
Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription

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Abstract

In his Private Law Sources and Analogies of International Law (1927), Hersch Lauterpacht claimed that many rules and concepts of international law stemmed from private law. He also showed that it was common practice in international adjudication and arbitration to look for inspiration there. The rules of private law that had found their way to international law were often common to the great municipal law systems. Many had their origins in Roman private law. This article examines whether and how the International Court of Justice has made use of Roman law rules and concepts. Roman law can be thought to fulfil its role as a source of inspiration for international law in three ways. First, it might have served as a direct historical source during the formative period of the modern law of nations. Second, it might have served as an indirect historical source because of its enduring impact on the great municipal law systems afterwards. Thirdly, it might still be considered ratio scripta, the expression of a timeless and universal law. For the purpose of examining which of these roles Roman law plays in the eyes of the ICJ, the analysis is restricted to two examples of private law analogies: occupation of terra nullius and acquisitive prescription.

1 Introduction

The Law of Nations is but private law 'writ large'. It is an application to political communities of those legal ideas which were originally applied to relations between individuals.¹

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¹ T. E. Holland, *Studies in International Law and Diplomacy* (1898), at 152.

These words of Thomas Holland were quoted by Hersch Lauterpacht (1897-1960) at the beginning of his *Private Law Sources and Analogies of International Law*, first published in 1927.² In this book, his doctoral thesis, Lauterpacht showed that international law, doctrine as well as practice, largely drew on private law. Concepts and rules that were common to the main – Western – municipal private law systems had found their way into public international law. International tribunals and arbitral bodies turned to private law for inspiration when existing international law did not provide a satisfactory solution to the problem at hand. As Lauterpacht recognized, many of these notions had their roots in Roman law.

Lauterpacht made a fundamental contribution to the debate on international law. The practice of referring to private law refuted the positivist doctrine of state voluntarism. As positivism and state sovereignty gradually lost ground, the profile of Lauterpacht's argument was raised. But while, since 1927, there has been much scholarly debate on private law analogies in general, the particular function of Roman law has been less discussed. Most international lawyers take for granted that many private law analogies stem from Roman law. In some particular cases, the bloodlines have been exposed. But there has been little discussion on the role Roman law plays in current international law as a source of inspiration, in other words, what the argumentative value of it is.³

The purpose of this article is to assess the role that argument from Roman law plays in current international legal practice. This will be done by analysing the practice of the International Court of Justice since 1945. The discussion is limited to a few instances of the use of Roman law which will be analysed in depth. In the practice of the Court, territorial and boundary disputes hold an important place. The international law of the acquisition of territory and the delimitation of international boundaries makes use of several rules derived from Roman law. Two of those examples of argument from Roman law will be assessed: occupation of *terra nullius* (Section 4) and acquisitive prescription (Section 5). The argument will be limited to disputes concerning land.

But first, the various functions that Roman law can conceivably have in the formation and elaboration of international law have to be defined. As very little of relevance has been added to Lauterpacht's view on the use of Roman law argument, it is only right to use his thoughts on the matter as a point of departure. To this, a more extensive survey of the historical interaction between Roman and international law than Lauterpacht provided will be added, which will lead us to a fine-tuning of Lauterpacht's views on the use of Roman law (Section 3). Before entering this discussion, Lauterpacht's thought on private law analogies in general needs to be clarified for two reasons (Section 2). First, his references to Roman law are brief and largely implicit. One cannot surmise Lauterpacht's views on Roman law argument outside the context of his general theory of private law analogies. Second, whether one deems private law analogies as fundamental as Lauterpacht did or not, it is only through the process of private law

² H. Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* (1927).

³ For a recent example of a study on the Roman origins of a particular principle (*uti possidetis*) see: J. Castellino and S. Allen, *Title to Territory in International Law. A Temporal Analysis* (2003).

analogies that Roman law has a role to play in current international law and the discussion on its role becomes relevant to the contemporary international lawyer.

2 Private Law Sources and Analogies of International Law

Lauterpacht's *Private Law Sources and Analogies* read like an impressive catalogue of private law concepts and rules which had been transposed to the law of nations. The law of treaties was tributary to contract law. The rules governing the acquisition of territory found their origins in property law. State responsibility was twin to torts law, while institutions, such as prescription, mandate, servitude, lease as well as the basic concepts of international procedural law, stemmed from Roman law and later private law systems.

Lauterpacht not only listed private law analogies, he also staunchly defended and promoted their use. For him, the historical and contemporary practice of turning to private law served as a strong rebut against mainstream positivism of the late 19th and early 20th centuries. It was no surprise to him that the majority of international lawyers denied the significance of private law analogies and turned a blind eye to them. The widespread use of private law in international legal practice struck at the heart of the positivistic bulwark in two different ways.

First, the practice refuted voluntarism, the claim that treaties and custom were the only existing sources of international law. Only through their consent – in treaties or custom – could states be bound to international law. Reference to private law rules and concepts was 'likely to subject the sovereign will of States to rules which have never received their express consent'.⁴ Nineteenth-century international lawyers, according to Lauterpacht, were commonly said to have defended voluntarism. However, upon closer look at the works of even some of the foremost 'positivists' like William Edward Hall (1835-1894), Lassa Oppenheim (1858-1919) and Franz von Liszt (1851-1919), one saw that even they had not embraced so faithfully the positivistic creed. In the end, claims to absolute sovereignty could not but lead to denying the binding character of international law. Therefore, scholars like Lauterpacht's own teacher Hans Kelsen (1881-1973) as well as Léon Duguit (1859-1928) had pointed to the necessity of at least one basic objective rule of international law that guaranteed the binding character of the law and transcended the sovereign will of the states. Also, many so-called positivists had not been able to completely shut out references to private law and to the law at large in their works.⁵

Second, the application of private law rules to international law clashed with 'the conception of the State as an entity of absolute legal and moral value'.⁶ According to the positivistic creed, states fundamentally differed from persons in that they had an absolute right to self-preservation. The sacred, in the words of Lauterpacht, 'metaphysical' character of states conveyed upon them interests and rights of 'a higher nature'.⁷ Surely, the state could not be submitted to rules normal people lived

⁴ Lauterpacht, *supra* note 2, at 44.

⁵ *Ibid.*, at 43-59.

⁶ *Ibid.*, at 43.

⁷ *Ibid.*, at 74.

under. Lauterpacht once again stated that this position had proved to be untenable and had little foundation in the historical tradition of international law. The doctrine of the special nature of states stood at the basis of dualism, and thus of the exclusion of individuals from the field of international law. But practice offered abundant proof that dualism had never truly existed. Moreover, the ‘state’ as a concept originated from the analogy of the state with the individual and the transferring of the (natural) rights of individuals to the state. Lauterpacht quoted Hugo Grotius (1583-1645): ‘in respect to the whole of mankind States took the place of private persons’.⁸

The frequent references to private law in international judiciary and arbitral practice, according to Lauterpacht, offered proof that positivism did not offer an accurate layout of contemporary international law. Private law analogies were far from a marginal feature in international law, as Lauterpacht saw it. In 1927, Lauterpacht was an unknown quantity in the world of international law. But this was soon to change. Over the next three decades, he became one of the most prominent and influential scholars of international law.⁹ Among contemporaries, Lauterpacht’s thought stands out for its remarkable consistency. Far from retracting anything from what he had claimed in 1927, Lauterpacht went on to construct his system of international law on the basis thereof.¹⁰

Central to Lauterpacht’s thought was his rejection of *non liquet*. According to Sir Hersch, this concept had been introduced in international law by Emer de Vattel (1714-1767) and had developed into one of the hallmarks of positivism. It implied that international law as a legal system was incomplete. States were only subjected to the rule of law in so far as they themselves had consented to the existence of a certain rule. In consequence, not all conflicts between states could be resolved through law. Therefore, international tribunals and arbiters could refuse to adjudicate if they found the law was incomplete and did not offer a solution to the dispute submitted to them.

Throughout his many publications, Hersch Lauterpacht fiercely attacked *non liquet* as an excess of positivism.¹¹ Though the doctrine of *non liquet* had met with widespread support among 19th-century scholars of international law, it had no foothold in judicial practice. Nor should it have. In Lauterpacht’s view, international law did

⁸ H. Grotius, *Mare liberum* 5 (1609) (author’s trans.); see on Grotius in this respect, R. Tuck, *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant* (1999), at 79-89. Lauterpacht, *supra* note 2, at 72-87, Grotius quotation at 81.

⁹ From 1938 to 1956, Lauterpacht was Whewell Professor of International Law at Cambridge. From 1956 until his untimely death in 1960, he served as a Judge in the International Court of Justice. Graveson, ‘Hersch Lauterpacht’, 10 *ICLQ* (1961) 1; E. Lauterpacht, ‘Sir Hersch Lauterpacht, 1897-1960’, 8 *EJIL* (1997) 313; McNair, ‘Hersch Lauterpacht’, *Proceedings of the British Academy* (1961) 371.

¹⁰ For some analyses and assessments of Lauterpacht’s thought see: Jenks, ‘Hersch Lauterpacht: The Scholar as a Prophet’, 36 *BYBIL* (1960) 1; M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (2001), at 353-412, this chapter was previously published in 8 *EJIL* (1997) 215; Scobbie, ‘The Theorist as Judge: Hersch Lauterpacht’s Concept of the International Judicial Function’, 8 *EJIL* (1997) 264; Rosenne, ‘Sir Hersch Lauterpacht’s Concept of the Task of the International Judge’, 55 *AJ* (1961) 825.

¹¹ H. Lauterpacht, *The Function of Law in the International Community* (1933; 2nd ed., 1973) and ‘Some Observations on the Prohibition of “Non Lique” and the Completeness of the Law’, in F.M. van Asbeck *et al.* (eds.), *Symbolae Verzijl* (1958), 196.

not fundamentally differ from municipal law. As he rejected voluntarism as well as the special character of the state, he refused to accept the incompleteness of international law. As was the case with the main municipal systems, international law was a complete law that provided juridical solutions to all conflicts between its subjects. There was no distinction to be made between 'juridical' and 'political' conflicts.

Lauterpacht found support for the completeness of international law in Article 38 of the Statute of the Permanent Court of International Justice. In addition to treaties and international customary law, Article 38 mentioned 'general principles of law as recognised by civilised nations' as one of the sources of international law that the Court should apply. In doing so, the signatory states had expressly rejected the first pillar of positivism: absolute voluntarism. In Lauterpacht's own words:

So far as the science of international law is concerned, Article 38(3) had dealt a death blow to positivism in its most important manifestation, namely in its theory of the sources of judicial decision. It denies the fundamental tenet of positivism that custom and treaty are the only sources upon which the judge is entitled to draw.¹²

In Lauterpacht's view, the general principles had a dual function. First, they served as a subsidiary source of law, whenever treaty and customary law were incomplete or unsatisfactory. As such, the general principles of law served as the stopgap to fill the *lacunae* left by positive international law and ensured the completeness of the law.¹³ Second, general principles served as the general background against which the more specific rules from the two primary sources of international law were to be read, interpreted and understood. In Lauterpacht's view, Article 38 was a cascade of sources that went both ways. While there was subsidiarity in application from treaties via custom to general principles, this last category offered a general and more universally valid context for customs, which in turn formed the context to the background of which treaties had to be interpreted. Positive international law was imbedded in the 'general principles of law'.¹⁴

For Sir Hersch, these 'general principles of law as recognised by civilised nations' were nothing but the basic principles and features that the main law systems of the world shared. With these, he meant in the first place municipal law systems. And as private law, of all branches of the law, had the longest tradition and was by far the best developed, general principles of law under Article 38 referred first and foremost to the common heritage of (Western) national private law systems. In consequence, the Statute had legitimated the practice of private law analogies and had given it an essential role in the development of international law.¹⁵ In doing so, it also affirmed that just like any other law system, international law was just a part of the law at large, of the 'legal experience of mankind':

¹² H. Lauterpacht, 'General Rules of the Law of Peace', in E. Lauterpacht (ed.), *International Law, Being the Collected Papers of Hersch Lauterpacht* (1970), i, 179, at 242, first published in 62 *RCADI* (1937) 99.

¹³ H. Lauterpacht, 'International Law: The General Part', in E. Lauterpacht, *supra* note 12, 1, at 68.

¹⁴ *Ibid.*, at 86 and H. Lauterpacht, *supra* note 12, at 231 and 351.

¹⁵ H. Lauterpacht, *supra* note 2, at p. viii.

The preceding considerations explain the nature of ‘general principles of law’. They are principles arrived at by way of a comparison, generalization and synthesis of rules of law in its various branches – private and public, constitutional, administrative, and procedural – common to various systems of national law. They are the modern *jus gentium* in the wider sense. In the sense here suggested, they are no more than a modern formulation of the law of nature which played a decisive part in the formative period of international law and which underlay much of its subsequent development. For there is no warrant for the view that the law of nature was mere speculation which gave a legal form to deductive thinking on theology and ethics. It was primarily a generalization of the legal experience of mankind.¹⁶

International law was not fundamentally different from other law systems. Its deficiencies as a law system, which often failed to provide an apparent rule for a case and the binding character of which was still often contested, had nothing to do with its exceptional character as positivists claimed, but merely with the fact that as a body of law it was largely underdeveloped. In referring to private law and looking for support in private law analogies, international lawyers only turned to the best ‘the legal experience of mankind’ had to offer further to develop their field. In Lauterpacht’s mind, there was no alternative:

Shall international law, by refusing to admit its present imperfections and by elevating them to the authority of legitimate and permanent manifestations of a ‘specific’ law, abdicate the task of raising itself above the level of a primitive law of a primitive community?¹⁷

Lauterpacht’s doctrine offered a severe challenge to the positivist mainstream. He touched upon two very contentious points of contemporary international law: the interpretation of ‘general principles of law as recognised by civilised nations’ and *non liquet*. Soviet international lawyers have denied Article 38(3) to indicate a source of law other than treaty or customary law.¹⁸ Other international lawyers, like the Italian Dionisio Anzilotti, understood ‘general principles’ first and foremost to be principles of international law.¹⁹ Both groups rejected an interpretation which associated international law with the law at large. In truth, the Hague Court only very rarely invoked Article 38(3), now Article 38(1)(c) of the Statute.²⁰ Nevertheless, over time the majority of 20th-century international lawyers came to accept that ‘general principles of law’ include principles derived from municipal law systems.²¹ Lauterpacht’s strong rejection

¹⁶ H. Lauterpacht, *supra* note 13, at 74–75.

¹⁷ H. Lauterpacht, *The Function of Law*, *supra* note 11, at 431.

¹⁸ G. Tunkin, *Theory of International Law* (trans. W.E. Butler, 1974), at 190–203.

¹⁹ D. Anzilotti, *Cours de droit international* (trans. G. Gidel, 1929), i, 117–118.

²⁰ Fitzmaurice, ‘The Law and Procedure of the International Court of Justice: General Principles and Substantive Law’, 27 *BYbIL* (1950) 1; Thirlway, ‘The Law and Procedure of the International Court of Justice 1960–1989’, 61 *BYbIL* (1990) 1, at 110–111.

²¹ Akehurst, ‘Equity and General Principles of Law’, 25 *ICLQ* (1976) 801; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1987); C. de Visscher, *Théories et réalités en droit international public* (4th ed., 1970), at 412; Friedmann, ‘The Use of “General Principles” in the Development of International Law’ in L. Gross (ed.), *International Law in the Twentieth Century* (1969), at 246; P. Guggenheim, *Traité de droit international public* (1967), i, at 295; G. Herczegh, *General Principles of Law and the International Legal Order* (1969); McNair, ‘The General Principles of Law Recognised by Civilised Nations’, 33 *BYbIL* (1957) 1; Sörensen, ‘Les principes généraux de droit reconnus par les nations civilisées’, 101 *RCADI* (1960) 16; G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (3rd ed., 1957),

of the doctrine of *non liquet* did not remain unanswered either. Most famously, Julius Stone published an article refuting Lauterpacht's position on the matter.²² Since then, the question has not been settled conclusively.²³

On two points, Lauterpacht's thought has found widespread acceptance. First, although many international lawyers do not accept the connection Lauterpacht made between private law analogies, general principles and *non liquet*, the point that private law analogies are a common feature of international law is hardly contended. The overall majority of international lawyers implicitly accept Lauterpacht's claims on the existence of private law analogies as a statement of fact. Second, as the practice of the ICJ proves, one does not need effectively to use the bridge between international law and municipal private law systems that Article 38(1)(c) offers to overcome the gap between them. One only needs to accept that the use of private law analogies is condoned by Article 38. This in itself is enough to vindicate Lauterpacht's most fundamental claim: international law is just another part of the 'common experience of mankind'.

3 The Triple Function of Roman Law in International Law

Lauterpacht's interpretation of 'general principles of law' in its connection to the prohibition of *non liquet* was not the sole argument he used to defend private law analogies. In a less explicit way, Lauterpacht also mobilized history to strengthen his hand. When discussing general principles derived from private law, Lauterpacht first and foremost meant principles taken from municipal law systems. But he also included taking inspiration from Roman law.

To him this was natural. Already in the preface to his doctoral thesis, Lauterpacht more than once added 'and Roman law' to 'private law' without making any allowances for it.²⁴ Throughout the book, there are more instances of the self-evident way in which the author associated Roman law with the general principles and common rules of private law he discussed. After all, Lauterpacht had received his legal education in Vienna and came from the German legal tradition. In this tradition, Roman law

i, at 43; Waldock, 'The Common Law of the International Community – General Principles of Law', 106 *RCADI* (1962) 54. See for a discussion on the various interpretations of 'general principles' and more literature: Lammers, 'General Principles of Law Recognized by Civilized Nations' in F. Kalshoven (ed.), *Essays on the Development of the International Legal Order* (1980), at 53; Thirlway, *supra* note 20, 116; Vitanyi, 'Les positions doctrinales concernant le sens de la notion de "principes généraux de droit reconnus par les nations civilisées"', 86 *RGDIP* (1982) 48.

²² Stone, 'Non Liquet and the Function of Law in the International Controversy', 35 *BYbLL* (1959) 124.

²³ Scobbie, *supra* note 10, at 274-276 and 285-288. On *non liquet* see: Fitzmaurice, 'The Problem of Non Liquet: Prolegomena to a Restatement' in R. Ago *et al.* (eds.), *Mélanges offerts à Charles Rousseau* (1974), at 89; Tammelo, 'Logical Aspects of the Non Liquet Controversy in International Law', 5 *Rechtstheorie* (1974) 1; J. Verzijl, *International Law in Historical Perspective* (1968), i, at 47; Weil, 'The Court Cannot Conclude Definitively . . . ? *Non Liquet* Revisited', 36 *Columbia J Transnat'l L* (1997) 109.

²⁴ E.g. 'The student who surveys in its entirety the whole field of application of private (and Roman) law . . .': H. Lauterpacht, *supra* note 2, at p.vii; 'To those instances cases may fairly be added in which doctrines originally created in close contact with Roman and private law developed subsequently . . .': *ibid.*, at 6.

held a place of honour in the study of private law even until after the codification of civil law in 1899.²⁵

But Lauterpacht's references to Roman law went further than almost absent-minded associations. Roman law argument served to underpin Lauterpacht's theory on private law analogies in three ways. First, by referring to Roman law, Lauterpacht at least suggested that the current reliance on private law was part of a longstanding tradition. Second, Lauterpacht had justified taking inspiration from municipal private law systems through linking them with the 'general principles of law' of Article 38 of the Statute. The fact that many private law analogies shared a common source in Roman law helped sustain that link. Third, Roman law offered an alternative to reliance on natural law as a 'mere speculation which gave a legal form to deductive thinking on theology and ethics'. The common features did not have to be explained on the shaky ground of moral natural law precepts, but could be seen as the results of the common history of the major positive law systems of the West, or in terms of 'natural law' as it was defined by Lauterpacht: the 'generalization of the legal experience of mankind'.

But in what ways had or did Roman law play a part in the formation of international law? Though his remarks on the issue were brief and sketchy, it is possible to discern Lauterpacht's views from his general theory of private law analogies. Three different roles of Roman law come to light.²⁶

First, Lauterpacht recognized that Roman law had played a paramount role during the formative period of international law (16th–17th centuries), and even during the 18th century. The great authors on international law, like Albericus Gentilis (1552-1608), Hugo Grotius (1583-1645), Richard Zouche (1590-1661) and even the 'positivist' Cornelius van Bynkershoek (1673-1743) had made ample use of 'private law analogies' derived from Roman law in articulating the emerging law of nations.²⁷ In that respect, Roman (private) law served as a direct historical source for current international law. And modern private law analogies were just the continuation of older analogies of Roman law (16th-early 17th centuries) and natural law (late 17th-18/19th centuries).

Second, for Lauterpacht Roman law was the common core under the municipal law systems of the civil law tradition. Though its influence on English law had certainly been smaller, it was not inexistent. Through equity, the ecclesiastical and the admiralty courts, Roman law certainly had a foothold in the English legal tradition. For his part, the Austrian-British internationalist was not one to underscore the differences between civil and common law. He expressly rejected the idea that these differences had led to a fundamentally diverse approach to international law.²⁸

²⁵ R. Zimmermann, *Roman Law, Contemporary Law, European Law* (2001), at 53.

²⁶ Lesaffer, 'The Scholar as a Judge: Romeins recht en algemene beginselen van privaatrecht bij sir Hersch Lauterpacht (1897-1960)', in E.-J. Broers and B. van Klink (eds.), *De rechter als rechtsvormer* (2001), at 65, 78.

²⁷ H. Lauterpacht, *supra* note 2, at 8. Also, see the more elaborate comments in the new version of the book Lauterpacht was preparing before his death, published in E. Lauterpacht, *International Law* (1973), ii, at 173, 184.

²⁸ H. Lauterpacht, 'The So-Called Anglo-American and Continental Schools of Thought in International Law', 12 *BYBIL* (1931) 31.

Inasmuch as common features of the main municipal private law bodies of the West stood at the origin of rules of international law, Roman law once again came to the fore as the historical source from which they had flowed. Next to a direct historical impact, Roman law thus also had an indirect historical role in the development of international law. So even when the heyday of Roman law in legal science was over after 1700, it continued to be a point of reference.

Third, Lauterpacht pointed out that some 19th-century and contemporary international lawyers, especially from common law countries, directly referred to Roman law as *ratio scripta* or 'the reason of the thing'. To those authors, Roman law by definition seemed to embody the general principles of law. Roman law rules and concepts were considered absolute proof of what was common in the law of the different nations and could be invoked to draft new rules of international law.²⁹ Examples of this could also be cited from international arbitration.³⁰ Lauterpacht thereby suggested that Roman law still directly inspired new private law analogies of international law. Lauterpacht was aware that this discussion on Roman law as *ratio scripta* was the replaying of a similar one the natural lawyers of the 17th and 18th centuries had held. He explained the enduring high standing of Roman law with Anglo-American writers by the fact that they, 'though following closely the practice of States, had never lost sight of what may be called the natural law foundation of international law'.³¹ And whatever claims to the contrary were made by those writers themselves or by later historians, the international and natural lawyers of the 17th and 18th centuries had been unable to shed Roman law completely so that 'natural law', to a large extent, was nothing else than Roman law. Another explanation, which Lauterpacht did not give, was that Roman law had a smaller impact on national private law in common law countries than in civil law countries. In consequence, it was more readily accepted as an autonomous source of inspiration for international law.

Lauterpacht was critical of this Anglo-American attitude. For him, private law rules could only be invoked as proof of 'general principles of law' inasmuch as they were truly 'general'. This necessitated that those rules had to be 'universally adopted', which outweighed considerations of 'legal justice'. Under 'universal' he understood that these rules had at least to be found in 'the main systems of private jurisprudence'.³² There was no reason not to subject rules of Roman law to this 'practical test':

Neither is there any cogent reason for maintaining that Roman private law constitutes an exception to the principle that rules and technicalities of particular systems of private law must not be advanced for the purpose of interpretation and construction of treaties.³³

Brief and implicit Lauterpacht's remarks may have been, his threefold analysis of the role of Roman law in international law was on the mark. We will adopt his views on

²⁹ H. Lauterpacht, *supra* note 2, at 25 and 176.

³⁰ H. Lauterpacht cited the *Venezuelan Preferential Arbitration* of 1903.

³¹ H. Lauterpacht, *supra* note 27, at 201, n. 1.

³² H. Lauterpacht, *supra* note 2, at 177.

³³ *Ibid.*, at 178.

the triple function of Roman law as a working hypothesis. However, it seems expedient to delve somewhat deeper into the history of the interaction between Roman and international law.

Though Lauterpacht devoted a substantial chapter of his book to the historic writers of international law, it was not his aim to offer an elaborate historical explanation of the use of Roman private law in the modern law of nations, but only to indicate and substantiate it. He wanted to show that there was a long tradition of private law analogies. It spanned the period of the sovereign state system and went back all the way to the formative period of international law. This all the more proved his point that private law analogies were no marginal feature of international law. But by not treating the historical relation between Roman and international law in its own right, Lauterpacht could not address a question which is crucial for our understanding of that relation, namely what was meant under ‘Roman law’?

Lauterpacht himself volunteered two explanations for the use of Roman law in international law. First, private, and thus Roman, law analogies were natural during the formative period of the law of nations because of the ‘patrimonial conception of the State’.³⁴ Until the 16th century, the state was considered to be the private patrimony of the prince and there was as yet no strict distinction between private and public law. Therefore, rules of private law easily found their way to the dealings between states, which were in fact dealings between princes. Indeed, during the Late Middle Ages and the 16th and early 17th centuries, treaties were not fundamentally different from private law contracts. Only the great ‘classics of international law’ from the early 17th century started to develop an autonomous doctrine of treaty law.³⁵

But the patrimonial conception of the state offered only part of the solution. As Lauterpacht suggested, this historical explanation was enthusiastically supported by positivist international lawyers because it served to corroborate their rejection of private law analogies. As the patrimonial conception of the state became outdated, private law analogies did too, or should have.³⁶ There was another explanation for the historical significance of Roman law that Lauterpacht hinted at when he wrote that ‘[i]n the Middle Ages Roman Law was, to a large extent, coterminous with law’.³⁷ Though the overall majority of legal historians will find this phrase too bold and disrespectful to the role played by canon, feudal and customary law, it has relevance to the question at hand. In fact, Lauterpacht refers to a historic reality largely neglected by historians of international law: that of the continuity between the medieval doctrine of the *ius commune* and the early modern law of nations.³⁸

³⁴ *Ibid.*, at pp.vii, 37, and 91.

³⁵ W. G. Grewe, *The Epochs of International Law* (trans. M. Byers, 2000), at 90 and 196–198; Lesaffer, ‘The Medieval Canon Law of Contract and Early Modern Treaty Law’, *2 J Hist Int'l L* (2000) 178, at 185, and ‘An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice’, *23 J Legal Hist* (2002) 223, at 224 and 244; K.-H. Ziegler, *Völkerrechtsgeschichte* (1994), at 155.

³⁶ H. Lauterpacht, *supra* note 2, at pp.vii–viii.

³⁷ H. Lauterpacht, *supra* note 27, at 185.

³⁸ Lesaffer, ‘The Grotian Tradition Revisited: Change and Continuity in the History of International Law’, *73 BYIL* (2002) 103.

To understand the impact of Roman law on the modern law of nations during its 'formative period' (16th-17th centuries) it is imperative to grasp its significance during the Late Middle Ages.³⁹ From the 11th century onwards, a new science of law was developed in the Latin West. The rediscovery of the Justinian texts and the construction of the 'classical' canon law were the two ingredients for the creation of this European legal science. The learned law, the *ius commune*, that had resulted from it by the 14th century, not only had two parts, but in many respects was forged from the merging of both. From the Late Middle Ages to the early 17th century, legal science was synonymous with the *ius commune*. Though it largely remained a learned law and was not applied by the vast majority of the secular courts in Europe, it had an enormous impact on the development of legal practice. The *ius commune* was scholastic. As such its sources had authoritative value and inspired a common ideal of law that hovered over the many hundreds of legal systems that existed and were applied all over the West. It was the lighthouse indicating the direction the many ships of law all had to steer to.⁴⁰

What was true for the law governing relations between private persons was true for the law governing the relations between princes, republics and the like. During the Middle Ages, there was never an autonomous jurisprudence and literature of the law of nations. But many lawyers, among them the greatest like Bartolus of Sassoferrato (1314-1357) and Baldus de Ubaldis (c. 1327-1400), discussed matters we would now classify under the law of nations. The relations between princes and republics were as much subject to the *ius commune* as all other fields of the law were. After all, the medieval jurists had no urge to treat the 'laws of nations' as something distinct from the law at large. There was yet no 'state' to claim a special character, absolute sovereignty and exclusive control over its territory and to exclude other entities and private persons from the scenery of international relations.⁴¹

In applying concepts, rules and institutions from private law to the relations between princes, the medieval jurists were helped by the confusion existing around the Roman concept of *ius gentium*. Originally this term referred to the system of 'universal' private law that the Roman *praetor peregrinus* – the republican magistrate who held jurisdiction over foreigners in Rome – had developed. From the post-classical period onwards (after AD 250) it was considered to include questions of what we would call 'public international law'.⁴² Though the Roman *ius gentium* was a positive law system,

³⁹ The most substantial publication on this matter for a long time was: Ziegler, 'Die römische Grundlagen des europäischen Privatrechts', 4 *Ius Commune* (1972) 1; now see also: C. Baldus, *Regelhafte Vertragsauslegung nach Parteirollen* (2 vols., 1998) and, Ziegler, 'The Influence of Medieval Roman Law on Peace Treaties', in R. Lesaffer (ed.), *Peace Treaties and International Law in European History* (2004), at 147. For a general survey of the role of general principles of law in the history of international law see Battaglini, 'Il riconoscimento internazionale dei principi generali del diritto' in *Le droit international à l'heure de sa codification. Etudes en l'honneur de Roberto Ago* (1987), i, 97.

⁴⁰ On scholastic jurisprudence see M. Bellomo, *The Common Legal Past of Europe 1000-1800* (1995).

⁴¹ Lesaffer, 'Charles V, *monarchia universalis*, and the Law of Nations (1515-1530)', 71 *Legal Hist Rev* (2003) 79.

⁴² This terminological confusion and evolution was recently brought forward as an explanation for the transfer of private law rules to the law of nations by Winkel. 'The Peace Treaties of Westphalia as an Instance for the Reception of Roman Law', in Lesaffer, *supra* note 39, at 222 and by Castellino and Allen, *supra* note 3, at 29.

there was a tradition of associating it to natural law.⁴³ After all free inhabitants of the Roman Empire became citizens in AD 212, the distinction between the *ius civile* and the *ius gentium* lost its practical importance and the two systems became increasingly intermingled.

It has, however, to be underscored that one can hardly assess the impact of the medieval civil law doctrine without taking into account that of canon law. Most aspects of international relations discussed by jurists involved arguments from both canon and Roman law that were inextricably intertwined. Moreover, the impact of canon law was more direct. Canon lawyers more often addressed subjects relevant to the law of nations than Roman law did.⁴⁴ Canon law had a greater impact than Roman law because it was the applicable law of the ecclesiastical courts, which – *ratione peccati* – held jurisdiction in many disputes between princes and body politics.

In short, during the Late Middle Ages, the law of nations was not so much inspired by the *ius commune*, as it was an inextricable part of it. The 16th century brought a radical change to all this. The emergence of powerful dynastical power complexes, the discoveries in the New World and the Reformation challenged the old European legal order. By 1550, canon law and the papal jurisdiction had lost their basis in somewhat half of the West. Quite suddenly, the strongest bridge between the *ius commune* and international legal practice collapsed.

The 16th century also saw the rise of a new jurisprudence: humanism. Humanists did not consider the Justinian compilation to be the embodiment of an absolute and timeless truth as the medieval scholastics had. They knew it for what it was: a collection of texts made by man, stemming from a specific historical context. Their concern was not to extricate an absolute truth from the Justinian books, but to interpret them from their original meaning and against the background of their historical context. Roman law was still considered the most perfect embodiment of reason and justice that ever was. But Roman law lost its absolute and timeless authority, and by consequence, it should not, it was held, be directly applied any longer to current problems. Contemporary law and legal practice had to be formed to its example; jurists had to emulate Roman law.⁴⁵ This humanistic approach is discernible in the works of the first writers who, from around 1600, started to develop an autonomous doctrine of the law of nations. Gentilis and Grotius are only the most famous names in generations of jurists and practitioners who from the early 17th century onwards tried to liberate the *ius gentium* from its old, *ius commune* context and form it into an independent discipline. But to mould the abundant mass of custom, treaties and rules into a systematic and scientific framework, they had no choice than to turn to the example of the only

⁴³ Gaii Inst. 1.1; Inst. 1.2.1; Dig. 1.1.9.

⁴⁴ Muldoon, 'The Contribution of the Medieval Canon Lawyers to the Formation of International Law', 28 *Traditio* (1972) 483, and 'Medieval Canon Law and the Formation of International Law', 81 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, kanonistische Abteilung* (1995) 64; Wijffels, 'Martinus Garatus Laudensis on treaties', in Lesaffer, *supra* note 39, at 184.

⁴⁵ Kelley, 'Civil Science in the Renaissance: Jurisprudence in the French Manner', 2 *J Hist of Ideas* (1981) 261; G. Kisch, *Studien zur humanistischen Jurisprudenz* (1972), at 19; Schoeck, 'Humanism and Jurisprudence', in A. Rabil (ed.), *Renaissance Humanism: Foundations, Forms and Legacy* (1988), iii, at 310.

pre-existing legal science, the *ius commune* or at least the Roman law part of it. First, they referred to the writings of the medieval jurists and as such built further on a body of '*ius gentium*' that had been part of the old *ius commune*. Second, when creating new rules and concepts of the law of nations, they often used Roman private law – the classical Roman law in its humanist interpretation – as a source of inspiration and started to use private law analogies. Grotius' equation of the state's personality with that of man in nature – adopted by Thomas Hobbes (1588-1679) – became a powerful myth. With time, the writers of the modern law of nations as well as their civil law counterparts became more critical of Roman law and found more instances of situations in which Roman law did not provide the most reasonable or just solution. A new criterion for the application or not for Roman law emerged: reason. Though Roman law often proved to encompass this, it not always did.

Although canon law had lost its secular authority and humanists wanted to return to the original Roman law, they could not undo the evolution that Roman law had undergone during the Middle Ages nor could they shed the influence of canon law. The merging of Roman law and canon law in medieval jurisprudence had above all served to liberate Roman law of its casuistic technicalities by imbedding them in the more general precepts and principles that radiated from moral theology and canon law. However keen some humanists were to restore the original meaning of certain institutions and concepts, one could not erase from memory doctrines like consensualism in contract law – *pacta sunt servanda*⁴⁶ – or liability for tort. These ideas, which were first developed in canon law, now gained the status of natural law. In other words, inasmuch as Roman law was still considered to be the main source for the 'reason of the thing' and for natural law by many of the 'classics of international law', as Lauterpacht had indicated,⁴⁷ it had to thank this to canon law. When Lauterpacht referred to 'Roman law', he in fact often meant medieval Roman law in its close connection to canon law. Furthermore, the evolution of Roman law had not stopped there. German Pandect-Science had continued the practice of natural lawyers to extract portions of Roman law in the form of terms, institutions and individual rules and to use them as building-stones for the construction of their own, contemporary system of (private) law that had little in common with classical Roman law.

Drawing from these insights in the historical role of Roman law, we can fine-tune Lauterpacht's views about the three potential functions of Roman law in current international practice. From Lauterpacht's writings, three different functions of Roman law can be distinguished: Roman law as a direct historical source for international law, Roman law as an indirect historical source and Roman law as *ratio scripta*, inspiring new private law analogies in contemporary international law. We need to add some remarks regarding the two first functions. This fine-tuning of Lauterpacht's approach mainly entails taking into account the shifting content of the term 'Roman law'.

First, Roman private law has directly played a historical role in the development of the law of nations. It did not only play this part during the formative period of the law

⁴⁶ X. 1.35.1: 'Universi dixerunt, pax servetur pacta custodiantur'.

⁴⁷ H. Lauterpacht, *supra* note 2, at 12.

of nations (16th–17th centuries) as Lauterpacht stated. Its influence dated as far back as the 11th century. The direct influence of Roman law was certainly on the decrease by the second half of the 17th century. A better insight into what that ‘Roman’ law consisted of and what its exact meaning was at the ‘critical date’ of its impact on the law of nations is expedient to interpret historic or even contemporary international law. Therefore, as has been indicated above, one must clarify what is understood under the heading of Roman law. Is it classical law or Justinian law – which is only likely for the period of humanism, the 16th and 17th centuries – or is it Roman law as a part of the medieval *ius commune*? And if the latter is true, would ‘Roman law’ then not often refer to canon law as well?

Second, later private law analogies from the 18th, 19th or even 20th centuries that have formed international law often imply references to elements that were originally taken from Roman law. Here again, it will be relevant to know if Roman law means classical, Justinian or medieval law, or if its just refers to some remnants – terms and Latin *adagia* – that have found their way into the supposedly ‘Roman’ legal science of the 19th century known as Pandect-Science.

4 Occupation of *terra nullius*

We will now turn to the use of argument from Roman law by the International Court of Justice since 1945. It is not our purpose to catalogue all the references to Roman law to be found in the judgments and advisory opinions of the Court. Such an endeavour would not be unfeasible, but its result would be disappointing. At no point does the ICJ expressly justify the use of a rule because it derives from Roman law. Some of the judges in their individual opinions have, however, done so, foremost among them Judge Federico De Castro, who served on the Court in the 1970s. Likewise, the Court very rarely appeals to a private law analogy in order to introduce a new concept or rule.⁴⁸ On the other hand, the Court often applies rules and concepts from private law, which in the past have found their way into international law. It also often uses general principles of law, without expressly referring to Article 38(1)(c) of the ICJ Statute or to their private law origins.⁴⁹ Many of these can be traced back, at least in part, to Roman law. Enumerating them would leave us doing quite the same as what Lauterpacht did in the 1920s and would lead to basically a similar inventory.⁵⁰ Moreover, making such an inventory would teach us little about the use and role of Roman law other than that international law had adopted private law rules, many of which have a basis in Roman law.

According to doctrine, there are five traditional modes of acquisition of territory in international law: cession, occupation, accretion, conquest or subjugation and prescription.⁵¹ These five modes are all derived from private law in general and have

⁴⁸ Thirlway, *supra* note 20, at 127.

⁴⁹ *Ibid.*, at 121.

⁵⁰ Fitzmaurice, *supra* note 20, 29 (1952) 1, 30 (1953) 1, 32 (1955–1956) 203, and 33 (1957) 203; Thirlway, *supra* note 20, 60 (1989) 1, 61 (1990) 1, 63 (1992) 1, and 66 (1995) 1.

⁵¹ I. Brownlie, *Principles of Public International Law* (4th ed., 1980), at 131; R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9th ed., 1992), ii, 679.

their roots in Roman law.⁵² It has been said that in most cases the different modes of acquisition cannot be isolated and separated from one another and that most titles are composite. However, as this is not a study of the law of acquisition of territory in international law, we will treat the two issues at hand in their own right – at least as far as this is possible.

Robert Jennings defined occupation as ‘the appropriation by a State of a territory which is not at the time subject to the sovereignty of any State’. According to him, this does not imply that – in the days of colonization when occupation was invoked – the territory was uninhabited: ‘Natives living under a tribal organization were not regarded as a State for this purpose.’ He recognized that this attitude, which stemmed from the 19th century, ‘may cause some embarrassment now’. Because the whole globe is now subject to some state’s sovereignty, except for the Polar Regions, occupation has become obsolete.⁵³

In December 1974, the UN General Assembly asked the ICJ for an Advisory Opinion on the Western Sahara. Resolution 3292 (XXIX) of 13 December 1974 submitted to the Court the question whether the Western Sahara was, at the time of its colonization by Spain, a territory belonging to no one, or *terra nullius*. In its opinion, the Court clearly accepted that occupation had been considered a mode of acquisition of territory in international law during the 19th century. In order, however, for a territory to be open to occupation, it had to be established that ‘at the time the territory belonged to no-one, in the sense that it was then open to acquisition through the mode of “occupation”’.⁵⁴ The ICJ also referred to *Legal Status of Eastern Greenland* (1931) where the Permanent Court of International Justice had recognized occupation of *terra nullius* as ‘an original means of peaceably acquiring sovereignty’.⁵⁵

The Court rejected that tribal lands, like the Western Sahara, had been appropriated as *terra nullius* through occupation during the colonization of the 19th century. It thus opposed the *communis opinio* of 20th-century international lawyers. The ICJ pointed out that ‘whatever differences of opinion there may have been among jurists, the state practice of the relevant period indicates that territory inhabited [*sic*] by tribes or peoples having a social or political organization were not regarded as *terrae nullius*’. Instead, in many instances the colonial power concluded agreements with the local tribal rulers and thus acquired sovereignty through cession, or through other derivative modes.⁵⁶ Hereby, the Court also rejected the claim that occupation

⁵² I.A. Shearer (ed.), *Starke’s International Law* (11th ed., 1994), at 146.

⁵³ R. Jennings, *The Acquisition of Territory in International Law* (1963), at 20. For a similar definition see L. Oppenheim, *International Law* (1905), i, at 275.

⁵⁴ [1975] ICJ Rep 11, at 39.

⁵⁵ PCIJ Series A/B, No. 53, 21, at 44 and 63.

⁵⁶ [1975] ICJ Rep 39; see also the Opinion of Judge Ammoun in *Legal Consequences of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 86. On the role of treaties in the colonization of the 19th century see Alexandrowicz, ‘The Role of Treaties in the European-African Confrontation in the Nineteenth Century’ in A.K. Mensah-Brown (ed.), *African International Legal History* (1975), at 27; Andrews, ‘The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century’, 94 *LQR* (1978) 408; Anghe, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’, 40 *Harvard ILJ* (1999) 36.

has been or was a valid way of acquiring inhabited territories that were not under the authority of a state – meaning a Western-style state – and demanded a stricter interpretation of *terra nullius*.⁵⁷

In later cases, the Hague Court also referred to occupation of *terra nullius* in relation to the doctrine of *uti possidetis juris*.⁵⁸ In *Frontier Dispute* (1986) between Burkina Faso and Mali, it claimed that one of the reasons the newly independent states of Latin America invoked this doctrine during the 19th century had been to prevent the colonial powers from laying claims on ‘uninhabited or unexplored’ territories. By taking the borders between the different administrative parts of the defunct Spanish colonial empire as their international borders, the new states could hold on to the same claims regarding ‘uninhabited and unexplored’ lands within those borders as the Spanish colonizer had. These lands had been under the sovereignty of a state for a long period of time. Therefore, they were not *terrae nullius*.⁵⁹ In *Land, Island and Maritime Frontier Dispute* (1992) between Guatemala and Honduras, the Court repeated this reasoning, this time referring to a 1922 arbitral award by the Swiss Federal Council between Colombia and Venezuela:

This general principle [of *uti possidetis juris*] offered the advantage of establishing an absolute rule that there was not in law on the old Spanish America any *terra nullius*; while there might exist many regions which had never been occupied by the Spaniards and many unexplored or inhabited by non-civilized natives, these regions were reputed to belong in law to whichever of the Republics succeeded to the Spanish province to which these territories were attached to by virtue of the old Royal ordinances of the Spanish mother country.⁶⁰

Though the ICJ had found little practical use for occupation of *terra nullius*, it sustained it as one of the theoretical modes of acquisition of sovereignty over land territory in international law.⁶¹ It is a clear instance of the adoption by international law of a concept that had a basis in Roman law. In this case, the Roman law analogy dates back to the formative period of international law.

Terra nullius is not a notion from classical Roman law. Occupation, however, is. According to the jurists of the classical period (50 BC – AD 250) *occupatio* was one of the natural modes of acquisition. It did not pertain to the *ius civile* nor to the *ius praetorium* – the application of which was restricted to Roman citizens – but to the *ius gentium* – the law applied in Roman courts to cases in which foreigners were involved. Furthermore,

⁵⁷ J. Crawford, *The Creation of States in International Law* (1979), at 176 and the references in n. 13; Shaw, ‘The Western Sahara Case’, 49 *BYbIL* (1978) 119, and *Title to Territory in Africa: International Legal Issues* (1986), at 31.

⁵⁸ See Castellino and Allen, *supra* note 3; Munkman, ‘Adjudication and Adjustment – International Judicial Decisions and the Settlement of Territorial and Boundary Disputes’, 46 *BYbIL* (1972) 22; Ratner, ‘Drawing a Better Line: *Uti possidetis juris* and the Borders of New States’, 90 *AJIL* (1996) 593; Shaw, ‘The Heritage of States: The Principle of *Uti possidetis juris* Today’, 67 *BYbIL* (1996) 98.

⁵⁹ *Frontier Dispute* (1986) [1986] ICJ Rep 554, at 566. Castellino and Allen, *supra* note 3, show that from its adoption into international law, during the decolonization process in Latin America, *uti possidetis* served as a stop to further use of the doctrine of *terra nullius*: see 64–87, 230, and 235.

⁶⁰ RIAA 1, 223, at 228. Fully quoted at [1992] ICJ Rep 351, at 387.

⁶¹ Recently, in *Sovereignty over Pulau Ligitan and Pulau Sipadan* (2002), both parties claimed that the islands were not to be considered *terrae nullius*. The ICJ did not go into a discussion of the concept: see <http://www.icj-cij.org>, at para. 108.

occupatio was originally not designed as a way of acquiring title over land. There were three juridical situations in which *occupatio* could be invoked. First, it was a way of acquiring *res nullius*. In practice, this only applied to wild animals, fish and *res hostilis*, enemy property taken on Roman soil during war.⁶² Gaius (c. AD 160) formulated the general rule that everything which belonged to nobody could be acquired through occupation. According to him, this comprised everything to be found on land, in the sea and in the air. Land itself was not included.⁶³ The only explicit reference to land to be found in this context is the case of an island rising from the sea (*insula in mari nata*).⁶⁴ The application of the rule of occupation in this uncommon situation probably resulted from an analogous interpretation of acquisition of fish and other things taken from the sea.

Second, also *res derelictae* or abandoned goods could be subject to occupation.⁶⁵ This category could include land. Occupation here only led to a title of ownership in civil law if the *res derelicta* was a *res nec Mancipi*. Land in Italy was therefore excluded.⁶⁶ Under the *ius civile* provincial land was always state-owned, so a title of ownership in civil law was not possible there. This kind of land could only be acquired under the *ius gentium*. In any case, *res derelicta* was, just like the third one, a category distinct from *res nullius*. Third, one could acquire property by occupation of a lost and found treasure. The treasure had to be lost for such a period of time that it had become impossible to determine who was the rightful owner.⁶⁷

There is not much more to be found in Roman law that can serve as a basis for occupation of *terra nullius* in international law. *Occupatio* as a way of acquiring vacant land came to the fore only in the era of the migration of the Germanic peoples and the fall of the Roman Empire (5th century and after).⁶⁸ Occupation of *terra nullius* took a strong foothold in the law of nations during the Age of Discoveries (16th-17th centuries). The discovery of the New World forced the European powers to develop rules about the attribution of the newly discovered lands. For this purpose, the feudal and local customary laws that formed the basis for the territorial divisions within the Latin West were inappropriate. There were no feudal or customary titles for the new territories which could substantiate the claim of one prince *vis-à-vis* his European counterparts, while the feudal and local law systems were completely irrelevant to the native peoples. The authority of the Pope to dispose of the non-Christian lands, which had its foundations in some precepts taken from medieval canon law – more particularly from the writings of Cardinal Hostiensis (c. 1200-1270)⁶⁹ – was equally unsatisfactory. Between 1493 and 1506, the Popes Alexander VI (1492-1503) and Julius II (1503-1511) promulgated several edicts, among which the bull *Inter Caetera*

⁶² Gaii Inst. 2.66-69 ; Dig. 41.1.3-6; Dig. 41.2.1.1.

⁶³ Gaii Inst. 2.66; Dig. 41.1.3 pr.: 'What presently belongs to no one becomes by natural reason the property of the first taker': *The Digest of Justinian* (trans. A. Watson, 1998), Inst. 2.1.12.

⁶⁴ Inst. 2.1.22 = Dig. 41.1.7.3.

⁶⁵ Dig. 41.7.1.

⁶⁶ For the acquisition of a derelict *res Mancipi*, prescription was necessary.

⁶⁷ Inst. 2.1.39. W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (1921), at 207-210; M. Kaser, *Das Römische Privatrecht* (2nd ed., 1971), i, at 425-427.

⁶⁸ J.-P. Lévy and A. Castaldo, *Histoire du droit civil* (2002), at 534.

⁶⁹ Hostiensis 3.34.8.

(1493), which attributed all territories beyond a line 100 miles westward of the Azores and the Cape Verde Islands to either Spain or Portugal. While Spain and Portugal would later invoke the papal edicts to defend their titles to the newly discovered territories and their exclusive right to navigate the oceans ‘beyond the line’,⁷⁰ it is far from certain that the Popes intended to attribute political authority to the Iberian powers. According to one interpretation, the papal decisions only granted the Iberian monarchs the right to spread the faith to the Indies.⁷¹ Whatever the case, papal authority to divide the outer-European world was challenged from the beginning, both by Iberian, Catholic writers such as Vitoria,⁷² and by non-Iberian Catholic and Protestant writers such as Gentilis and Grotius.⁷³ Therefore, it became necessary to formulate new titles to the territories in the Indies. One of these alternative titles was *occupatio* of *terra nullius*.

Vitoria expressly stated that the lands of the natives could not be considered *terrae nullius*. He claimed that ‘the barbarians possessed true public and private dominion’.⁷⁴ But at the same time he recognized that occupation of *terra nullius* was, generally speaking, a valid title to territory under the law of nations:

The law of nations, on the other hand, expressly states that goods which belong to no owner pass to the occupier. Since the goods in question here had an owner, they do not fall under this title.⁷⁵

By the end of the 16th century, occupation of *terra nullius* was established as a mode of acquiring territory under the doctrine of the law of nations.⁷⁶ Most writers from the Spanish neo-scholastic school such as Domingo de Soto (1495-1560) as well as Protestant jurists such as Gentilis and Grotius accepted that occupation constituted a valid way of acquiring *terra nullius*. Their arguments, as well as those of most writers in the 17th and 18th centuries, were concerned with what constituted *terra nullius* and whether native lands were considered *terra nullius* or not. The rule itself was not placed in doubt. Contrary to what Vitoria had upheld, Grotius and some

⁷⁰ A. Helps, *The Spanish Conquest in America* (1900), i, 264; Truyol y Serra, ‘Staatsräson und Völkerrecht in der Zeit Karls V.’, in F.A. Van der Heydte (ed.), *Völkerrecht und rechtliches Weltbild. Festschrift für Alfred Verdross* (1960), at 273, and ‘The Discovery of the New World and International Law’ [1971] *U Toledo LR* 305.

⁷¹ For this scholarly debate see Grewe, *supra* note 35, at 233-237.

⁷² Francisco de Vitoria, *De Indis* 2.2.

⁷³ S.J. Anaya, *Indigenous People in International Law* (1996), at 9-19; Cohen, ‘The Spanish Origin of Indian Rights in the Law of the United States’, 31 *Georgetown LJI* (1942) 1; J. Fisch, *Die europäische Expansion und das Völkerrecht* (1984), at 187-263; Grewe, *supra* note 35, 240-250; L. Hanke, *The Spanish Struggle for Justice in the Conquest of America* (1965); Dickason, ‘Jus Gentium Takes on a New Meaning’, in L.C. Green and O.P. Dickason, *The Law of Nations and the New World* (1989), at 227; A. Pagden, *Lords of All the World. Ideologies of Empire in Spain, Britain and France c. 1500-c. 1800* (1995); R.J. Williams, *The American Indian in Western Legal Thought. The Discourses of Conquest* (1990), at 59-232; Ziegler, ‘Völkerrechtliche Aspekte der Eroberung Lateinamerikas’, 23 *Zeitschrift für Neuere Rechtsgeschichte* (2001) 1.

⁷⁴ Vitoria, *De Indis* 2.3, trans in A. Pagden and J. Lawrence, *Vitoria. Political Writings* (1991).

⁷⁵ Vitoria, *De Indis* 2.3. See also Pagden, ‘Introduction’, in Pagden and Lawrence, *supra* note 74, at pp.xxiv-xv; Pagden, *supra* note 73, at 80.

⁷⁶ As well as in practice: A.S. Keller, O.J. Lissitzyn, and F.J. Mann, *Creation of Rights of Sovereignty through Symbolic Acts 1400-1800* (1938).

later writers of the 17th century found that *under some circumstances* native lands, though inhabited, were to be considered *terrae nullius*.⁷⁷

Vitoria vested the right to occupy vacant land in natural law.⁷⁸ He referred to a fragment from Justinian's *Institutes* (2.1.12), where it was stated that the right to occupy *res nullius* was dictated by natural reason. The compilers of the Justinian book had taken the fragment from Gaius' *Institutes*.⁷⁹ For Gentilis too 'the seizure of vacant places is regarded as law of nature'.⁸⁰ He included references to the *Digest* (41.1.3) as well as to some medieval and 16th-century Roman and canon law texts, next to – in line with the humanist tradition – historical examples taken from the Roman historians such as Livy or Tacit.

In making references to the *Digest* and the medieval tradition of Roman law, Gentilis was confronted with the problem that *occupation*, as it was understood by the jurists and canonists of the Middle Ages and the 16th century, did not apply to land. The humanist Andreas Alciatus (1492-1550) had defended the notion that Roman law did not sanction the taking of land, since all land had to belong to somebody. At the very least, it was commonly and correctly believed that Roman law provided that all land belonged to some ruler and that his was the right to dispose of the land.⁸¹ One canon lawyer from the 15th century, Franciscus Aretinus, accepted that private persons could obtain title to vacant land by cultivating it.⁸² But as Richard Tuck recently remarked, none of the jurists and canonists from the *ius commune* tradition accepted that 'vacant' land could be taken in this way against the will of the ruler.⁸³

In his major work, *De jure belli ac pacis libri tres*, the Dutch humanist Grotius distinguished (private) property – *dominium* – from (public) jurisdiction – *imperium*. Wasteland was liable to occupation. Grotius considered uncultivated or unsettled lands of nomadic hunters or pasturers to be wasteland. Ownership could be acquired by any individual who chose to settle on the land or cultivate it. The ruler, who held jurisdiction, was not allowed to prevent an individual, whether a foreigner or not, from doing so because this was the individual's natural right. As such it stood on the same level as the right of communication and free passage, on which Grotius had founded the freedom of navigation. In making this distinction, Grotius did not aim to align his doctrine with the *ius commune*. His purposes were opportunistic. Grotius' double

⁷⁷ Fisch, *supra* note 73, at 187-263 and 297-298; Tuck, *supra* note 8, at 47-50, 89-93, 102-108, 120-126, 156-158, 175, 181-183. The application of the doctrine was, however, disputed at times during the late 16th century by some sovereigns. See Van der Heyde, 'Discovery, Symbolic Annexation and Virtual Effectiveness in International Law', 29 *AJ* (1935) 459.

⁷⁸ Among late-medieval jurists and canonists, the occupation of *res nullius* was widely accepted as a rule of natural law. This was of importance to medieval scholars because it proved that individual property was protected by natural law. see K. Pennington, *The Prince and the Law 1200-1600. Sovereignty and Rights in the Western Legal Tradition* (1993), at 124-125; B. Tierney, *The Idea of Natural Rights. Studies on Natural Rights, Natural Law and Church Law 1150-1625* (1997), at 135-145.

⁷⁹ Gaii Inst. 2.66. The text of the *Institutes* of Gaius was retrieved only in the 19th century.

⁸⁰ Albericus Gentilis, *De jure belli libri tres* 17.131 (*Classics of International Law* 16 (1933)).

⁸¹ Andreas Alciatus, *Consilia* 52.20 in *Opera omnia* (1571), vi, 143-144, referred to in Gentilis, *De jure belli* 17.131.

⁸² Franciscus (Accolti) Aretinus, *Consilia* 15.3 (1536), referred to in Gentilis, *De jure belli* 17.131.

⁸³ Tuck, *supra* note 8, at 49.

approach allowed the Dutch trading companies to claim the natural right to take vacant land – under which Grotius also understood uncultivated and unsettled land such as the hunting grounds and pasture land of nomadic peoples – without having to challenge at all times the political authority of local rulers, which pertained to the positive, municipal law.⁸⁴ More importantly, Grotius also needed the distinction between property and jurisdiction to deny the possibility of ownership over the high sea, without rejecting the possibility of jurisdiction over certain stretches of water. His dual approach suited the policies of the Dutch India Companies with regard to their European competitors as well as the native rulers in the early 17th century.⁸⁵

The colonization of the 18th and 19th centuries, particularly of Africa and Australia, brought the doctrine of occupation of vacant land to the fore.⁸⁶ Most of the debate concerned the questions of what was to be considered *terra nullius* and what were the conditions of an effective occupation. The positivist international lawyers of the 19th century, who only recognized states in their Western form as subjects of international law, held that non-state entities could not hold sovereignty, so that their lands were *terrae nullius*. Recent research on the colonization of Africa during the 19th century has shown that, in contrast to what the ICJ claimed in its *Western Sahara* Opinion of 1975, the doctrine of *terra nullius* was often relied upon.⁸⁷ The second debate, on the conditions of occupation, related to the question whether discovery constituted a valid title.⁸⁸ Accepting discovery as title at least presupposed a very extensive interpretation of the corporeal element in the Roman concept of occupation. But the basic rule on *terra nullius* itself was left untouched.⁸⁹

⁸⁴ Hugo Grotius, *De jure belli ac pacis libri tres*, 2.2.17, 2.3.4, and 2.3.19.2 (1625). This double standard of natural law and positive, municipal law still served to justify the seizure of uncultivated land in Emer de Vattel, *Le droit des gens, ou principes de la loi naturelle* (1758), 3.37-38 (*Classics of International Law* 4 (1916)). See Pagden, *supra* note 73, at 78-79.

⁸⁵ E. Keene, *Beyond the Anarchical Society. Grotius, Colonialism and Order in World Politics* (2002), at 52-57; Tuck, *supra* note 8, at 89-93 and 103-108; Yanagihara, 'Dominium and Imperium', in Y. Onuma (ed.), *A Normative Approach to War. Peace, War and Justice in Hugo Grotius* (1993), at 151 and 164. For other writers of the 17th century on *terra nullius* see Pagden, *supra* note 73, at 76-77.

⁸⁶ Grewe, *supra* note 35, at 548; Keene, *supra* note 85, at 60-96.

⁸⁷ Castellino and Allen, *supra* note 3, 96-118; Fisch, 'Africa as *Terra nullius*: The Berlin Conference and International Law', in S. Forster, W.J. Mommsen, and R. Robinson (eds.), *Bismarck, Europe and Africa* (1988), at 349, 360.

⁸⁸ Under the Federal Law of the US, American Indians were not recognized as fully-fledged subjects of international law, but were granted some rights so that the mere discovery and coming of the Europeans to the New World was not considered to have deprived them of all their rights. Discovery served only to exclude all other European powers from acquiring land from the Indians: Anaya, *supra* note 73, 16-18; Cohen, *Felix S. Cohen's Handbook of Federal Indian Law* (2nd ed., 1989), at 46-66 and 291-294; Green, 'Claims to Territory in Colonial America', in Green and Dickason, *supra* note 73, 1 at 81-84 and 99-124.

⁸⁹ Castellino and Allen, *supra* note 3, 48-51; Fisch, *supra* note 73, at 87-91, 298-314, and 349-377; Grewe, *supra* note 35, at 395-402 and 545-550; Pagden, *supra* note 73, at 80-86. As was already pointed out, at the same time its future application was blocked by the newly independent states of Latin America in the early 19th century through the introduction of the doctrine of *uti possidetis*. This did not, however, prevent it from being applied in disputes with some European powers over some territories on the subcontinent, and it certainly did not lead to its general discrediting under international law: Castellino and Allen, *supra* note 3, esp. 77-79.

Occupation of vacant land as a mode of acquisition of territory was introduced in international law during the Age of Discoveries. The concept of *occupatio* was taken from classical Roman law and the notion of *terra nullius* was closely related to another Roman law concept, *res nullius*. Inst. 2.1.12 and Dig. 41.1.3 pr. stated that, according to natural reason, something which belonged to nobody could be occupied. The writers of the early modern period articulated their rule on the basis of a close analogy to classical Roman law.

But to apply the rule to land was another matter. Roman law did not recognize the occupation of land. Both medieval and early modern jurists had been aware of this and had upheld the concept. Only in canon law, occupation of real property could constitute a title. Confronted with this problem, both Gentilis and Grotius turned to a solution that Gaius himself had offered and Vitoria and other neo-scholastic writers had already turned to. The early-modern writers on international law considered occupation of vacant land to be a precept from natural law. They took the Roman concept of occupation, stripped it from its particulars and technicalities, which they banned from the sphere of positive law, and thus created a general principle of natural law. From thereon forwards, the exclusion of land in Roman law could be considered a concretization in positive law of a natural precept.⁹⁰ This touched upon the problem for which the writers on the law of nations of the 16th and early 17th centuries tried to formulate an answer. In relation to the 'Indians' and other non-European peoples, the medieval *ius gentium* as part of the *ius commune* was obsolete. Natural law came to replace it and had to serve as the basis for a new *ius gentium* that transcended the Latin West. On the basis of some general precepts of natural law, a more detailed body of universal rules had to be construed. In practice, these general precepts were distilled from the 'legal experience' of Christianity, which meant from the scholarly tradition of Thomistic moral philosophy and of the *ius commune*. From the abundance of technical and sophisticated rules, procedures and concepts Roman law offered, general principles and rules were derived. The technicalities themselves were given up, as part of positive law, which no longer held authority for the drafting of the law of nations.

This process of generalization was nothing less than a continuation of a long and gradual process started within the context of the late-medieval *ius commune* tradition under the influence of canon law. In this process, Vitoria's vesting of *occupatio* in natural law was seminal, but not final. His natural law was not yet a truly universal natural law in the sense that it was completely independent from Christian notions of morality. His goal was to pass judgment over the American Indians in the light of natural moral precepts that stood in the Thomistic tradition of moral philosophy and natural law.⁹¹ Nevertheless, he rejected the notion that the Indians were subject to

⁹⁰ Indeed, regardless of Gaius' association of the *ius gentium* with natural reason, the Roman *ius gentium* from which *occupatio* stemmed was positive (private) law.

⁹¹ A. Pagden, *The Fall of Natural Man. The American Indian and the Origins of Comparative Ethnology* (1982), at 59-80; Pagden, 'Dispossing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians', in A. Pagden (ed.), *The Languages of Political Theory in Early Modern Europe* (1987), at 79. Anghie and Onuma emphasized the universality of Vitoria's natural law and natural *ius gentium*: Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law', 5 *SocL and Leg Stud* (1996) 321; Onuma, 'Eurocentrism in the History of International Law', in Onuma, *supra* note 85, at 371.

imperial or papal authority and law and thereby justified divorcing the concept from positive Roman law and stripping it from its technicalities. Only from Grotius onwards did natural law become less coterminous with Christian morality and the Thomistic tradition and came to be perceived as truly universal. This would further stimulate the process of abstraction of old juridical notions.⁹²

When the international lawyers of the 18th and 19th centuries turned occupation of territory into a concept of positive international law, history came full circle. Out of the specific practice of the Roman *praetor peregrinus* regarding wild animals, fish and the like, Gaius had construed a general precept of ‘natural reason’ that made all *res nullius* liable to occupation. The writers of the 16th and 17th centuries did much the same again. The bridge between Roman private law and the new law of nations was natural law. From the particulars of Roman law as it was known in the *ius commune* tradition, the founders of the modern law of nations distilled the general rule of occupation as a precept of natural law. From then onwards, international lawyers could construe specific rules of positive international law around it. In other words, the modern international lawyers adopted a general principle that the Romans had articulated as a principle of ‘natural law’, but gave it a new field of application in positive law.

The age-old terminological confusion around *ius gentium* – universal private law or law of nations? – was instrumental to legitimate the use of Roman law and the *ius commune* to determine what the rules of natural law and the new *ius gentium* were. But it was its association to natural law that truly bridged the gap. The new *ius gentium* (law of nations) was now based on natural law,⁹³ just as the old Roman *ius gentium* (in the sense of private law) had been associated with it by some Roman lawyers.⁹⁴

5 Acquisitive Prescription

Acquisitive prescription ranks among the five modes of acquiring territory in international law. It has been defined as ‘the result of the peaceable exercise of de facto sovereignty for a very long period over territory subject to the sovereignty of another’.⁹⁵ It does not apply to *terra nullius*.⁹⁶ Doctrine distinguishes three different types of acquisition through lapse of time.⁹⁷ First, there is ‘immemorial possession’. It involves a situation which has been in place for so long that there is no certainty about its

⁹² See the famous fragment ‘Etiamsi daremus’ from Grotius, *De jure belli ac pacis*, Prol. 11. On the later evolution of natural law in general, see most recently T.J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (2000), as well as Onuma, *supra* note 91; R. Tuck, *Natural Rights Theories. Their origins and development* (1979) and Tuck, *supra* note 8, and the literature cited there.

⁹³ Vitoria, *De Indis* 3.1.2.

⁹⁴ Gaii Inst. 1.1, known through Inst. 1.2.1 and Dig. 1.1.9. See also Rubin, ‘International Law in the Age of Columbus’, 39 *NRIL* (1992) 25; Winkel, *supra* note 42.

⁹⁵ Shearer, *supra* note 52, at 153.

⁹⁶ J. Verzijl, *International Law in Historical Perspective* (1970), iii, 381–382.

⁹⁷ Brownlie, *supra* note 51, at 154; Johnson, ‘Acquisitive Prescription in International Law’, 27 *BYIL* (1950) 332.

origins. It may be legal or illegal, but it is presumed legal. 'Immemorial possession' is not derived from Roman law. It stems from medieval customary law and, therefore, will not be discussed.⁹⁸ Second, there is a type of acquisitive prescription, which international lawyers have recognized as being close to the Roman *usucapio*. The conditions for acquisition under *usucapio* in Roman law were, as Johnson enumerated them: '(a) A thing susceptible of ownership (*res habilis*); (b) An, albeit defective, title of some kind (*justus titulus*), such as sale, gift, or legacy; (c) Good faith (*fides*); (d) Possession (*possessio*), implying physical control (*corpus*) and the intention to possess as owner (*animus*); (e) The possession must be uninterrupted for a period of time defined by law (*tempus*).'⁹⁹ Third, from this second kind *usucapio mala fide* can be distinguished. Johnson stated that Roman law allowed this in at least one case.¹⁰⁰ Both with *usucapio bona* and *mala fide*, prescription serves to validate a title, which is – unbeknown or known to the possessor – in its origin defective.¹⁰¹ Ever since the days of Grotius, there has been considerable discussion on the contents and function of the last two types, while some of the leading international lawyers of the 19th century such as Fedor von Martens (1845-1909) and Alphonse Rivier (1835-1898) disputed their place in international law.¹⁰² According to Johnson, they were at fault in doing so because they 'paid too much attention to detail and insufficient attention to principle'. He referred to their argument that, unlike private law, international law had not laid down fixed times for prescription.¹⁰³

What Johnson, Brownlie and other international lawyers referred to as *usucapio* stemmed actually from pre-Justinian, classical Roman law. It was a concept from the *ius civile* and pertained to all goods subject to ownership under the *ius civile*. As such, it included *res mancipi* such as land within Italy (*praedia Italica*).¹⁰⁴ Under Justinian law, however, *usucapio* only applied to movables. For other goods, such as land, there was *praescriptio longi temporis*, which also necessitated *justus titulus* and *bona fides*. A period of 10 (for Italian land) or 20 years (for provincial land) had to lapse. Furthermore, there was the *praescriptio longissimi temporis* of 30 years. Here, no title was necessary, but prescription only had an acquisitive effect if there was good faith. If not, the 30-year prescription was only extinctive.¹⁰⁵ It was these concepts from Justinian law that the medieval and early modern jurists revived. Both the civil and the canon lawyers of the Middle Ages continued to demand good faith for the transfer of ownership. During the 17th and 18th centuries, some prominent jurists such as Antoine Loysel (1536-1617) and Joseph Pothier (1699-1772) dropped this

⁹⁸ Lévy and Castaldo, *supra* note 68, at 612.

⁹⁹ Johnson, *supra* note 97, at 334.

¹⁰⁰ *Usucapio pro herede*: Johnson, *supra* note 97, at 338.

¹⁰¹ Jennings, *supra* note 53, at 21.

¹⁰² F. von Martens, *Traité de droit international* (1883), at 460-461; A. Rivier, *Principes du droit des gens* (1896), i, 182-183. See also Grotius himself: *De jure belli ac pacis*, 2.4.1. 7 and 9, and, more recently, Judge Moreno Quintana in *Right of Passage over Indian Territory* (1960) [1960] ICJ Rep 88, at 88.

¹⁰³ Johnson, *supra* note 97, at 334.

¹⁰⁴ Kaser, *supra* note 67, at 418-425.

¹⁰⁵ Cod. 7.31.1 and 7.39.8.1. See Lévy and Castaldo, *supra* note 68, at 608-609; M. Kaser, *Romeins privaatrecht* (2nd ed., 1971), at 125, and *Das Römisches Privatrecht* (2nd ed., 1975), ii, at 285.

condition. From then on, the *praescriptio longissimi temporis mala fide* found its way to the *Code civil*.¹⁰⁶

Prescription had been invoked as a mode of transferring sovereignty over territory long before the 18th century. In the 14th century, Bartolus applied prescription to public authority. According to the Bologna jurist, the Emperor's universal authority could be lost with regard to a certain territory through prescription.¹⁰⁷ Bartolus did not propose this view in the context of a discussion on the different modes of transferring territory. His remarks are to be situated in the context of his distinction between *de facto* and *de iure* jurisdiction and sovereignty, which served to defend the autonomy of the Italian princes and city republics in the face of the universal authority of the Roman Emperor.¹⁰⁸ Many jurists and canonists of the Late Middle Ages and the 16th century repeated his views.¹⁰⁹ Grotius expressed doubts about the application of prescription for the transfer of sovereignty over territory. First, he stated that prescription did not fall under natural law. Second, he asked whether it was applicable under the positive law of nations. He argued that, as the sovereign law-makers were not bound by their own laws or will, it was difficult to consider them bound by their behaviour. Acquisitive prescription, which belonged to the Roman *ius civile*, could therefore not be applied to the law of nations.¹¹⁰ During the 17th and 18th centuries, the application of prescription under natural law and the law of nations remained a matter of debate.¹¹¹ In the 19th and early 20th centuries, it gained acceptance as one of the modes of acquisition of territory among many international lawyers, most of them from common law countries.¹¹² Since in common law, a fixed term is not constitutive to prescription, but the passing of time just serves as proof for the regularity of the situation, the adoption of prescription in international law was more natural to

¹⁰⁶ Art. 2262. See Lévy and Castaldo, *supra* note 68, at 614-615. As such the argument by Castellino and Allen, *supra* note 3, 52-53, quoting Johnson, *supra* note 97, at 338, that the Twelve Tables allowed *usucapio* without good faith is immaterial in the discussion about the historic impact of Roman law on the international law doctrine of prescription, as it had not been the Twelve Tables that fed the discussion during the formative period of the doctrine in international law.

¹⁰⁷ Bartolus ad Dig. 27.1.6. See Van der Heydte, *supra* note 77, at 449.

¹⁰⁸ Pennington, *supra* note 78, at 183; C. Woolf, *Bartolus of Sassoferrato* (1913), at 108.

¹⁰⁹ Grotius, *De jure belli ac pacis* 2.4.12.1.

¹¹⁰ Grotius, *De jure belli ac pacis* 2.4.12. See Y. Blum, *Historic Titles in International Law* (1965), 15-16. Oppenheim, Blum, at 16-17, and Johnson rightly relate that Grotius accepted immemorial possession to be part of the law of nations. It did not serve to cure a defective title, but applied when there was no certainty about the origin of a state of affairs which had been in existence since time immemorial. As Grotius – in line with tradition – accepted this time to be a century, it has proven to be of no actual value in international law. Blum therefore agreed with Johnson that the doctrine had little value in international law. Grotius, *De jure belli ac pacis* 2.4.11; Johnson, *supra* note 97, at 334; L. Oppenheim, *International Law* (1905), ii, at 705.

¹¹¹ S. Pufendorf, *De jure naturae et gentium libri octo* (1688), 4.12 (*Classics of International Law* 17 (1934)); C. Wolff, *Ius naturae et gentium methodo scientifica pertractatum* (1749-1764), 3.7 (*Classics of International Law* 13 (1934)); Vattel, *Le droit des gens* 2.11.

¹¹² P. Fauchille, *Traité de droit international public* (8th ed., 1925), ii, 760-761; W.E. Hall, *A Treatise on International Law* (8th ed., 1924), at 143; M. Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), at 178; R. Phillimore, *Commentaries upon International Law* (3rd ed., 1879), i; J. Westlake, *International Law* (1904), i, 92-94; H. Wheaton, *Elements of International Law* (1860), paras. 164-165.

common lawyers than to their colleagues from civil law countries.¹¹³ Prescription, however, did not hold a place among the important arguments to legitimate the European expansion outside the old continent and had little practical value in the ages of discovery and colonization.¹¹⁴

This is no different today. There are no instances of a pure application of *praescriptio bona* or *mala fide* in recent international legal practice.¹¹⁵ Acquisitive prescription serves to affirm the rights of the holder of a defective title. It is supposed to attribute title to the state, which can prove a peaceable or undisturbed¹¹⁶ possession of the territory over a long period of time. It does not involve an assessment of the claims or titles of other states, which it is supposed to overrule. But in all cases brought before international tribunals or arbitrators, competing acts of sovereignty or possession of different states had to be weighed against one another.¹¹⁷ In consequence, there is no example of an international adjudication to be cited where 'acquisitive prescription' in the sense of the Roman *usucapio* served as the sole title. In brief, 'prescription' in the sense of *usucapio* had been found too strict and unsatisfactory for the purpose of dispute settlement over territory. A broader category was needed.

This does not imply that acquisitive prescription served no purpose in the shaping of international law. It has been said that international law in this context began 'to outgrow its origins in the categories of Roman law'.¹¹⁸ Acquisitive prescription evolved away from its sources into something different, known as 'peaceful and continuous display of State authority' or 'effective occupation'. In the formulation of this doctrine, prescription had played together with occupation *sensu stricto*. International legal doctrine distinguishes acquisitive prescription from occupation. While occupation concerns *terra nullius*, prescription concerns territory over which another state had sovereignty before.¹¹⁹ However, there is common ground for the two concepts to stand on. In both cases, effective occupation of territory is involved. While in the case of *terra nullius* there is an analogy with the Roman concept of *occupatio*, in the case of prescription effective occupation in fact refers to the Roman concept of *possessio*.¹²⁰

¹¹³ Blum, *supra* note 110, at 8, 13-14, and 18. Recently, Harry Post discussed the influence of Roman and common law upon acquisitive prescription in international law. He does not draw any conclusion however, other than that Roman law stands at the root of both the civil and common law traditions in the matter: Post, 'International Law Between Dominium and Imperium: Some Remarks on the Foundation of the International Law of Territorial Acquisition', in T. Gill and W. Heere (eds.), *Reflections on Principles and Practices of International Law. Essays in Honour of Leo J. Bouchez* (2000), at 147.

¹¹⁴ Under US law, a kind of immemorial possession, however, was attributed to the North-American Indians: see Berman, 'The Concept of Aboriginal Rights in the Early History of the United States', 27 *Buffalo Law Review* (1978) 637; Cohen, *supra* note 88, at 291-294; Morris, 'International Law and Politics. Towards a Right of Self-Determination for Indigenous Peoples', in M.A. Jaimes (ed.), *The State of Native America. Genocide, Colonization and Resistance* (1992), at 53, 64.

¹¹⁵ S. Sharma, *Territorial Acquisition, Disputes and International Law* (1997), at 113.

¹¹⁶ See the definition by Oppenheim, *supra* note 53, at 294.

¹¹⁷ Verzijl, *supra* note 96, at 381-383.

¹¹⁸ By Hersch Lauterpacht: see R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (9th ed., 1992) i, at 708. See also Pinto, 'La prescription en droit international', 87 *RCADI* (1955) 387, at 397.

¹¹⁹ Brownlie, *supra* note 51, at 139.

¹²⁰ *Ibid.*, at 138-139.

The broadening of prescription was already clear in the thought of the earlier proponents of acquisitive prescription, among whom was Paul Fauchille (1858-1926).¹²¹ Fauchille labelled four conditions for acquisitive prescription in international law. First, possession had to be exercised *à titre de souverain*. Not only should the state display state sovereignty, it also could not recognize any other state's sovereignty to the territory concerned. Second, possession should be peaceful and uninterrupted. In its most extreme interpretation, this meant that the possession had to go unchallenged. Third, possession should be public. Fourth, it must persist.¹²² Fauchille took these conditions from the French Civil Code.¹²³ They remind us of the maxim *nec vi, nec clam, nec precario* from the Roman law of possession.¹²⁴ But Fauchille did not consider whether the possession was *bona fide* or not, nor whether there was a *justus titulus*. In making the concept more suitable for the purposes of states, Fauchille went a long way in watering down acquisitive prescription to something that is remarkably close to effective occupation as it was subsequently developed by international tribunals and arbitrators. Later authors followed suit.¹²⁵ They dropped *justus titulus* and *bona fides* as conditions and found themselves unable to stipulate a fixed lapse of time.¹²⁶ In the end, only peaceful and undisturbed possession, in the sense of the exercise of sovereign authority – *corpore* and *animo* – remained.

Around 1900, in several international arbitral awards and cases before municipal courts, 'prescription' was invoked in a territorial dispute.¹²⁷ Here too, it turned out to be a broader category than in Roman law and came close to effective occupation. The term prescription was not used in an international forum by the court or the arbitrators themselves. In *Boundary Dispute between British Guiana and Venezuela* (1899) the conditions forwarded by Phillimore for prescription were quoted: 'publicity, continued occupation, absence of interruption, aided no doubt generally both morally and legally by the employment of labour and capital . . . or the absence of any attempt to exercise proprietary rights by the former possessor'.¹²⁸ In *Grisbadarna* (1909) the parties based their claim on prescription. Although the arbitrators did not use the term prescription, they acknowledged 'that it is a well-established principle that it is necessary to abstain as much as possible from changing the order of things'.¹²⁹ In *Chamizal*

¹²¹ For other examples see Blum, *supra* note 110, at 19-20.

¹²² Fauchille, *supra* note 112, at 760-761. All four were adopted by Johnson, *supra* note 97, at 343.

¹²³ Art. 2229.

¹²⁴ Kaser, *supra* note 67, at 396-397.

¹²⁵ Sharma, *supra* note 115, at 115.

¹²⁶ Becket, 'Questions d'intérêt général dans la jurisprudence de la Cour Permanente de Justice Internationale', 50 *RCADI* (1934) 192, at 249; Lindley, *supra* note 112, at 178; H. Lauterpacht (ed.), *Oppenheim's International Law* (8th ed., 1948), at 526-527; Schwarzenberger, 'Title to Territory: Response to a Challenge', in L. Gross (ed.), *International Law in the Twentieth Century* (1969), at 287; P.A. Verykios, *La prescription du droit international public* (1934).

¹²⁷ For a survey see Blum, *supra* note 110, at 20-34. Prescription has also been invoked in bilateral negotiations and acknowledged in one treaty, but this serves more as an indication of the fact that it was not generally accepted as a rule of international law at the turn of the 19th century. Blum, *supra* note 110, at 34-37; *Settlement of the Boundary between British Guiana and Venezuela* of 2 February 1897, 89 *BFSP* 57.

¹²⁸ 92 *BFSP* 944. See Phillimore, *supra* note 112, para. 260.

¹²⁹ *RIAA* 11, at 155, 161. See H. Lauterpacht, *supra* note 2, at 264-265.

(1911) the US claimed title to the disputed tract on the border with Mexico on the basis of prescription, which it defined as the ‘undisturbed, uninterrupted, and unchallenged’ possession since 1848. ‘Without thinking it necessary to discuss the very controversial question as to whether the right of prescription . . . is an accepted principle of the law of nations’, the arbitrators nevertheless rejected the claim because the possession did not live up to the conditions forwarded by the US. According to them, the possession of the territory had to be peaceable. More was meant under this term than the absence of violence; diplomatic protest sufficed to prevent prescription. The possession had to involve the display of sovereignty by the possessor; the other party could not have opposed this. ‘Peaceable’ thus meant acquiescence by the opposing party.¹³⁰ In several other municipal and international cases, acquiescence by the opposing party also turned out to be an important element in the evaluation of a claim based on prescription.¹³¹

Island of Las Palmas (1928) is the classical point of reference for the doctrine of effective occupation. Max Huber, the arbitrator, stated that there is a common core in prescription and occupation, and that is peaceable possession. Huber attributed to this possession an autonomous power to create title. Acts of occupation or possession were thereby promoted to constitutive elements of title. In the context of prescription, these acts only constitute evidence for the possession, which in its turn is a condition for prescription.¹³² The element of possession, now referred to in terms of ‘continuous and peaceful display of territorial sovereignty’, was allowed to transcend its Roman law sources.¹³³ In *Eastern Greenland* (1931), the Permanent Court of International Justice stated that to constitute title ‘continued display of authority’ necessitated ‘the intention and will to act as sovereign, and some actual exercise or display of such authority’.¹³⁴ The intentional element, *animus*, has a positive as well as a negative aspect to it: the occupying state has to claim sovereignty and cannot accept the sovereignty of another state.¹³⁵ The limitation of the corporeal element of occupation or possession to the ‘display of territorial sovereignty’ makes effective occupation further drift away from its private law origins.¹³⁶ Furthermore, settlement by private persons acting in their own names – except in the case of subsequent state authorization – and discovery fall under the definition of effective occupation. But as Huber has stated it, what constitutes a ‘display of territorial sovereignty’ has to be assessed in the light of the specific circumstances of the case:

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory.¹³⁷

¹³⁰ RIAA 11, at 309, 328.

¹³¹ MacGibbon, ‘The Scope of Acquiescence in International Law’, 31 *BYbIL* (1954) 143, at 154.

¹³² Jennings, *supra* note 53, at 23-26.

¹³³ RIAA 2, at 829, 839.

¹³⁴ PCIJ A/B No. 53, at 45-46.

¹³⁵ Brownlie, *supra* note 51, at 140; Fitzmaurice, *supra* note 20, and 32 *BYbIL* (1955-1956) 56.

¹³⁶ On that evolution see Sharma, *supra* note 115, at 97-98.

¹³⁷ RIAA 2, 840. See also: Brownlie, *supra* note 51, at 141-143; H. Lauterpacht, *The Development of International Law by the International Court of Justice* (1958), at 240-242, and ‘Sovereignty over Submarine Areas’, 27 *BYbIL* (1950) 415.

Huber seemed to imply that international law could not come any closer to private law prescription, as he indicated continuous and peaceful display of sovereignty as ‘so-called prescription’.¹³⁸

The doctrine of effective occupation goes a long way in capturing international legal practice.¹³⁹ It is built on elements from the doctrines both of occupation of *terra nullius* and acquisitive prescription and engulfs them at the same time.¹⁴⁰ International tribunals and arbitrators in reality even use more different criteria to weigh the specific claims of the parties and attribute to them value according to the circumstances of the case. Possession and exercise of sovereignty are only two among recognition, acquiescence, preclusion, affiliations of the inhabitants, geographical, economic and historical considerations.¹⁴¹

Acquisitive prescription as derived from Roman law had been constitutive in the formation of the doctrine of effective occupation. Does this also appear from the practice of the International Court of Justice? What is its current role in the application of the doctrine by the Court? In none of the cases regarding land territory has the case turned on acquisitive prescription. Some individual opinions show that it is disputed whether acquisitive prescription is recognized under international law. In his separate opinion on the Judgment on Jurisdiction and Admissibility in *Nicaragua* (1986), Judge Mosler stated that acquisitive prescription is ‘a general principle of law within the meaning of Article 38, paragraph 1(c) of the Statute, by which lapse of time may remedy deficiencies of formal legal acts’.¹⁴² But in his separate opinion in *Land, Island and Maritime Frontier* (1992), Judge Torres Bernardez called acquisitive prescription ‘a highly controversial concept which, for my part, I have the greatest difficulty in accepting as an established institute of international law’.¹⁴³

There are quite some cases concerning land territory where effective occupation has played a significant role. In *Minquiers and Ecrehos* (1953), the ICJ weighed the respective historic rights of France and England on these islets in the Channel, going back to the 13th century.¹⁴⁴ The Court analysed which of the parties had held possession, a concept it equated with sovereignty. Different sorts of factual and juridical elements, ranging from feudal rights to hydrographical surveys, were taken into account.

¹³⁸ RIAA 2, at 840.

¹³⁹ The Belgian international lawyer Charles De Visscher would introduce an even broader category: consolidation of historic titles. The *ratio legis* for this concept was, according to De Visscher, ‘the fundamental interest of the stability of territorial situations from the point of view of order and peace’. ‘Consolidation’ is broader than prescription in so far as it is not limited to cases of adverse possession. It may also pertain to *terra nullius* and to parts of the sea: *supra* note 21, at 199. It was applied by the ICJ in *Anglo-Norwegian Fisheries* (1951) [1951] ICJ Rep 116, at 138. Recently the ICJ pointed out that the theory had not been applied in other cases and stated that it ‘is highly controversial and cannot replace the established modes of acquisition of title under international law’: *Land and Maritime Boundary between Cameroon and Nigeria* (2002), available at www.icj-cij.org, para. 65.

¹⁴⁰ N. Hill, *Claims to Territory in International Law and Relations* (1945), at 157.

¹⁴¹ Munkman, *supra* note 58, at 95.

¹⁴² [1984] ICJ Rep 461, at 464.

¹⁴³ [1992] ICJ Rep 629, at 678.

¹⁴⁴ ‘The Court being now called upon to appraise the relative strength of the opposing claims . . .’: [1953] ICJ Rep 47, at 67.

While the Court did not define the 'rule' it based its Judgment on, from the evidence it considered one can deduce the elements which constituted title according to the Court. As it had been established before in case law and doctrine, possession meant the exercise of sovereignty. There was both a factual and an intentional element. While the Court concentrated on state activity, it also considered that some deeds proved the will of the state to act as sovereign. What the Court called 'possession' and 'sovereignty' was nothing less than effective occupation.¹⁴⁵

In the years around 1960 effective occupation was referred to in several cases.¹⁴⁶ The ICJ very much sustained what it did in *Minquiers and Ecrehos* to the point of not clearly defining the conditions for title through effective occupation. An example of the blur the Court has created for the law as regards prescription and possession is offered by *Right of Passage over Indian Territory* (1960). Portugal claimed a right of passage for some villages it was said to have sovereignty over and which were surrounded by Indian territory. The Court accepted the Indian interpretation of the 1779 Treaty, on the basis of which Portugal defended its sovereignty. According to India and the Court, the Treaty had only granted the right to levy a tax on the villages. But when the British had taken over sovereignty of India, they had:

found and left . . . the Portuguese in occupation of, and in exercise of exclusive authority over the villages. The Portuguese held themselves out as sovereign over the villages. The British did not, as successors of the Marathas, themselves claim sovereignty, nor did they accord express recognition of Portuguese sovereignty, over them. The exclusive authority of the Portuguese over the villages was never brought in question. Thus Portuguese sovereignty over the villages was recognized by the British in fact and by implication and was subsequently tacitly recognized by India. As a consequence the villages comprised in the Maratha grant acquired the character of Portuguese enclaves within Indian territory.¹⁴⁷

According to the Judgment, Portugal had gained sovereignty over the villages through the acquiescence of the British and the Indian Government in a situation the British found, or better misunderstood. But the Court did not specify what mode of acquiring territorial sovereignty it applied. Elements of effective occupation, including acquiescence (continuous and peaceful display of sovereignty) were present, but the Court chose not to go into the legal basis for its decision.¹⁴⁸

Moreover, in these and later cases, the Court has not been consistent or clear in its use of terms.¹⁴⁹ In its judgments, the Court responds to the claims brought forward by

¹⁴⁵ *Ibid.*, at 53.

¹⁴⁶ Such as *Sovereignty over Certain Land* (1959), *Right of Passage* (1960), *Temple of Preah Vihear* (1962).

¹⁴⁷ [1950] ICJ Rep 39.

¹⁴⁸ According to Thirlway, because of the existence of a lesser title – the right to levy a tax – prescription, as it is known in private law, does not apply here. While there is certainly truth in this, one could also claim that the lesser title served as the basis for the defective title that would be validated through prescription. This brings the case closer to private law prescription. In any case, the Court did not indulge in this kind of discussion: Thirlway, *supra* note 20, 66 *BYBIL* (1995) 14.

¹⁴⁹ Cases after 1962 involving effective occupation include: *Frontier Dispute* (1986), *Land, Island and Maritime Frontier Dispute* (1992), *Territorial Dispute* (1994), *Kasikili/Sedudu Island* (1999), *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (2001), *Land and Maritime Boundary between Cameroon and Nigeria* (2002), *Sovereignty over Pulau Litigan and Pulau Sipadan* (2002).

the parties and often does not go further than to adopt their terminology. *Effectivités*, possession, display of territorial sovereignty, effective occupation and effective administration have all been used without much discrimination. One may say that these are all terms referring to a broad doctrine of ‘effective occupation’. Over time, *effectivités* has become the preferred term.

Over the last two decades, the Court has shed more light on the doctrine of effective occupation. First, the Court does not use a strict definition of what actions constitute effective occupation because it cannot. Like in *Minquiers and Ecrehos*, the Court judges on effective occupation in relative terms. It weighs the different *effectivités* forwarded by the parties. This does not only include an evaluation of the positive actions of the parties, but also of their reactions to the actions of the other, or lack thereof (acquiescence).¹⁵⁰ There are no absolute, but only relative, prerequisites. This, logically and necessarily, also pertains to the condition of ‘peaceful’ possession (acquiescence). This is another difference with prescription as it was interpreted by Fauchille and other authors, as well as by the arbitrators in *Chamizal*. Acquiescence is just one, if an important, element to be taken into consideration in the weighing of actions of the parties.¹⁵¹

Second, some recent cases offer slightly more information on the criteria the Court uses in the evaluation of *effectivités*. The activities involving exercise of jurisdiction have to pertain to the disputed territory itself.¹⁵² They may either be actions by the state itself in the exercise of its sovereignty,¹⁵³ or be individual actions authorized by the state,¹⁵⁴ or be actions of corporations and companies licensed by the state.¹⁵⁵ In line with that which is stated in *Eastern Greenland*, the Court acknowledged on several occasions that in some circumstances – as in the matter of a dispute over a very small island – very little action may be sufficient.¹⁵⁶

Third, in *Frontier Dispute* (1986), the Court clarified the relative position of claims based on effective occupation in regard to claims based on title and acquiescence to a pre-existing title. The Court stated that it only turns to the weighing of *effectivités* if none of the litigants holds a title.¹⁵⁷ This was made transparent in two judgments of the Court from 2002. In *Land and Maritime Boundary between Cameroon and Nigeria* (2002), the ICJ did not attribute much value to effective occupation, as one of the litigants held a conventional title to the disputed territories.¹⁵⁸ In *Sovereignty over*

¹⁵⁰ Jennings, *supra* note 53, at 6 and 13; Post, *supra* note 113, at 154.

¹⁵¹ Sharma, *supra* note 115, at 100 and 108–110. See *Land, Island and Maritime Frontier* (1992) [1992] ICJ Rep 351, at 577; *Territorial Dispute* (1994) [1992] ICJ Rep 6, at 35.

¹⁵² *Sovereignty over Pulau Litigan and Pulau Sipadan*, available at www.icj-cij.org, para. 136.

¹⁵³ *Minquiers and Ecrehos* [1953] ICJ Rep 47, at 65 and 69.

¹⁵⁴ *Sovereignty over Pulau Litigan and Pulau Lipadan*, available at www.icj-cij.org, para. 140.

¹⁵⁵ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045 and 1105.

¹⁵⁶ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (2001), available at www.icj-cij.org, para. 197; *Sovereignty over Pulau Litigan and Pulau Sipadan* (2002), available at www.icj-cij.org, para. 147, with reference to *Eastern Greenland*, para. 134. See also *Clipperton Island* (1931) for an uninhabited island: RIAA 22, 1107.

¹⁵⁷ [1986] ICJ Rep 587.

¹⁵⁸ Available at www.icj-cij.org, paras. 68–70 and 223–224.

Pulau Litigan and Pulau Sipadan (2002), the Court found that none of the parties held title and thus turned to weighing the *effectivités* forwarded as proof of effective occupation.¹⁵⁹ As such, effective occupation seems to have grown as a distinct and autonomous mode of acquisition.

Fourth, perusal of the relevant cases of the ICJ shows us that the key element of effective occupation or *effectivités* is the effective exercise of territorial jurisdiction or sovereignty (*corpus*).¹⁶⁰ From the evidence considered by the Court in the different cases, it is also clear that an intention to act as sovereign is implied (*animus*). In *Sovereignty over Pulau Litigan and Pulau Sipadan* (2002) the Court expressly stated the need for the activities to be ‘acts *à titre de souverain* reflecting the intention and will to act in that capacity’.¹⁶¹

Effective occupation in the sense of the exercise of territorial jurisdiction of sovereignty is closely analogous to possession in property law.¹⁶² The doctrine of effective occupation takes more from private law prescription than the element of possession, equated with sovereignty. Although theoretically effective occupation could be thought not to involve a lapse of time and momentary occupation could suffice, the Court – and most scholars – did not take this approach. In order to establish whether a state took effective control over a territory, the Court normally examines its deeds performed over a certain period.¹⁶³ Moreover, in the weighing of facts and claims, it matters whether the exercise of sovereignty has been peaceful or not, uninterrupted or not, public or not, even if the Court has not been explicit on these points. The phrase ‘continuous and peaceful display of sovereignty’, as used in the much-quoted *Las Palmas Case*, already seems to encompass all these conditions.

But, this does not constitute prescription in the sense of – any – Roman law. There are no fixed terms. Nor is the public or the peaceful or the continuous character of the possession an absolute condition. The claims of the parties are weighed, and the one providing the most convincing evidence for the most convincing behaviour as sovereign – including acquiescence – wins the case. Thus, effective occupation has shed most of the particulars Roman law attached to *usucapio*, *praescriptio longi terminis* and even *praescriptio longissimi terminis*. This process of generalization is historically analogous to what happened in private law. There was already such an evolution from classical to Justinian Roman law. By the 18th century, civil lawyers accepted that prescription could lead to title after 30 years, even when the possession was *mala fide*. What modern and current international lawyers have made from acquisitive

¹⁵⁹ Available at www.icj-cij.org, paras. 134-149.

¹⁶⁰ ‘The effective exercise of territorial jurisdiction’: *Frontier Dispute (1986)* [1986] ICJ Rep 586. ‘An exercise of authority on his territory’: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (2001)*, available at www.icj-cij.org, para. 96.

¹⁶¹ Available at www.icj-cij.org, para. 141. The Court also referred to *Eastern Greenland*, where both *corpus* and *animus* were said to be necessary, at para. 134.

¹⁶² Post, *supra* note 113, at 158 and 166-169. Brownlie refers to the ‘better right to possess familiar in common law’: *supra* note 51, at 124.

¹⁶³ In *Right of Passage*, the Court accepted a ‘constant and uniform practice’ of passage for over a century to be a solid basis for a title on the disputed right to travel over Indian territory: [1960] ICJ Rep 40.

prescription may have been quite unrecognizable for the Roman jurists, but the process of transformation is analogous to what happened in the tradition of the civil law.

It remains to be seen whether the doctrine of effective occupation leaves any room for acquisitive prescription as a distinct category, more faithful to private law. While some textbooks continue to name prescription as a distinct category, it is not clear what its relation to effective occupation could be. As was indicated above, it does not serve any practical purpose as a means to affirm a putative or defective title.¹⁶⁴ And what would be its exact contents? The ICJ has not yet shed a clear light on the matter. *Kasikili/Sedudu* (1999) is interesting in this respect. Namibia had invoked ‘prescription’ as an alternative title to the treaty of 1890 upon which the dispute turned. However, what Namibia meant by acquisitive prescription was nothing other than what Fauchille had understood it to be, as it repeated his four conditions. As it was said before, this was not the ‘acquisitive prescription’ from private law, but something that had been watered down and adapted to the context of international law. Whether the title Namibia claimed can rightly be called ‘prescription’ and whether, as Namibia seemed to imply, it is to be distinguished from effective occupation are questions which were not addressed by the Court. The ICJ evaded a discussion on the matter by stating that the parties agreed that prescription was a rule of international law. The judges then found that Namibia, however, had not fulfilled the four conditions it had brought to the fore itself.¹⁶⁵

6 Conclusion

Three potential roles of Roman law in current international law have been defined by way of hypothesis. First, both occupation and prescription, were already discussed by the fathers of the modern law of nations of the 16th and 17th centuries. As these early modern ‘international lawyers’ were still in the process of emancipating the *ius gentium* from the *ius commune*, from extracting the law of nations from the intellectual framework of the law at large, it came naturally to them to take inspiration from the *ius commune* and its Roman part. Moreover, in both cases they continued applying rules of Roman law to the relations between princes and peoples, as had been done in the late medieval era. As such, Roman law played a historical role in the formation of the modern law of nations. Under the heading ‘Roman law’, however, should be understood the learned civil law as part of the medieval tradition of the *ius commune*. This ‘Roman law’ does fulfil the first of the three potential functions that were defined.

Second, from the 16th to the 20th century, both occupation and prescription were moulded to suit the needs of international relations.¹⁶⁶ In general, this meant that the particular technicalities which limited the scope and application of the rules under Roman law were thrown overboard and the concepts were reconstructed as general

¹⁶⁴ As in Brownlie, *supra* note 51, at 154. Brownlie does not see any practical use of the concept: at 159 (see n. 17 on that page for authors who think the same way).

¹⁶⁵ Available at www.icj-cij.org, para. 90. See also Castellino and Allen, *supra* note 3, at 145–146.

¹⁶⁶ Something similar happened with *uti possidetis*: see Castellino and Allen, *supra* note 3, esp. at 13–20, 24–27, and 229–238.

principles. Until the 18th century, the writers of the law of nations felt obliged to legitimate their deflections from Roman law. The intellectual construction that natural law was served an important purpose here. It hovered as an ideal and general body of law over all systems of positive law. It was filled with concepts and rules taken from the medieval tradition of the *ius commune* and, under the influence of humanistic jurisprudence, from classical and Justinian Roman law, which were then transformed into more abstract and general principles. From there, these could find their way to the modern law of nations. As such, natural law became pretty much what the *ius gentium* had been to the Romans.¹⁶⁷ More than just being an interesting parallel in history partly based on terminological confusion, this indicates how much the law of nations was intertwined with the law at large in the Western legal tradition. The intuitive views that Lauterpacht expressed in his *Private Law Sources and Analogies* on the role of natural law during the early modern period and its relations to Roman law amount to the same.¹⁶⁸ He, however, underestimated that in many cases, the process of generalization and abstraction that was done under the wings of natural law, continued processes started during the Late Middle Ages under the wings of canon law.

Thus, from the 16th to the early 20th century, Roman law continued to feed private law analogies in international law. Its influence was mostly indirect. Roman law served to inspire natural law and was – together with canon law – the common ground under the leading private law systems of the West. As the concepts and rules taken from Roman law were all adapted to the purposes of states, classical, Justinian and medieval Roman law were used and misused without little discretion. By the 18th century, Roman law had lost its authority, but it still loomed as the treasure house of the Western tradition of private law, where all the great principles and ideas of the law in general could be found.

Third, there are no instances in the judgments of the ICJ of a direct appeal to Roman law as evidence of what is commonly accepted to be law or general principles of law. Roman law has historically inspired private law analogies, but this has ceased. Roman law has ceased to be considered *ratio scripta*.

Today, Roman law only holds a place in international law from the perspective of history. First, during the formative period of the modern law of nations, precepts were adopted from Roman law because they belonged to the *ius commune*, which for centuries had served as the law applied to relations between princes and peoples as well as individuals. Second, once the law of nations had become a distinct body of law, Roman law continued to feed it. Many general rules of natural law, which were said to form the basis of the law of nations, were extracted from Roman law through inductive reasoning. It is an example of what Lauterpacht called ‘the generalization of the legal experience of mankind’. In all, these conclusions run parallel to the role that Lauterpacht attributed to Roman law in an intuitive way.

¹⁶⁷ As was pointed out in *Venezuelan Preferential Claim (1903)*, *supra* note 30; see H. Lauterpacht, *supra* note 2, at 251.

¹⁶⁸ *Ibid.*, at 8-17.

This analysis of the interaction between Roman and international law confirms Lauterpacht's claim that international law is not a totally autonomous body of law. Through Roman law, international law shares much of its history with the main municipal private law systems. The fact that the Roman material was thoroughly moulded to the needs of international law does nothing to reaffirm that the state differs *in an absolute way* from the individual as a moral and legal person, nor that international law is an absolutely voluntary system as the positivists of the early 20th century would have it. The changes are not dissimilar from the adaptations that the same rules underwent in municipal law systems. Most involve a degree of abstraction necessary to apply the rule to a context different from the original context of Roman law.

As modern international law had to adapt the rules it took from private law to a vast extent, researching these historical affiliations will in most cases serve little else than man's – not so fashionable – urge to know his history. But at the same time this history reminds us that the laws governing the relations between men and between body politics stem from the same sources and share the same basic concepts and rules.