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# Preface

This book is based on my dissertation, which I wrote at the University of Hamburg and which was accepted for a doctorate. My doctoral supervisor Prof. Dr. Armin Hatje wrote the first accompanying report. The second report was prepared by Prof. Dr. Markus Kotzur.

I would like to thank Mr. Armin Hatje for the patient and always constructive support! My thanks also go to Mr. Markus Kotzur for the critical and careful preparation of the second report.

I would also like to thank my wife, Ama Martin, who provided me with encouraging advice throughout the entire process. Most sincere thanks to my two sons. Their zest for life always gave me hope to bring the project to a successful conclusion.

This opportunity should also be used to thank Hannfried Leisterer for the always challenging and stimulating discussions on the subject. I would also like to thank Moritz von Rochow for sharing with me his invaluable knowledge in long discussions over the years.

And of course, my entire family! Thank you.

"Who ain hear their name, I hope they ain bawl, there just too much good people's names to call!" (*Lord Pretender*)

Hamburg, December 2020 *Edward Martin*

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# List of Abbreviations

| | |
|---|---|
| AJIL | American Journal of International Law |
| ASIL | American Society of International Law |
| AustYBIL | Australian Year Book of International Law |
| AVR | Archiv des Völkerrechts |
| BritYBIL | British Year Book of International Law |
| BrookJIL | Brooklyn Journal of International Law |
| CARICOM | Caribbean Community |
| ColumJTransnatlL | Columbia Journal of Transnational Law |
| DSt | Der Staat |
| ECJ | European Court of Justice |
| ECSC | European Coal and Steel Community |
| EJIL | European Journal of International Law |
| GLJ | German Law Journal |
| HarvHumRtsJ | Harvard Human Rights Journal |
| HT | History and Theory |
| ICJ | International Court of Justice |
| ICLQ | International and Comparative Law Quarterly |
| IO | International Organization |
| IsrLRev | Israel Law Review |
| JHistIntlL | Journal of the History of International Law |
| LRevIntlL | London Review of International Law |
| MichLRev | Michigan Law Review |
| NordicJIL | Nordic Journal of International Law |
| NTIR | Nordisk Tidsskrift for International Ret |
| RBDI | Revue Belge de Droit International |
| Rg | Rechtsgeschichte |
| RRIAS | Institute of African Studies: Research Review |
| TICLJ | Temple International and Comparative Law Journal |
| TWAIL | Third World Approaches to International Law |
| UCLA JILFA | UCLA Journal of International Law and Foreign Affairs |
| Washington L Rev | Washington Law Review |
| WResLRev | Western Reserve Law Review |
| ZaöRV | Zeitschrift für ausländisches öffentliches Recht und Völkerrecht |

# A. Introduction

The doctrine of intertemporality has been described as an under-researched notion of international law.[1] It is a recognized doctrine (or principle, or rule; the literature on the terminology is ambiguous)[2] of international law.[3] However, its legal source remains unclear. The most famous formulation of the doctrine was made by Judge Max Huber in the *Island of Palmas Case*.[4] According to Huber, the doctrine of intertemporality contains two elements. The first element requires that:

> "a juridical fact [is] appreciated in the light of the law contemporary with it, and not the law at the time when a dispute in regard to it arises."[5]

The second requires that:

> "*[t]*he same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law."[6]

The second element of the doctrine of intertemporality could therefore be summed up as follows: acquired rights have to be maintained in a fashion consistent with the evolving law.

Questions remain as to the hierarchy between these two elements, the possibility of applying just one of the two elements and the general relationship between them.[7] However, for deciding contentious cases with an intertemporal dimension, the first of the two elements – the obligation to ascertain the law contemporary with the judicial facts – is of utmost importance and has achieved universal acceptance in international

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[1] See *Krause-Ablaß*, Wolf-Dietrich: Intertemporales Völkerrecht, p. 13.

[2] *Kotzur*, Markus: The temporal dimension, p. 159.

[3] For the doctrine of intertemporality generally see, *Tavernier*, Paul: Recherches; *Elias*, Taslim Olawale: The Doctrine of Intertemporal Law, AJIL 74, 2 (1980); *Higgins*, Rosalyn: Some Observations; *Krause-Ablaß*, Wolf-Dietrich: Intertemporales Völkerrecht; *McWhinney*, Edward: Time Dimension.

[4] *Island of Palmas (United* State*s v. Netherlands)*, 4 April 1929, II RIAA p. 845.

[5] *Ibid.*

[6] *Ibid.*

[7] See *Tavernier*, Paul: Relevance of the Intertemporal Law, p. 397, where it is stated that while some authors only mention one aspect of the doctrine, the choice to do so is not a neutral one.

legal scholarship.[8] Yet, the obligation to ascertain the law contemporary to the judicial facts is by no means free of uncertainties in its application.

At least one aspect of the doctrine of intertemporality is unambiguous: the prohibition of retroactive application of law. Treaties and customary international law ought not to be applied retroactively.[9] The consequence is the obligation to positively ascertain the historic law applicable between the parties in a contentious proceeding. The ascertainment of modern international law in present disputes has its challenges; especially non-written law, such as custom cannot be ascertained in a manner completely satisfying strictly formal criteria.[10] The challenges faced when needing to ascertaining historic law – sometimes law as far back as several centuries needs to be ascertained –[11] are numerous. Also, the aspect of deciding a case based on law, which does not reflect the moral consensus of the time it is decided in – i. e. the present – has been discussed as a particular problem of applying the doctrine of intertemporality.[12]

Ascertaining the applicable historic law becomes even more problematic in constellations in which the parties do not share a common legal heritage and tradition.[13] Law is not an abstract formalistic, but rather a social phenomenon, reflecting an underlying social reality.[14] With differences in social reality come differences in law and the perception of it. Can a particular regional – a European – conceptualization of (international) law perceive and understand legal phenomena outside its own web of reasoning and socio-political reality? If yes, by the use of

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[8] See, *inter alia*, *Crawford*, James: Brownlie, p. 218; *Shaw*, Malcolm Nathan: International Law, p. 497; *Koskenniemi*, Martti: From Apology to Utopia, p. 455; *Crawford*, James: The Creation of States, p. 271; *Jennings*, Robert Yewdall: The Acquisition of Territory in International Law, p. 28.

[9] See, *Tavernier*, Paul: Rechèrches, pp. 115 – 124; *Elias*, Taslim Olawale: The Doctrine of Intertemporal Law, AJIL 74, 2 (1980), p. 288; for the prohibition of retroactive application of treaty provisions see Art. 28 Vienna Convention on the Law of Treaties.

[10] For a brilliant account on the difficulties and challenges of formally ascertaining contemporary international law in general and unwritten instruments in particular, see *D'Aspremont*, Jean: Formalism, pp. 161 – 178. Also, for a deconstruction of international legal argument, highlighting the pull of from two ends of a spectrum – one being apology for state behavior, the other being the formulation of an imagined utopia – in ascertaining the actual content of a rule see *Koskenniemi*, Martti: From Apology to Utopia.

[11] As was required in the *The Minquiers and Ecrehos case*, Judgment, ICJ Reports 1953, p. 47 ff., in which France for example relied on a legal title dating as far back as 1066. Another example would be the *Case concerning Right of Passage over Indian Territory (Merits)*, Judgement ICJ Reports 1960, p. 6 ff., in which the ICJ needed to interpret the legal content of a treaty which was concluded in 1779.

[12] See, *McWhinney*, Edward: Time Dimension p. 197 ff. who proposes "progressive interpretation" as a means to bridge the gap of time.

[13] For example in the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, p. 303, the International Court of Justice needed to interpret treaty concluded between Britain and the Kings and Chiefs of Old Calabar in the 1880's.

[14] *Koskenniemi*, Martti: From Apology to Utopia, p. 474.

which methods could this be achieved? Is the methodology identifying international law – which was developed over centuries within Europe –[15] an apt tool for identifying the (historic) law of peoples who have a differing underlying reality constituting their legal framework?[16] And if not, what are possible solutions?

In introducing the problems discussed in this thesis, it is of use to parse why, generally speaking, the doctrine of intertemporality can be viewed as problematic. In a second step take a closer look at the two sides of the coin of the doctrine of intertemporality – the prohibition of retroactive application of law and the obligation to ascertain the applicable historic law is undertaken.

## I. Intertemporality as a Problem

In the application of the doctrine of intertemporality, starkly different legal views clash. An ancient or historic view of legal relations between subjects of international law collides with the perception of international law at the time the dispute is litigated – the present. International courts and tribunals therefore find themselves in a position to litigate judicial facts sometimes dating back several centuries with direct effects in the present for the parties to the dispute and indirect effects for the international community as a whole. These anachronistic results are discussed in international legal literature as a moral conflict.[17] No concrete, methodologically justifiable solution has been presented to date.

The problem of anachronistic results is accompanied with problems in the ascertainment process. A particular historic rule governing the conflict of two parties needs to be conclusively ascertained. Since this thesis focuses on disputes involving a (historic) European and a non-European legal framework, "meta-law" regulating

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[15] For the history of European international law and its methodology generally, see *inter alia* *Grewe*, Wilhelm Georg: Epochen der Völkerrechtsgeschichte; *Schmitt*, Carl: Der Nomos der Erde.

[16] This discrepancy between the perceived history and genealogy of international law as being decisively European and the actual diverse historic legal phenomena throughout different regions of the world has been termed "Eurocentrism". The question of the "Eurocentricity" of international law, especially its history, and the neglected developments of international law in regions outside of Europe have been appropriately critiqued by several scholars. See *inter alia* *Anghie*, Antony: Imperialism, Sovereignty and the Making of International Law; *Kämmerer*, Jörn Axel: Introduction. Imprints of Colonialism in Public International Law: On the Paradoxes of Transition, JHistIntlL 18 (2016); *Koskenniemi*, Martti: Histories of International law: Dealing with Eurocentrism, Rg 19 (2011); *Butkevych*, Olga: History of Ancient International Law: Challenges and Prospects, JHistIntlL 5 (2003); *Levitt*, Jeremy: The African Origins of International Law: Myth or Reality?, UCLA JILFA 113 (2005); *Orford*, Anne: The Past as Law or History?.

[17] See *McWhinney*, Edward: Time Dimension, p. 195 f.; *Orford*, Anne: On International Legal Method, LRevIntlL 1 (2013), p. 170 ff.; *Orford*, Anne: The Past as Law or History?, p. 100 ff.