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# **OUTER SPACE A NO MAN TERRITORY: CONCEPTUAL DISCOURSE IN THE LIGHT OF STATE TERRITORY**

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## **INTRODUCTION**

Power of the state under international law to regulate or otherwise impact upon people, property and circumstances reflects in the basic principles of state sovereignty, equality of states and non-interference in domestic affairs of other states. Each state has its own territorial Jurisdiction over its people property etc. each state is sovereign in its territories. It can make civil or criminal law for its people. This phenomenon is referred as territorial Jurisdiction of a state or protective Jurisdiction. State Jurisdiction is the power of a state under international law to govern persons and property by its municipal law; it includes both the power to prescribe rules and power to enforce them. The territorial sovereignty of subjacent state extends only up to a particular height of the air space. The remaining part of the airspace is free and open. According to NASA outer space to be the area beyond fifty miles i.e. about eighty Kilometers above sea level, outer space is the area beyond the Karman line, which is about sixty two miles above sea level. According to scientist the inner boundary of outer space is 100+ 10 Kilometer above sea level. The boundary between air and outer space is generally accepted as above 100 Kilometer because space craft cannot descend below this height, and aircraft cannot climb at these altitudes. There is no definition given by the United Nations as to where outer space begins.

## **1. MEANING AND DEFINITION OF STATE TERRITORY**

State territory has been defined as portion of globe which is subjected to the sovereignty of a state. A state without a territory is not possible, although the necessary territory may be very small, as with Vatican City A wandering tribe, although it has a government and is otherwise organized, is not a state until it has settled down in a territory of its own.<sup>1</sup> The importance of state territory is that it is the space with in which the state exercises its supreme and normally exclusive authority.

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<sup>1</sup>Oppenheim's International Law (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, chapter 5

The exclusive domain of a state within its territory is basic to the international system. The words “territorial sovereignty” implies the authority and control exercised by a State within its boundaries over individuals and property to the exclusion of other States. In the case of **Island of Palmas Arbitration**<sup>2</sup>Max Huber, the Arbitrator described territorial sovereignty in the following words. “Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State.” In **Western Sahara Case**,<sup>3</sup>the International Court of Justice gave a landmark opinion where it pointed out that one of the characteristics of the existence of territorial sovereignty is State activity on an adequate scale showing conclusively the exercise of authority.

Article 2(4) of the UN Charter requires all members to restrain in their international relations from the threat or use of force against the territorial independence of any state. It comprises land territory, territorial waters, national waters and air-space over the territory and also the subsoil.

According to Kelson: “the territory of the state is a space within which the acts of the state, and especially its coercive acts are allowed by general international law to be carried out, a space within which the acts of a state may legally be performed.”<sup>4</sup>

According to Savarlien: “the territory of a state composed of all the land and water surface within its boundaries and jurisdiction, all the earth and water below this surface, and all the air above it.”<sup>5</sup> **Oppenheim** has defined the word “State Territory” as “a portion of globe which is subjected to the sovereignty of a State. A State without territory is not possible, although the necessary territory may be very small as with Vatican City. A wandering tribe, although it has a government and is otherwise organized is not a State until it has settled down in a territory of its own”.<sup>6</sup> The importance of State territory is that it is the space within which the State exercises its supreme and normally exclusive authority. Power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs. Each state has its own territorial Jurisdiction over its people property etc. each state is sovereign in its territories. It can make civil or criminal law for its people. It is called as territorial Jurisdiction of a state or protective

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<sup>2</sup>(1928) 22 Am J Int'l L. 875,

<sup>3</sup> Advisory Opinion, ICJ Rep 1975, 12.

<sup>4</sup>S. P. Sharma, Territorial Acquisition, Disputes and International Law, The Hague, 1997

<sup>5</sup> Ibid p. 231

<sup>6</sup> Supra Note 1, p. 236

Jurisdiction.<sup>7</sup> State Jurisdiction is the power of a state under international law to govern persons and property by its municipal law, it includes both the power to prescribe rules prescriptive Jurisdiction and power to enforce them enforcement Jurisdiction<sup>8</sup>

## 2. TYPES OF ACQUIRING AND LOSING STATE TERRITORY

The five common modes of acquiring territory are occupation, prescription, accretion, cession and conquest.

### 2.1. OCCUPATION

Oppenheim has defined the term “occupation” as the act of appropriation by a State by which it intentionally acquires sovereignty over such territory as it is at the time not under the sovereignty of any other State. It should be kept in mind that the subject matter of occupation is terra nullius. Hence the territory which is a subject matter of occupation should not belong to any State. Thus occupation consists in establishing sovereignty over a territory not under the authority of any other State whether newly discovered or an unlikely case abandoned by the State formerly in control.<sup>9</sup> Merely occupying territory does not amount to occupation because there should be effective occupation.

To determine whether there is effective occupation of a territory by a State it is necessary that two essential conditions must be fulfilled. *Firstly*, possession and *secondly*, administration. Once possession is established over a territory, the State possessing the territory must establish some kind of administration over the said territory.

In **Eastern Greenland case (Denmark Vs Norway)**,<sup>10</sup> It was in clear cut terms held by the Permanent Court of International Justice that for occupation of a territory, the occupying State must fulfill two conditions:

1. An intention or will to act as sovereign
2. Adequate exercise of display of sovereignty

The intention of the State occupying the territory to act as sovereign is ascertained from the underlying circumstances. The intention must be to assume permanent control of the occupied territory. To make the occupation look real and as a consequence to transform the inchoate title of

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<sup>7</sup>M. Akehurst, 'Jurisdiction in International Law', 46 BYIL, 1972-3, p. 145

<sup>8</sup>F. A. Mann, 'The Doctrine of Jurisdiction in International Law', 111 HR, 1964, p. 1

<sup>9</sup>N. Hill, Claims to Territory in International Law and Relations, London, 1945

<sup>10</sup>1933 PCIJ [(Ser. A/B) No. 53].

the occupying State into a perfect title it is important that the second condition also be fulfilled by the occupying State's legislative or executive measures affecting the occupied territory i.e. signing treaties with other States concerning sovereignty of the said territory and the fixing of the boundaries in respect of that territory.

In another case i.e. the **Island of Palmas (United States Vs Netherlands)**,<sup>11</sup>The dispute was between United States and the Netherlands wherein the United States claimed sovereignty over the island on the basis of a treaty which it signed with Spain in the year 1898. Netherlands contented that it was in possession of the island over a long period and also established sovereignty over the island. Spain at no point of time had occupied the island although it had discovered the island and since its title was defective, it had no right to transfer the island to the United States. However, both the States decided to refer the matter to arbitration. Arbitrator Huber ruled that a mere act of discovery by one State is not sufficient to confer a title by occupation and gave the decision in favour of Netherlands on the ground that Netherlands not only exercised a long, continuous and effective authority over the island but also established contacts with the inhabitants of the island.

## 2.2. PRESCRIPTION

Another method of acquiring territory is prescription. Where a State establishes occupation and exercise control over a certain territory for a long duration of time, it is deemed that the State exercises de-facto sovereignty over the territory then as a consequence the said territory becomes a part of the territory of that State.<sup>12</sup>

In the words of **J.G. Starke** "Title by prescription i.e. acquisitive prescription is the result of the peaceable exercise of de-facto sovereignty for a long period over a territory subject to the sovereignty of another and this may be as the consequence of immemorial exercise of such sovereignty (i.e., for such period of time as in effect to extinguish memories of the exercise of sovereignty by a predecessor) or as the result of lengthy adverse possession only".<sup>13</sup> A State may acquire territory by prescription only when some conditions are satisfied such as:

1. A State may acquire some territory by prescription only when it has not accepted the sovereignty of any other State over the said territory.
2. Possession must be peaceful and uninterrupted.

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<sup>11</sup>2 UN Rep Int'l Arb Awards 829 (1928): (1928) 22 Am J Int'l L 875.

<sup>12</sup> Supra Note 7, p. 136

<sup>13</sup> J.G. Strake, Introduction to International Law, (10th Ed. 1994), p. 232

3. Possession should be in public.
4. Possession should be for a definite period of time.

Some jurists are of the opinion that international law does not recognize the acquisition of territory through prescription but, another section of jurists are of the opinion that some precedents exist in international law, precedents such as the case of Island of Palmas Arbitration.

### 2.3. ACCRETION

Accretion is the name given for the increase or decrease of land through new formations. Title by accretion occurs when new territory is added mainly through natural causes or calamities (such as earthquakes, volcanic eruptions, tsunami or even flash floods in international rivers), to territory already under the sovereignty of the acquiring State. In all such cases there is no need for any formal act or assertion of title. For instance, an island may rise within the territorial waters of a State then the State ipso facto acquires sovereignty over the new formation.<sup>14</sup>

It is a customary rule of international law that any enlargement or expansion of territory of a State as a result of new formations, the State takes it ipso facto through accretion without the State concerned taking any special step for the purpose of extending its sovereignty.

### 2.4. CESSION

Through cession also territory may be acquired. Cession of State territory is the transfer of sovereignty over State territory by the State which owns the territory to another State. The cession of a territory may be voluntary it may be made under compulsion as a result of war fought successfully by the State to which the territory is to be ceded. Cession is affected through a treaty or agreement between the ceding State and the acquiring State. However, such treaties or agreements could be a result of peaceful negotiations or war. Cession is considered valid only when sovereignty of a territory is transferred to another State.

In the case of **In re Berubari Union and Exchange of Enclaves**<sup>15</sup> The Supreme Court of India observed: "...it is an essential attribute of sovereignty that a sovereign State can acquire foreign territory and can, in case of necessity, cede apart of its territory in favour of a sovereign State and this can be done in exercise of its treaty making power. Cession of national territory in law amounts to transfer of sovereignty over the said territory by the owner State in favour of another State...."

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<sup>14</sup> Ibid p. 244

<sup>15</sup> AIR 1960 SC845

This power, it may be added, is of course subject to the limitations which the constitution of the State may either expressly or by implication impose in that behalf.”

A similar view was taken by the Supreme Court of India i.e. cession indisputably involves transfer of sovereignty from one sovereign State to another, in the case of *Union of India v. Sudhansu Mozumdar*,<sup>16</sup>

In another case i.e. *Sugandha Roy v. Union of India*,<sup>17</sup> the Calcutta High Court had to determine the question whether giving of Teen Bigha (Zameen) to Bangladesh on lease in perpetuity under agreements between India and Bangladesh of 1974 and 1982 amounted to cession of territory. The Calcutta High Court held: “the implementation of these two agreements would not involve cession of any territory to Bangladesh in respect of Teen Bigha. There is no question of transfer of sovereignty, wholly or partially, in respect of the said area. What has merely been done is to enable the Government of Bangladesh and its nationals to exercise certain rights in respect of the said area which otherwise they would not have been able to enjoy”

## 2.5. DISMEMBERMENT

The dismemberment of a state takes place when its territory becomes the territory of two or more new states. Consequently, the predecessor state ceases to exist and the newly formed States are regarded as its successors (Art.18 of Vienna Convention)

## 2.6. RETROCESSION

It is a process through which certain territories are returned peacefully to its original State by executing special agreement. The People's Republic of China and Great Britain have set a precedent in negotiating the peaceful return of Hong Kong's sovereignty and administration to China.<sup>18</sup> The Joint Declaration on Hong Kong establishes the legal framework for continued prosperity and stability in Hong Kong to the year 2047 under Chinese leadership.

### **The Joint Declaration states:**

The Hong Kong Special Administrative Region Government shall maintain the rights and freedoms as provided for by the laws previously in force in Hong Kong, including freedom of speech, of the press, of correspondence, of travel, of movement, of strike, of demonstration, of choice of occupation, of academic research, of belief, inviolability of the home, the freedom to

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<sup>16</sup>(1971) 3 SCC 265: AIR 1971 SC 1594.

<sup>17</sup>(AIR 1983 Cal 468)

<sup>18</sup>R. Y. Jennings, *The Acquisition of Territory in International Law*, Manchester, 1963

marry and the right to raise a family freely.<sup>19</sup>

For the purpose of exercising State Jurisdiction customary international law recognizes the state territory as follows

### **5.1. LAND TERRITORY**

It consists of land within its boundaries. A boundary is a line on the surface of the earth which separates the territory of one state from that of other or from an appropriated territory. Boundaries may be of two kinds, Natural boundaries, such as rivers, arrangement of rocks or mountains, deserts or forest and Artificial boundaries, which are constructed for the purpose of dividing territories.<sup>20</sup> They may consist of walls pillars, poles and trenches etc. Boundaries may be demarked either by the States concerned themselves or by the international agencies. Demarcation of Boundary in 1991 between Iraq and Kuwait by Iraq-Kuwait Boundary Demarcation Commission set up by the Security Council of the UN.<sup>21</sup>

### **5.2. NATIONAL WATERS**

It includes waters in its rivers together with their mouths, canals, ports, harbors and in some of its gulfs and bays it was also referred as internal water. Rivers are of four kinds. Those who flow from its source to its mouth, within the boundaries of one and the same state called as national rivers. Rivers which separate two different states from each other called as Boundary Rivers. Rivers which run successively through two or more states and therefore called as multilateral or plurilateral or non-national rivers.<sup>22</sup> They are owned by one or more states. Fourthly that plurilateral river which are navigable from the open sea and which, though belonging to the territories of the different states concerned, are nevertheless named international rivers.<sup>23</sup> For such rivers there is a rule of international law that a state cannot alter the natural flow of the river.

### **5.3. TERRITORIAL SEA**

As per United Nations convention on the law of sea 1982 territorial sea is a belt of coastal waters extending at most 12 nautical miles 22.2 kilometers from the baseline of a coastal state, it is regarded as a sovereign territory of a state, although foreign ships are allowed innocent passage

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<sup>19</sup>D. P. O'Connell, *State Succession in Municipal Law and International Law*, Cambridge, 2 vols., 1967

<sup>20</sup>N. Hill, *Claims to Territory in International Law and Relations*, London, 1945

<sup>21</sup> *Ibid*, p.122

<sup>22</sup>Brown, *International Law of the Sea*, vol. I, chapter 5

<sup>23</sup>O'Connell, *International Law of the Sea*, vol. I, chapter 9

through it.<sup>24</sup> This sovereignty also extends to the airspace over and seabed below. Adjustment of these boundaries is called as maritime delimitation. If it overlaps with other states territorial sea the border is taken as the median point between the states baseline. Unless a state in question agree otherwise. A state can also choose to claim a smaller territorial sea.<sup>25</sup>

#### **5.4. THE CONTIGUOUS ZONE**

The contiguous zone is a band of water extending further from the outer edge of the territorial sea to up to 24 nautical miles 44.4 kilometers from the baseline, within which a state can exert limited control to prevent and punish infringements of its customs, fiscal, immigration, and sanitary law with in its territory or territorial sea<sup>26</sup>

#### **5.5. EXCLUSIVE ECONOMIC ZONE**

An exclusive economic zone is a sea zone prescribed by the 1982 United Nations Convention on the law of Sea over which a state has special rights regarding the exploration and use of marine resources, including energy production from water and wind. From baseline to two hundred nautical miles [three seventy kilometers from its cost]<sup>27</sup>

The difference between the territorial sea and the exclusive economic zone is that the first confers full sovereignty over the waters, whereas the second is merely a sovereign right which refers to the sea. The surface waters are international waters. The law relating to this is codified by the United Nations convention on the Territorial Sea and Contiguous Zone, 1958.<sup>28</sup> The difference between the territorial sea and the exclusive economic zone is that the first confers full sovereignty over the waters, whereas the second is merely a sovereign right which refers to the sea. The surface waters are international waters. The law relating to this is codified by the United Nations convention on the Territorial Sea and Contiguous Zone, 1958, which came into force from Ten Sep 1964. The Parliament of India al so enacted an act named as Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1970 to implement this convention and convention on law relating to Sea.<sup>29</sup>

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<sup>24</sup>Churchill and Lowe, Law of the Sea, pp. 65

<sup>25</sup>Article 5(1) of the 1958 Convention on the Territorial Sea and article 8(1) of the 1982 Convention.

<sup>26</sup>W. M. Reisman and G. S. Westerman, Straight Baselines in International Maritime Boundary Delimitation, New York, 1992

<sup>27</sup>J. A. Roach and R. W. Smith, United States Responses to Excessive Maritime Claims, 2nd edn, The Hague, 1996

<sup>28</sup> Ibid, p.22

<sup>29</sup> Shilpa Jain: Introduction to Public International Law (EBC 2016)

## 5.6. AIR AND OUTER SPACE

### 1.6.1. AIR SPACE

Air space means all space in which man made instruments- air crafts weather controlled or not, can be in operation at any given time. There were five theories in connection with the questions of the sovereignty of a state over the superjacent air space. The subjacent territorial state has absolute sovereignty over the whole space of atmosphere above its territory to unlimited height.<sup>30</sup> The air space is absolutely free and open being analogous to high seas. The territorial sovereignty of subjacent state extends only up to a particular height of the air space. The remaining part of the airspace is free and open. A subjacent state has a right to impose regulations, to protect its interest, on passing foreign aircrafts even above the air belt though such air space beyond the belt is not subject to sovereignty of the state<sup>31</sup>

The sovereignty of the subjacent state extends to the unlimited air space but the other State has a servitude or right of innocent passage for their civil aircrafts. After the outbreak of First World War the question of sovereignty over air space underwent a radical change. The only theory that was universally accepted was the first theory, which conceded sovereignty to an unlimited height over the subjacent air space.<sup>32</sup>

In 1919, the conference of Paris adopted the convention for the regulation of aerial Navigation. This convention accepted the following four broad principles.<sup>33</sup>

- The subjacent state has absolute sovereignty over its air space in peace time,
- Freedom of innocent passage is to be accepted to aircrafts of the parties to the convention, but regular international Airlines have no such right unless the subjacent territory gives its consent.
- No aircraft is to be registered in a country unless it belongs only to the nationals of that country
- No aircrafts can be registered in more than one country

Chicago Conference, 1944,<sup>34</sup> certain freedoms were granted to airlines of each state, modern state use to establish closed air space for security purpose. Air defense identification zones reserved for the aircrafts of subjacent state only called as 'Air corridors'

<sup>30</sup>C. Q. Christol, *The Modern International Law of Outer Space*, New York, 1982

<sup>31</sup>S. Gorove, 'International Space Law in Perspective', 181 HR, 1983, p. 349

<sup>32</sup>B. Cheng, 'The 1967 Space Treaty', *Journal de Droit International*, 1968, p. 532

<sup>33</sup>Cheng, 'The Legal Status of Outer Space', *Journal of Space Law*, 1983, p. 89

<sup>34</sup> V.K. Ahuja, *Public International Law* (Lexis Nexis 2016)

Euro-control an International agency for common air traffic control service for upper air space established by six states in western Europe including UK.<sup>35</sup>

### **1.6.2. OUTER SPACE**

According to NASA outer space to be the area beyond fifty miles about eighty Kilometers above sea level, outer space is the area beyond the Karman line, which is about sixty two miles above sea level<sup>36</sup> According to scientist the inner boundary of outer space is 100+ 10 Kilometer above sea level. The boundary between air and outer space is generally accepted as above 100 Kilometer because space craft cannot descend below this height, and aircraft cannot climb at these altitudes.<sup>37</sup> There is no definition given by the United Nations as to where outer space begins.

### **1.6.3. LAW RELATING TO OUTER SPACE**

The initial phase of development started in 1957, when the Soviet Union launched its first satellite (Sputnik). On 13th December, 1958, the GA of the UN passed a resolution, recognizing "the common interest of mankind in outer space" and "that it is the common aim that outer space should be used for peaceful purposes only."<sup>38</sup> "Declaration of Legal Principles Governing the Activities of States in the Exploration and use of Outer Space" was unanimously adopted by the General Assembly 13th December, 1963

The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, 1967

#### **1.6.3.1. THE OUTER SPACE TREATY, 1967**

Outer space, which includes the moon and other celestial bodies, shall be free for exploration by all States without any discrimination. There shall be freedom of scientific research. Outer space is not subject to national appropriation by claim of sovereignty, by means of occupation, or by a other means. State parties to the treaty undertake not to place in orbit around the earth objects carrying nuclear weapons or weapons of mass destruction, install such weapons on celestial bodies or station such weapons in outer space.<sup>39</sup>

The moon and other celestial bodies shall be used by all States parties to the treaty exclusively for

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<sup>35</sup>Cheng, 'The UN and the Development of International Law Relating to Outer Space', 16 Thesaurus Acroasium, Thessaloniki, 1990, p. 49,

<sup>36</sup>Shaw, M. N. (1997). International Law. Cambridge University Press.

<sup>37</sup> S.K. Verma: An introduction to Public International Law ( Prentice Hall 1998)

<sup>38</sup>N. Matte, Treatise on Air– Aeronautical Law, Montreal, 1981, chapters 4 and 5

<sup>39</sup> Ibid p. 31

peaceful purposes. State parties to the treaty shall treat astronauts as envoys of mankind in outer space, provide all possible assistance in the event of accident, distress or emergency landing on the territory of another State Party or on the high seas. When astronauts make such a landing they shall be safely and promptly returned to the state of registry of their space vehicle. The establishment of military bases, installations and fortifications, the testing of any type of weapon, conducting of military exercises on celestial bodies shall be forbidden. State Parties to the Treaty shall bear international responsibility for national activities in outer space.<sup>40</sup>

Each State Party to the Treaty that launches or procures the launching of an object in outer space, the moon and other celestial bodies and each State Party from whose territory or facility an object is launched, is internationally liable for damage to another state party by such object or its component parts on the earth, in air space or in outer space. A State Party which launches an object in outer space shall retain jurisdiction and control over such object and personnel while in outer space including celestial bodies.<sup>41</sup>

- The Convention on International Liability for Damage caused by Space Objects -1971
- The Convention on Registration of Objects Launched into Outer space – 1974
- The Agreement Governing the Activities of States on the Moon and other Celestial Bodies – 1979
- Vienna Convention on the Exploration and Peaceful Uses of Outer-space (UNISPACE II) AND (UNISPACE III)

## CONCLUSION

In international law, responsibility pertains to a State which commits an internationally wrongful act against another, giving rise to the duty to give reparation. The wrongful act that is attributable to a State, committed by its agencies or officials or in the exercise of its authority, constitutes a breach of international obligation that is binding at the time the act is committed. Such a classic formulation of international responsibility is premised on inter se relations of States; an act or omission of one State in breach of an obligation defined by international custom or convention, which it owes to another State. However, progress in the theory and practice of international responsibility has gone beyond the scope of bilateral relations. The developments towards the consolidation of the institutions making up the International Community of States as a whole have broadened in significant scale on the basis of territory.

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<sup>40</sup>Cheng, 'The Moon Treaty', 33 Current Legal Problems, 1980, p. 213

<sup>41</sup> Ibid p. 45