained its title[17]

Also akin to prescription is the theory of *historical consolidation of title* suggested to encompass all considerations relevant to the historical process of accumulation of evidence of title. It has appeared in practice (the 1875 *Delagoa Bay* arbitration, the 1904 *Guiana Boundary case,* the 1909 *Grisbadarna case,*

[15] See Island of Palmas Case (or Miangas). United States v. Netherlands. Award. 1928. – *Reports of International Arbitral Awards.* 2006. Vol. II. P. 839; The Chamizal Case. Mexico v. United States. 1911. – *Reports of International Arbitral Awards.* 2006. Vol. XI. P.328-329.

[16] See also Kasikili/Sedudu Island Botswana v. Namibia. Judgment. – *I.C.J. Reports.* 1999. P. 1045, p. 1101 et seq.

[17] Case concerning sovereignty over certain frontier land. Judgment of 20 June 1959. – *I.C.J. Reports.* 1959. P. 209, 227–229.

the 1928 I*sland of Palmas* case, the 1933 *Honduras borders* arbitration, the 1991 *Chamizal* arbitration[18] and others) [Johnson 1951:340–341]. The doctrine is praised by some as a flexible and convenient tool that allows one to avoid the fragmentation of the process of formation of title into the artificial "modes" of acquisition of territory and to embrace all relevant factors [Jennings 1963:23–28], and believed to be superfluous by others [Munkman 1973:94, 103. Kozlowski 2010:90-91; Sharma 1997:173–180]. For our purposes, it is a tool that we certainly will use in looking at the big picture of the Southern Kurils reality, but it does not bring anything new into the analysis.

Recognition is often mentioned as a tool for perpetuating debatable territorial change on the logic that the international community can create lawfulness. This time, we are talking about recognition by third states, which, being political in nature, is admittedly not a condition for or decisive proof of consolidation of new title (and is not even conclusive upon the recognising state [Cheng 2006:189]), but can nonetheless evidence that the new state can no longer be uprooted without disrupting peace [Jennings 1963:38]. Since third states may be more objective, as observers of a territorial controversy [Schwarzenberger 1957:311] (although they too can have economic, political and other stakes in the game), their endorsement can be valuable for the contending states or "could validate an uncertain or dubious claim to territory or could prevent effective control from hardening into title, particularly when the UN adopts a stand" [Title to Territory... 2005:xxvi]. Recognition can create an estoppel for the recognising state [Schwarzenberger 1957:316], while non-recognition is at times a formidable weapon in blocking the legitimation of otherwise effective claims.

Now, we have seen the instruments for transforming effective change into reality, but what about the means for withstanding unwanted change? As the state that has lost effective control over territory cannot, sometimes legally and at other times physically, use force to reclaim it, the only instrument the international law can offer it outside adjudication (also not always possible or feasible) is the *diplomatic protest.* Protests are an almost "instinctive defence mechanism" [MacGibbon 1956:171; Schwarzenberger 1957:310] in interstate relations, used to prevent another's claims of acquiescence and prescription, draw the international community's attention to the situation and invite its reaction or delay consolidation of another's title [Johnson 1951:346; Kozlowski 2010:75–76; Barsegov 1958:111]. Back in 1911, in the *Chamizal* award, it was recognised that peaceful diplomatic protest (although the commission voiced a hope for a more effective mechanism to be developed in the future) can preclude title by prescription [Johnson 1951:341][19]. Scholars also indicate that written protests are preferable to spoken ones [Klimenko 1982:174–177].

The presumption in favour of title based on effective occupation is strong and, according to scholars, can be overcome by unequivocal evidence only [MacGibbon 1956:158]. By that token, protests cannot continue forever [Jonhson:341 fn. 5, 346; MacGibbon 1956:167; Klimenko 1982:177, 121], and states must aspire to settle the territorial dispute via one of the mechanisms offered by Art. 33 of the UN Charter, such as approaching the ICJ [Gavrilov 2016:304] or the UN Security Council [Schwarzenberger 1957:322–323; Kaikobad 1985:137–138; Klimenko 1982:174–175; Johnson 1951:341–342]. D.H.N. Johnson goes as far as suggesting that failure to do so must entail acquiescence even if "paper" protests continue, opposed by B.M. Klimenko who believes this development to be not only unrealistic (since such measures can be impossible, too expensive or otherwise unfeasible for states), but also "once and for all" denounced by the international law insofar as effective titles based on unlawful force are concerned. It would appear to us, however, that if no action more robust than mere protest is taken by a state because it feels that it has low chances of success in court, its effective rival should be eventually deemed to have consolidated its title. Alas, so far there is no tool for establishing that outside of court, the

[18] Award of the President of the French Republic on the Claims of Great Britain and Portugal to Certain Territories Formerly Belonging to the Kings Tembe and Mapoota, on the Eastern Coast of Africa, Including the Islands of Inyack and Elephant (Delagoa Bay or Lorenzo Marques). Decision of 24 July 1875. – *Reports of International Arbitral Awards.* 2006. Vol. XXVIII. P. 160–161;The Guiana Boundary Case. Brazil v. Great Britain. – *Reports of International Arbitral Awards.* 1904. Vol. XI. P. 21–22; The Grisbadarna Case. Norway v. Sweden. Award of the Tribunal. 1909. P. 6. URL: http://www.worldcourts.com/pca/eng/decisions/1909.10.23_Norway_v_Sweden.pdf (accessed date: 18.06.2019); Island of Palmas Case (or Miangas). United States v. Netherlands. Award. 1928. – *Reports of International Arbitral Awards.* 2006. Vol. II. P. 839; Honduras borders. Guatemala v. Honduras. 1933. – *Reports of International Arbitral Awards.* 2006. Vol. II. P. 1307–1366; The Chamizal Case. Mexico v. United States. 1911. – *Reports of International Arbitral Awards.* 2006. Vol. XI. P. 309–347.

[19] See The Chamizal Case. Mexico v. United States. 1911. – *Reports of International Arbitral Awards.* 2006. Vol. XI. P. 329.

competent UN body or recognition by third states, and protest remains the only and somewhat viable instrument for blocking another's title (we will not discuss reservations expressly leaving the territorial issue open between states in treaties [Vylegzhanin, Neverova 2016:43–45, 56], since they are essentially written protest, or the excusable ignorance defence, since in the dispute under our scrutiny Japan is, obviously, aware of Russia's claims).

An issue we have announced at the start and touched upon is how much unlawfulness is trumped by effective control and its avatars prescription and acquiescence. After all, acquisition of territory by force (conquest) is unacceptable in the post-1945 world order; it is undeniably prohibited (Art. 2(4), UN Charter). A breach of that peremptory prohibition precludes title: *ex injuria jus non oritur,* that is, a wrong does not create a right [Jennings 1963:56]. The inevitable difficulty, however, is that life does not always follow theory. What, then, to think of the situation where force was applied to secure territory, and the occupant would not budge? Some authors have had to conclude that "the principle… does not, or not without important exception, apply in international law" and that it is "a political postulate" [Kelsen 1952:215–216, 264, 363, 422-423; Cheng 2006:187]. Others try to accommodate it through affirmative recognition, including on the part of the supplanted state: the title would thus form by way of consolidation [Jennings 1963:61–64, 67]. It would seem that this position was supported by Sir G. Fitzmaurice and H. Lauterpacht – subject to recognition, not of the legality of force, but of the irreversibility of change, since "peace is a paramount consideration" (see discussion in [Jennings 1963:58–59; Lauterpacht:429–430]). It is debatable if such recognition, especially collective, can be realistically anticipated given the extensive arguments in favour of the so-called Stimson doctrine mandating non-recognition of aggressive conduct [Jennings 1963:57–58; Langer:95–122].

Finally, one must not ignore the important development of the international law of territory that falls under the notion of *self-determination:* territory is no longer an area on the map, free to be disposed of by its sovereign as it likes; the focus now is (or at least should be) on the people inhabiting it and their rights to have a say in the destiny of their homeland, recognised by the ICJ in its Advisory Opinion on *Western Sahara.* This principle is *jus cogens* [Shaw 1997:479; Sharma 1997:8–9] and creates an obligation *erga omnes*[20]; it is argued that it is now a *sine qua non* of any transfer of title to inhabited territory, that has replaced the doctrine of *debellatio* (post-war settlement between the victor and the vanquished) making the will of the people the only means of legitimizing post-war change.

Once again, all is well in theory, but self-determination remains a mostly unenforceable (outside of the context of decolonization) and vague concept practice-wise. In the litigations and arbitrations referred to above, courts and tribunals did not expressly look into how their decision would affect the people of the respective territories; according to J. Crawford, "traditional rules for territorial disputes… are largely based on the political history of a territory rather than on the democratically expressed wishes of its inhabitants" [Crawford 2014:381–382]. This can also, perhaps, be explained by the prevalence of decisions aimed at confirming title with the effective state, that is, one whose people are living in the territory, so as to preserve the existing state of affairs; therefore, no contradiction arises. Outside of adjudication, self-determination should ideally be complied with *via* a mechanism allowing the people to express their opinion on the change of title such as a plebiscite or referendum. It is likely that a cession of territory in breach of the principle would be voidable, if not *ab initio* invalid, on top of being potentially disruptive of the peace and security in the territory in question, the respective region or even the world at large.

3. The Southern Kuril Dispute

Let us now weigh the relevant evidence of Russia's and Japan's title to the Southern Kurils for 1945–2019 against the background of applicable international legal theories. It should be recalled that Russia would have a heavier burden, since its task is to prove creation of title, while Japan's job would be to react actively enough so as not to lose it.

Soviet and then Russian administration of the Southern Kuril Islands began on 20 September 1945, when the islands were declared Soviet territory, followed by the arrival of the first Soviet settlers in a month and a change of currency in March 1946; on 2 January 1947, the Sakhalin Region (*oblast*) was created, incorporating the islands, and on 25 February 1947, the USSR Constitution was amended to include them into state territory [Stephan 1974:168–169]. By the 1970s, the population of the regional centre,

[20] East Timor. Portugal v. Australia. Judgment. – *I.C.J. Reports.* 1995. P. 90. Para. 29.

Yushno-Kurilsk (on Kunashir) was 3,900 people; of Kurilsk (on Iturup), 1,600, not to mention seasonal workers; there were frontier guard outposts on Kunashir, Shikotan and the Habomai, and the islands of Iturup and Kunashir hosted (albeit not very populous) military units, air and naval bases. The economic development of the islands followed the 1946 recommendations issued by a commission from Vladivostok that had assessed their potential, with a focus on fisheries. As of the 1970s, a large salmon hatchery operated on Iturup, and crab canneries were built on Shikotan. During that period, Kunashir and Iturup also had running sulphur mines. The infrastructure was poor; that notwithstanding, a geothermal plant was erected on Kunashir [Stephan 1974:171–194]. One could say that the islands suffered from neglect after the dissolution of the Soviet Union, though there is no evidence of resumption of Japanese control at that time.

A new page for the islands was turned in the recent decades, with more subsidies being allocated to that part of the country. The Southern Kuril Islands administratively make part of the Sakhalin Region under Law of the Sakhalin Region No. 25-3O dated 23 March 2011 "On the Administrative and Territorial Structure of the Sakhalin Region", and the Sakhalin Region authorities are collecting the relevant taxes and duties in these territories. Apart from military and naval facilities, there is an airport, a passenger and freight facility and other infrastructure either built and requiring maintenance or improvement, or planned in the Southern Kuril Islands for over 16,000 people living in the three larger islands of the group (no civilians reside in the Habomai) according to the comprehensive Federal Target Programme for the Social and Economic Development of the Kuril Islands for 2016–2015, approved by the Resolution of the federal Russian Government[21]. It can be said that the Southern Kuril Islands are now getting much more attention than ever before under Russian jurisdiction. In all aspects of life, they are being administered with no distinction from other Russian regions. Moreover, the public support of Russia's sovereignty is strong both among the islanders (96% of respondents in 2019 were against handing the islands over to Japan)[22] and the wider Russian public (78% of respondents opposed the transfer in an independent 2016 survey)[23]. The reproach for neglect is thus not as relevant as it had been, although one could still say that the government could do more for the islands and the islanders and that the position where no official statements lobbying for recognitions of Russian title (that would be declared world-wide, rather than to the target Russian population and in response to Japan's protests) are being made, and the attitude of why advocate for a truism (that sovereignty is with Russia), are not unproblematic.

Unable to exercise any real administration over the Islands (all Japanese inhabitants were ousted from the territories after the USSR established control, and they are allowed to visit their ancestors' graves only on a special visa-free arrangement [Williams 2003:110–113]), Japan has busied itself with protests against Russia's "annexation" of the "Northern Territories". These take the form of diplomatic protests against Russia's *effectivités* in the islands (*e.g.*, against visits of Russian officials, Russian military drills or plans to lay cables to the islands)[24], speeches in the Japanese Diet[25], posting Japan's position in English on the "Northern Territories Issue" on the website

[21] Federal'naya tselevaya programma "Sotsial'no-ekonomicheskoe razvitie Kuril'skikh ostrovov (Sakhalinskaya oblast') na 2016–2025 gody" [Federal Target Programme for the Social and Economic Development of the Kuril Islands (Sakhalin Region) for 2016–2015]. (In Russ.). URL: https://minvr.ru/activity/gosprogrammy/sotsialno-ekonomicheskoe-razvitie-kurilskikh-ostrovov/ (accessed date: 10.06.2019).

[22] Zhiteli yuzhnykh Kuril vystupili protiv peredachi ostrovov Yaponii [Residents of the Southern Kurils Oppose Cession of the Island to Japan]. – *RIA Novosti*. February 19, 2019. (In Russ.). URL: https://ria.ru/20190219/1551053278.html (accessed date: 10.08.2019).

[23] Spor Rossii i Yaponii vokrug Kuril'skikh ostrovov [The Dispute between Russia and Japan Concerning the Kuril Islands]. – *Levada-Center.* August 5, 2016. (In Russ.). URL: http://www.levada.ru/2016/08/05/spor-rossii-i-yaponii-vokrug-kurilskih-ostrovov/ (accessed date: 10.08.2019).

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[25] *E.g.,* Japan's Abe reiterates Tokyo's stance on southern Kuril Islands. – *Interfax*. January 30, 2019. URL: https://tass.com/world/1042384 (accessed date: 10.06.2019).

of its Ministry of Foreign Affairs (though it has not been updated since 2011)[26], and "National Rallies to Demand the Return of the Northern Territories" held every 7 February (the "Northern Territories Day") since 1981[27], not to mention regional acts by the prefecture of Hokkaido to which the islands used to belong. The Northern Territories Affairs Administration within the Cabinet and the Northern Territories Issue Association have campaigns for the return of the islands to Japan, and in 1982 Japan adopted a 1982 "Law on Special Measures to Advance a Solution to the Northern Territories Issue", amended to stipulate that the "Northern Territories" are the "inherent" territories of Japan.

These protests are certainly not lacking in number and persistence: Japan is very careful to avoid "slips of the tongue" in official speeches or documents that could be held as proof of the surrender of its claim. Thus, the Japanese version of the Ministry of Foreign Affairs' webpage on the "Northern Territories Issue" is more extensive and contains a reminder to persons travelling to those territories to refrain from actions that could be deemed submission to Russian jurisdiction[28].

There "quality" of such protests, however, can be put into question. Thus, although the abovementioned law sounds like a solid piece of evidence for just how serious Japan's intentions are, no English or Russian translation of the law seems to be available, precluding wider awareness of the public. I have also failed to identify any protests or reservations made at the 1951 San Francisco Peace Conference by the then Japanese Prime-Minister regarding the express provision on Japan's forfeiture of the islands [Stephan 1974:200], at the time of occupation by the Soviet troops, at the time of dissolution of the USSR (which could be relevant in terms of succession of claims to the territories) – that is, where the "circumstances were such as called for some reaction"[29] on the part of Japanese authorities. To the best of my research, no protests have been made in the UN or its bodies that would seemingly be more effective than essentially inward-directed, internal Japanese protests. On top of that, public support is waning, as 57% of respondents of a 2016 poll by *The Mainichi* (Japanese longstanding daily) stated that Japan should not insist on the return of four islands, while in 2018, 46% participants of another poll, by Nikkei/TV Tokyo, stood for an "initial return of two islands", 33% "wanted all four returned together, while 5% were satisfied with getting just two islands back"[30]. Therefore, although there has been no manifest change of attitude of the Japanese authorities, with the clock ticking well past the seventh decade of its rival's effective administration of the land as its own, Japan's chances are becoming increasingly illusory – especially in the light of self-determination, which is complicating any prospects of removing over ten thousand Russians from the islands or integrating them smoothly into the population of Japan, should Japan be successful.

Japan's claims have enjoyed consistent support of the US since the 1951 San Francisco Peace Conference and to date[31] [Elleman, Nichols, Ouimet 1998–1999:503–504]. As to China, after initially siding with the USSR, the People's Republic later expressed its "unswerving support of Japanese" efforts to reclaim the Islands, that, it seems, has weakened (but not altogether vanished) over time as China has turned to improve its relations with Russia[32]. The rest of the world appears to have no interest or opinion of the matter – which could be likened to the "general toleration" noted in the *Anglo-Norwegian Fisheries* case. It would hardly be possible to call recognition by the US or China conclusive, as recognition is not

[26] Northern Territories Issue. – *Ministry of Foreign Affairs of Japan.* March 1, 2011. URL: https://www.mofa.go.jp/region/europe/russia/territory/overview.html (accessed date: 10.06.2019).

[27] 2019 National Rally to Demand the Return of the Northern Territories. – *The Prime Minister in Action. Prime Minister of Japan and His Cabinet*. February 7, 2019. URL: https://japan.kantei.go.jp/98_abe/actions/201802/_00049.html (accessed date: 10.08.2019).

[28] 北方領土への渡航自粛要請. April 6, 2016. URL: http://www.mofa.go.jp/mofaj/area/hoppo/hoppo_qa.html (accessed date: 10.08.2019).

[29] Case concerning the Temple of Preah Vihear. Cambodia v. Thailand. Merits. Judgment – *I.C.J. Reports.* 1962. P. 6, 23.

30 Majority say Japan shouldn't insist on return of all disputed Northern Territories islands: poll. – *The Mainichi.* November 7, 2016. URL: https://mainichi.jp/english/articles/20161107/p2a/00m/0na/019000c (accessed date: 10.08.2019); 46% of Japanese favor initial return of 2 islands from Russia. – *Nikkei*. URL: https://asia.nikkei.com/Politics/46-of-Japanese-favor-initial-return-of-2-islands-from-Russia (accessed date: 10.08.2019).

[31] U.S. recognizes Japan's sovereignty over Russian-held isles: official. – *The Japan Times.* August 14, 2014. URL: https://www.japantimes.co.jp/news/2014/08/14/national/u-s-recognizes-japans-sovereignty-over-russian-held-isles-official/#.XU6N5i2B3BI (accessed date: 10.08.2019).

[32] Yun Sun. Why Russia and China Won't Join Forces Over Disputed Islands. URL: https://www.defenseone.com/ideas/2014/03/why-russia-and-china-wont-join-forces-over-disputed-islands/80080/ (accessed date: 10.08.2019).

conclusive in and of itself, and, more importantly, it is very obviously politically motivated in both cases. The other two (besides Russia) superpowers have a strategic and military, or strategic and economic agendas, respectively, in their dealings with Russia and Japan, making their recognition too unsound to serve as solid evidence of title.

4. Conclusion

It would seem that from the standpoint of international law, the Russian control of the Southern Kuril Islands, that covers all aspects of their life and development, for over seven decades (hardly looking to end any time soon), should be viewed as close to a stable and effective title by prescription or, if one still wishes to preserve the concept in its pure form, by consolidation, supported by compliance with the self-determination of the people living there. That would be an unfortunate outcome for Japan, for much is staked on the claim for the "Northern Territories", but to say that protests and protests alone, unaccompanied by more active measures, such as addressing the UN or initiating an adjudicatory procedure, can maintain a viable claim is unrealistic[33], and perhaps even undesirable. It is unfair to have been banished from the Kurils after the WWII, but to hold on to resentment is no way forward to prosperity and cooperation. If ever tensions increase between the two countries, it may even escalate from a nuisance to threat. For now, we can only leave it to politicians to be creative and wise enough to find a middle way that would as much as possible accommodate the needs and interests of both states and peoples.

Apart from the effects of the above analysis on the perception of the dispute between Russia and Japan, it serves to highlight a well of gaps or 'offshore' zones, where international law is uncertain and requires reinforcement. These areas are the principle of self-determination, the doctrine of prescription, protests, enforceability of territorial claims and the obligation not to leave interstate disputes unresolved. They are all, despite the venerable age of some, viable doctrines and rules – but work is required if not to redefine them for the demands of the world today, then to refine their scope and mechanics of application. Perhaps, some reassessment of the ratio of effectiveness and stability in territorial matters (necessarily in light of the principle of self-determination that had not been in place when the traditional modes of acquisition of territory emerged and developed) would also do good to the understanding of how they operate in a globalised environment, where a shift in a long-running controversy can have larger implications for regional or global security.

Lastly, there is a need for scholarly attention to the idea of ex injuria jus non oritur in this area of the law. Since territory has formative value for statehood and therefore international legal personality, it is a sensitive matter. Much of the world's stability rests on territorial stability. It is therefore by far not an idle question what should be thought of effective titles of dubious origin, if we want to have a system of international law with credible, realistic and practical underpinnings. Ex injuria is an intuitively satisfactory idea (it is doubtful, as noted above, that it is part of positive international law) that has moral value in that it aims to "uphold the authority of the law" [Cheng 2006:187]. But the world will always change and rules will always remain revisable [Buchanan 2010:76–97]. Here is the conflict between "the desire to prevent illegal acts and situations from generating rights" and "the need to accept the realities of state sovereignty" [Shaw 1982:81]. Effectiveness is the ultimate creator of law and rights in a "decentralized and horizontal" system such as the international law [Shaw 1982:82], but it must have boundaries, and everyone concerned must be able to see and understand them.

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