7

Territorial Disputes

> A territorial change means not just a transference of a portion of the earth's surface and its resources from one regime to another; it usually involves, perhaps more importantly, a decisive change in the nationality, allegiance and way of life of a population.[1]

Territorial land disputes are means for states to reinforce their territorial integrity. The principle of territorial integrity in international law assures a geographical space for a government to exercise its authority and therefore reinforces state sovereignty.[2] Finalising the space in which a state may exercise its sovereignty, through stabilising its territorial boundaries, is therefore critical to states. Such boundaries can be defined as 'the imaginary lines on the surface of the earth which separate the territory of one State from that of another, or from unappropriated territory, or from the Open Sea'.[3]

There are two types of territory-related disputes that may appear before the International Court of Justice (ICJ, the Court): 'frontier disputes' or 'delimitation disputes' are centred on delimiting or clarifying the particularities of a line itself, while 'disputes as to attribution of territory' focus on the areas divided by the line.[4] While the Court elucidates that their difference is in the 'degree as to the way the operation in question is carried out', it admits that there is 'not so much a difference in kind'[5] between them. Thus, both types of disputes will be examined in this chapter.

[1] Robert Y. Jennings and Marcelo Kohen, *The Acquisition of Territory in International Law with a New Introduction by Marcelo G. Kohen* (Manchester University Press 2017) 16.
[2] Lassa Francis Lawrence Oppenheim, *International Law: A Treatise*, vol I (3rd edn, Longmans, Green and Company 1920) 564.
[3] Ibid [253].
[4] *Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) [1986] ICJ Rep 554, 563–64 [17].
[5] Ibid.

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Inhabitants form a critical part of any territory. The first criterion of statehood in the 1933 Montevideo Convention on the Rights and Duties of States is 'a permanent population'.[6] A lack of inhabitants on a territory may be an indication that it is *terra nullius*: belonging to no one.[7] The Court has clarified that state sovereignty comprises not only control over territory but also control over people.[8]

As individuals form an important part of a territory, they are likely affected when territorial boundaries change. In the words of former ICJ President Rosalyn Higgins, 'When a state delimits its territorial boundaries, grants nationality under its own rules and asserts territorial and extended jurisdiction over its nationals, individuals are manifestly affected.'[9] Indeed, handing down a judgment regarding a territorial dispute is only the beginning of the story for a state's population, as several changes may thereafter occur on the ground. For instance, nationals may become foreigners, certain residents may have their status altered, and private property may become foreign instead of domestic, thereby requiring new rules of governance. Transferring property from one nation to another would be negotiated, and people may have to be compensated for losing their properties.[10] For instance, in *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, the Court, *inter alia*, ordered a transfer of sovereignty of the Bakassi peninsula from Nigeria to Cameroon. This has impacted Bakassians identifying as Nigerian who have been killed, disenfranchised, or become internally displaced persons.[11] As one author explained when describing this dispute,

[6] Montevideo Convention on the Rights and Duties of States, 165 LNTS 19 ["Montevideo Convention"].

[7] *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, 38–39 [79]–[80]; *Legal Status of Eastern Greenland* (Judgment) [1933] PCIJ Series A/B, 22.

[8] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) [2008] ICJ Rep 12, 40 [79].

[9] Rosalyn Higgins, 'Conceptual Thinking about the Individual in International Law' (1978) 4(1) *British Journal of International Studies* 1, 1.

[10] Hephzibah Egede, 'The ICJ Bakassi Decision: The Rights of the Indigenous Communities and Populations in the Bakassi Peninsula' in Edwin Egede and Mark Igiehon (eds), *The Bakassi Dispute and the International Court of Justice: Continuing Challenges* (Routledge 2018) 91.

[11] 'Cameroon forces "kill 97 Nigerian fishermen" in Bakassi' *BBC News* (14 July 2017). www.bbc.co.uk/news/world-africa-40607306; Anietie Akpan, 'Bakassi Returnees' Two-Decade Grueling Sojourn in "New Bakassi"' *The Guardian* (1 May 2022) https://guardian.ng/sunday-magazine/bakassi-returnees-two-decade-grueling-sojourn-in-new-bakassi/.

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> There is an abundance of facts to support a claim that the people of Bakassi dreaded the unwelcome consequences of being dislocated from their comfortable connection to Nigeria. The Bakassi was not simply about a physical space or resources contained in that area. It was also about human beings. There should be a marked distinction between cases where a state engages in a boundary dispute to protect its territory and assets and where it engages in a dispute that pertains to an inhabited territory.[12]

In this chapter, I argue that such implications for individuals are seldom considered in territorial disputes and propose ways to do so. Such adjustments are encouraged to fulfill the demands of justice under social idealism, serving as a basis for evaluating the legitimacy of judgments. I first observe that the Court traditionally resolves territorial disputes with reference to a firm hierarchy of titles, few of which allow for the consideration of individuals (Section 7.1). Titles are modes of acquisition through which states will establish their sovereignty over a piece of land[13] – in other words, the legal or factual conditions that prove a state's wilful territorial sovereignty.[14] I then consider how the title of *effectivités* could potentially allow for the consideration of individuals (Section 7.2) and acknowledge that their rights and needs have been mentioned by the Court as an afterthought in certain judgments (Section 7.3). Finally, I analyse the reasons for the Court's approach (Section 7.4) and argue that the principle of equity could play a stronger role in allowing for the consideration of individuals in territorial disputes (Section 7.4). Section 7.5 concludes.

7.1 Legal Titles and Local Populations: A Mismatch

The most preferred titles by the Court are legal titles. The main difference between legal titles and the other main category of title, *effectivités*

[12] Eemeka Duruigbo, 'Should Nigeria Have Sought Revision of the Bakassi Decision by the International Court of Justice?' in Edwin Egede and Mark Igiehon (eds), *The Bakassi Dispute and the International Court of Justice: Continuing Challenges* (Routledge 2018) 25.

[13] Marcelo G. Kohen, 'Titles and *effectivités* in Territorial Disputes' in Marcelo G. Kohen and Mamadou Hébié (eds), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing 2018) 145.

[14] *Burkina Faso/Republic of Mali* (n. 4) [17]–[18]; Malcolm Shaw, 'The International Court of Justice and the Law of Territory' in Christian J. Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (1st edn, OUP 2013) 154–55.

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(Section 7.2), is that the latter is concerned with the *display* of authority – certain practices proving and establishing the existence of sovereignty[15] – while legal titles rely on the *source or root* of territorial jurisdiction.[16] Indeed, emanating from legal acts, legal titles typically take the form of 'a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights'.[17] While there are many kinds of legal titles, the most valued of them by the Court is a boundary treaty.[18]

There are many reasons why boundary treaties are the most preferred legal titles. Treaties, more generally, are featured in Article 38 of the ICJ Statute, which compels the Court to consider them as a source of international law. They also reflect state consent, which is a paramount principle in the eyes of the Court.[19] Thus, to question the content of the treaty if presented would be tantamount to questioning and obstructing the parties' desires.[20]

Boundary treaties are of particular value to the Court in the context of such disputes because they solidify territorial stability in a number of ways. First, in terms of *ratione temporis*, such treaties are timeless in that their consequences will continue even if the treaty itself ceases to exist, as stated by the Court in *Territorial Dispute (Libyan Arab Jamahiriya/ Chad)*.[21] Second, in terms of *ratione personae*, boundary treaties create objective borders that are valid *erga omnes*, creating rights binding upon third states.[22] Third, the common requirement for parties to register treaties with the United Nations Secretariat, pursuant to Article 102 of

[15] Kohen (n. 13) 145.
[16] Ibid.
[17] *Burkina Faso/Republic of Mali* (n. 4) [54].
[18] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (Judgment) [1992] ICJ Rep 350, 389–90 [45].
[19] E.g., *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (Application to Intervene) (Judgment) [1990] ICJ Rep 92, 132–33 [94]; *East Timor (Portugal v. Australia)* (Judgment) [1995] ICJ Rep 90, 102 [29]; *Anglo-Iranian Oil Co. (United Kingdom v. Iran)* (Judgment) [1952] ICJ Rep 93, 102–3; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Judgment) [1994] ICJ Rep 112 [25]; *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Judgment) [2003] ICJ Rep 161, 182–83 [42]; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (Order of 10 July 2002) [2002] ICJ Rep 219, 241 [57].
[20] Brian Taylor Sumner, 'Territorial Disputes at the International Court of Justice' (2004) 53 (6) *Duke Law Journal* 1779, 1804.
[21] *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (Judgment) [1994] ICJ Rep 6, 37 [73].
[22] *Territorial Sovereignty and Scope of the Dispute) (Eritrea and Yemen)* (1998) (Award) PCA Case No. 1996-04, [153].

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the UN Charter, gives a greater degree of certainty and transparency. These elements guarantee peace and long-term stability for states.[23] The Court has explained the importance it places on such stability: 'Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence and is subject to the rule excluding boundary agreements from fundamental change of circumstances'.[24]

While certain treaties may confer rights upon individuals (see Section 9.1), the focus of boundary treaties is naturally not the inhabitants of the state parties. Therefore, given that the Court prioritises such treaties, it is no surprise that individuals are often sidelined in the Court's judicial reasoning in the exercise of territorial boundary delimitation.

The second type of legal title prioritised by the Court in territorial disputes is the principle of the intangibility of boundaries inherited from colonisation, more commonly referred to as *uti possidetis juris*. This principle aims to 'secur[e] respect for the territorial boundaries at the moment when independence [was] achieved'.[25] Colonial powers will have typically adopted bilateral or unilateral instruments – for instance, a decree by one leader of a colony – or joint declarations or agreements between two colonial powers defining a boundary.[26] The principle of *uti possidetis juris* transforms such delimitations into international frontiers.[27]

Like boundary treaties, most colonial agreements treated by the Court make no reference to the inhabitants of the disputed territory. Therefore, the principle of *uti possidetis juris* does not allow individuals to be considered in the Court's legal reasoning in the context of territorial boundary disputes. Furthermore, this process of 'freez[ing] the territorial

[23] *Libyan Arab Jamahiriya/Chad* (n. 21) 37 [72]; *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Judgment) [1962] ICJ Rep 6, 34.

[24] *Aegean Sea Continental Shelf (Greece v. Turkey)* (Judgment) [1978] ICJ Rep 3, 35–36 [85]. For more on the principle of stability in territorial disputes, see Géraldine Giraudeau, *Les différends territoriaux devant le juge international: entre droit et transaction* (Martinus Nijhoff Publishers 2013) 281–339.

[25] *Burkina Faso/Republic of Mali* (n. 4) 566 [23]. See also Philippe Couvreur, 'Notes sur le "droit" colonial français dans la mise en oeuvre du principe de *l'uti possidetis juris* par la Cour internationale de Justice' in Maurice K. Kamga and Makane Moïse Mbengue (eds), *Liber amicorum [en l'honneur de] Raymond Ranjeva: l'Afrique et le droit international; variations sur l'organisation internationale* (Pedone 2013) 111–24.

[26] Hugh Thirlway, 'Territorial Disputes and Their Resolution in the Recent Jurisprudence of the International Court of Justice' (2018) 31(1) *Leiden Journal of International Law* 117, 132.

[27] *Burkina Faso/Republic of Mali* (n. 4) 566 [23].

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title'[28] focuses on the colonial power's boundaries prior to the independence of the modern-day state and not indigenous boundaries of the first people settled on the land. The designated Chamber of the Court recalled in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (1992) that 'when the principle of the *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign'.[29] Hence, when El Salvador argued that the *uti possidetis* boundaries should be drawn based on those of the earlier Indian settlement ('poblaciones'), the Chamber refuted this.[30] The emphasis of such legal titles is on the will of the colonial sovereigns dominating the territory in question as opposed to local populations.

In the Court's spirit of ensuring stability, the rationale behind the *uti possidetis juris* principle was the need for stability and security after decolonisation, particularly in African nations.[31] While understandable, the principle has still been criticised for undermining local populations. Makau Mutua has argued that this form of territorial boundary delimitation does not respect the real configuration of African populations. In his view, in instances where 'European map-makers split one nation in two states (. . .), the fate of the people was discussed as though they were two separate and alien entities, in defiance of reality on the ground'.[32] Furthermore, the application of this principle is problematic insofar as it legitimises *a posteriori* the administrative decisions made in grave violation of the rights and freedoms of colonised populations.[33] In this vein, Judge Mohamed Bennouna contemplates whether 'contemporary international law can rely on law produced by such an institution, even

[28] Ibid [30]; *Frontier Dispute (Benin/Niger)* (Judgment) [2005] ICJ Rep 90, 109 [26].
[29] *El Salvador/Honduras: Nicaragua intervening* (n. 18) 558–59 [333].
[30] Ibid 392–93 [50].
[31] Makane Moïse Mbengue, 'Delimitation and Demarcation of Borders in Africa: History, Problems and Prospects' in Pierre D'Argent (ed), *Droit des frontières internationales: Journées Franco-Allemandes = The Law of International Borders* (Pedone 2016) 87–101; Inge Van Hulle, 'Imperial Consolidation through Arbitration: Territorial and Boundary Disputes in Africa (1870–1914)' in Ignacio de la Rasilla and Jorge E. Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (1st edn, CUP 2019) 55–75.
[32] Makauwa Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995) 16 (4) *Michigan Journal of International Law* 1113, 1119.
[33] *Frontier Dispute (Burkina Faso/Niger)* (Judgment) [2013] ICJ Rep 45, 95 (Declaration of Judge Bennouna); Robert McCorquodale and Raul Pangalangan, 'Pushing Back the Limitations of Territorial Boundaries' (2001) 12(5) *European Journal of International Law* 867.

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though it involved only administrative boundaries which, moreover, attached little importance to the populations concerned and their historical and sociological relationships'.[34]

In sum, legal titles such as treaties and colonial instruments applied through the principle of *uti possidetis juris* do not leave much room for the consideration of individuals, as they reflect the desires of past and present sovereign powers at the expense of local populations. Beyond legal titles, however, *effectivités* present more prospects for inclusion.

7.2 The Potential of *Effectivités*

Contrary to the legal titles examined before (Section 7.1), *effectivités* has given individuals a platform of sorts in the Court's jurisprudence on territorial disputes.[35] *Effectivités* is the exercise of effective possession by an authority of the state on the basis of its sovereignty. Contrary to legal titles, relying on a legal *source* to prove the state's sovereignty, *effectivités* relies on the state's *actions* and practice that demonstrate its authority over the relevant territory. It includes any 'actual continuous and peaceful display of state functions',[36] such as, but not limited to, 'legislative acts or acts of administrative control, acts relating to the application and enforcement of criminal or civil law, acts regulating immigration, acts regulating fishing and other economic activities, naval patrols as well as search and rescue operations'.[37] The Permanent Court of International Justice (PCIJ) explained in *Eastern Greenland* that alongside such a display of authority, 'the intention and will to act as sovereign' is required.[38]

[34] *Frontier Dispute (Burkina Faso/Niger)* (Declaration of Judge Bennouna) (n. 33).

[35] Marcelo Kohen and Mara Tignino, 'Do People Have Rights in Boundaries' Delimitations?' in Laurence Boisson de Chazournes, Christina Leb, and Mara Tignino (eds), *International Law and Freshwater* (Edward Elgar Publishing 2013) 98.

[36] *Island of Palmas (or Miangas) (The Netherlands/The United States of America)* (1928) (Award) II RIAA 829, 10.

[37] *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Judgment) [2012] ICJ Rep 624, 655 [80]. See also *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (Judgment) [2007] ICJ Rep 659, [176]–[208]; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Judgment) [2002] ICJ Rep 625, 683 [137]–[141]; *Minquiers and Ecrehos (France/United Kingdom)* (Judgment) [1953] ICJ Rep 47, 65–69.

[38] *Legal Status of Eastern Greenland* (n. 7) 45-46.

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Acts of individuals can serve as evidence of a state's sovereignty over the relevant territory. An example where *effectivités* was recognised to this end was in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (2008). Here, Malaysia claimed that its title to Pedra Branca/Pulau Batu Puteh was confirmed by the ties of loyalty existing between the Sultanate of Johor and a nomadic 'people of the sea' named the Orang Laut. These people were reported to have engaged in 'various activities such as fishing and piratical activities in the waters in the Straits of Singapore, including in the area of Pedra Branca/Pulau Batu Puteh'.[39] Malaysia provided evidence – writings of British officials in Singapore – that the Straits of Singapore were these peoples' habitat that they frequently visited[40] and that they were subjects of the King of Johor, appointed by the latter.[41] Due to the high probative value given to these sources, the Court concluded that Malaysia had the original title over Pedra Branca/Pulau Batu Puteh.[42]

Therefore, *effectivités* is seemingly, as a state litigant once said, '[t]he only satisfactory way of dealing with the emotively real and ethically unavoidable question of the link between man and the land'.[43] However, this title carries two main problems when considering its ability to integrate individuals into the Court's legal reasoning in territorial disputes.

First, *effectivités* is secondary to legal titles. Despite this showcase of the behaviour of individuals in the assessment of territorial sovereignty, the Court has always stood by the primacy of legal title over effective control.[44] This means that if both a legal title and *effectivités* are presented, and the legal title and *effectivités* state different rights, then preference is given to the legal title.[45] For instance, the Court rejected

[39] *Malaysia/Singapore* (n. 8) 37 [70].
[40] Ibid 37 [71].
[41] Ibid 37–38 [72]–[73].
[42] Ibid 38–39 [74]. However, the Court ultimately concluded that Pedra Branca/Pulau Batu Puteh belonged to Singapore through acquisitive prescription.
[43] Memorial of the Republic of El Salvador (1 June 1988) [7.17].
[44] Marcelo G. Kohen, 'La relation titres/effectivités dans la jurisprudence récente de la Cour internationale de Justice (2004-2012)' in Denis Alland et al (eds), *Unité et diversité du droit international: ecrits en l'honneur du professeur Pierre-Marie Dupuy* (Martinus Nijhoff Publishers 2014) 599–614.
[45] *Burkina Faso/Republic of Mali* (n. 4) 586–87 [63]. See also *El Salvador/Honduras: Nicaragua intervening* (n. 18) 398 [61]; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303, 353–54 [68]; *Benin/Niger* (n. 28) 148–49 [141]; *Case concerning Sovereignty over Certain Frontier Land (Belgium/Netherlands)* (Judgment) [1959] ICJ Rep 209, 229–30.

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Thailand's claims of sovereignty over the temple in *Preah Vihear*, allegedly manifested through a number of acts of effective control subsequent to a 1904 boundary treaty with France attributing sovereignty to Cambodia.[46]

Effectivités only serves to confirm the right derived from a legal title if the latter is 'obscure'[47] or 'doubtful',[48] therefore failing to provide a clear solution regarding the disputed territory.[49] For example, the Court turned to *effectivités* in *El Salvador/Honduras* after noting that the legislative and administrative texts provided were 'confused and conflicting'.[50] *Effectivités* may also override legal titles where the latter is lacking.[51] For instance, in *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (2002), the Court only considered *effectivités* after having decided that neither of the parties had provided a legal title.[52] Finally, *effectivités* may also be considered where a contending state proves that it acquiesced effective control over a disputed territory, despite the existence of a treaty attributing original sovereignty to another state (acquisitive prescription).[53] Therefore, despite *effectivités* taking individuals into account, it is only a subsidiary consideration.

The second limitation to *effectivités* is its preoccupation with the state's authority as opposed to the individual's desires. The activities of individuals are not assessed to arrive at a solution that factors their needs or desires into account. Rather, they serve as 'evidence of the intention of that Government to act as sovereign (. . .) involving a manifestation of State authority in respect of [the relevant territory]'.[54] The Court clearly stated in *Indonesia/Malaysia* that 'activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority'.[55] The mere presence of

[46] *Temple of Preah Vihear* (n. 23) 27–29. See also *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) [1999] ICJ Rep 1045, 1087 [63], 1095 [75], 1096 [79], [80].
[47] See *Burkina Faso/Niger* (n. 33) [78].
[48] *Benin/Niger* (n. 28) 148–49 [141].
[49] *El Salvador/Honduras: Nicaragua intervening* (n. 18) 566 [347]; Ibid.
[50] *El Salvador/Honduras: Nicaragua intervening* (n. 18) 55–59 [333]. See also *Nicaragua v. Colombia* (n. 37) 649 [55].
[51] *Libyan Arab Jamahiriya/Chad* (n. 21) 38–39 [76]; *Benin/Niger* (n. 28) 108–10 [25]–[27], 127 [76]–[77], 128 [82].
[52] *Indonesia/Malaysia* (n. 37) 678–79 [127].
[53] *Cameroon v. Nigeria: Equatorial Guinea intervening* (n. 45) 352–53 [67]; *Malaysia/Singapore* (n. 8) 50–51 [121].
[54] *France/United Kingdom* (n. 37) 71.
[55] *Indonesia/Malaysia* (n. 37) 683 [140] and 683–84 [142].

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individuals is therefore insufficient to be considered by the Court – only their presence *à titre de souverain* would yield value.[56]

Thus, the Court rejected Indonesia's argument that Indonesian fishermen used the waters around Ligitan and Sipadan, as these activities did not constitute acts *à titre de souverain* reflecting the intention and will of Indonesia.[57] Similarly, in *Kasikili/Sedudu Island (Botswana/Namibia)* where Namibia invoked its title on the grounds of *effectivités* in two instances to claim its sovereignty over the island, the Court found in both instances that there was nothing showing that the presence of the Masubia people was linked to territorial claims by the Caprivi authorities.[58] It noted that it was 'not uncommon for the inhabitants of border regions in Africa to traverse such borders for purposes of agriculture and grazing, without raising concern on the part of the authorities on either side of the border'.[59] The acts of individuals in and of themselves are therefore insufficient to establish *effectivités*, reflecting the theory of agency.[60]

As it stands, the peoples' consent and acceptance to be ruled by the claiming state litigant is in fact an implicit element in the Court's assessment. They, for instance, pay taxes imposed by the state litigants or use buildings that the state litigants claim to have built. This receptivity indicates their acceptance of the state's authority and therefore allegiance to that state. This, however, is not explicitly acknowledged nor examined in territorial disputes. As I have argued elsewhere, the Court could, in determining the application of *effectivités*, go further than assume the peoples' allegiance due to their passive acceptance of the state's actions.[61] It could verify that the individuals in question have

[56] *Malaysia/Singapore* (n. 8) 50–51 [121]; Ibid 683–84 [142]. See also Mariano Aznar, 'The Human Factor in Territorial Disputes' in Marcelo Kohen and Mamadou Hébié (eds), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing 2018) 308.

[57] *Indonesia/Malaysia* (n. 37) 683 [140]–[141].

[58] *Botswana/Namibia* (n. 46) 1094–95 [74], 1103–4 [94], 1105–6 [98].

[59] Ibid [74].

[60] Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 138 ("Acts by private persons purporting to appropriate territory for the State of which they are nationals may be ratified by the State ... based upon [a theory of] agency in private law"); Angelo Piero Sereni, 'Agency in International Law' (1940) 34(4) *The American Journal of International Law* 638.

[61] Yusra Suedi, 'Self-Determination in Territorial Disputes before the International Court of Justice: From Rhetoric to Reality?' (2022) 36(1) *Leiden Journal of International Law* 161.

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exhibited allegiance and a desire to be governed by that state and explicitly affirm this.

For example, in *El Salvador/Honduras*, the Chamber noted that '[i]n the absence of legislative instruments formally defining provincial boundaries, not only the grants to Indian communities but also land grants to private individuals afford some evidence which might indicate where the boundaries were thought to be or ought to be'.[62] In this case, the private individuals must have consented to the granting state's authority even if no mention was made of this in the analysis of *effectivités* by the Court. It is not only the state's intention to govern a people but also the latter's desire to be governed by the state, which has value in the claim of *effectivités*. Similarly, in *Malaysia/Singapore*, if there were any reason to believe that the Orang Laut did not accept the sovereignty of the Sultanate of Johor, the *effectivités* of Malaysia would likely not have been upheld. However, this step of the reasoning is omitted in judgments in territorial disputes, which only place emphasis on the state. My proposal is to not only analyse the Sultan of Johor's authority over the Orang Laut but also to consider if the Orang Laut accepted such authority and, if so, explicitly state this.

This subtle shift does not compromise the principle of stability of boundaries as the Court is already foregoing such stability when resolving a territorial dispute on the grounds of a state litigant's *effectivités*, due to the absence or inadequacy of a boundary treaty. The state's territorial integrity also remains unaffected insofar as *effectivités* still aims to affirm the state's sovereignty. However, this proposal implies that if, when assessing the peoples' desires in the examination of *effectivités*, they do not align with the state's acts *a titre de souverain*, then *effectivités* would not be upheld as a valid title in the given context. In such a scenario, the Court would still have other more subsidiary means to resolve the territorial dispute pursuant to its practice, such as the principle of equity explored later (Section 7.6).[63]

In summary, examining a state's *effectivités* over a territory—and, by extension, the actions of individuals—is the primary means by which the latter are incorporated into the framework established by the Court for addressing territorial disputes. Despite its subsidiary nature, a shift in

[62] *El Salvador/Honduras: Nicaragua intervening* (n. 18) 394 [54].

[63] Yusra Suedi, 'Man, Land and Sea: Local Populations in Territorial and Maritime Disputes Before the International Court of Justice' (2021) 20(1) *Law and Practice of International Courts and Tribunals* 30, 44–52.

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legal reasoning during its application can allow the desires of local populations to be considered in territorial disputes before the Court. This proposal does not completely address the marginalisation of individuals in territorial disputes before the Court, nor does it prioritise them in such cases. However, it offers a way to acknowledge peoples' aspirations without upending the established jurisprudence that has shaped the Court's steadfast approach.

7.3 Forsaken Titles

Legal titles and *effectivités* are the two main categories of title considered by the Court in territorial disputes. As observed earlier, neither directly reflects human concerns. However, state litigants have occasionally invoked other arguments allowing for local populations to be considered in the dispute, such as human concerns and history, respectively. This section illustrates such instances, noting that such titles have been rejected by the Court as they fail to fit in the well-established title system developed in its jurisprudence.

First, states have plainly expressed concern for the human dimensions of the case to advocate for the rights of their inhabitants in territorial disputes. In *El Salvador/Honduras*, for example, El Salvador explicitly requested for the appointed Chamber to consider the 'human factor' in hopes of impacting the Chamber's legal reasoning in its delimitation of the territorial boundary. Explaining how the disputes would impact its local populations, it pleaded on the grounds of 'reasons of crucial human necessity',[64] arguing that factoring in human considerations was 'indispensable in the best interests of the requirements of authentic international justice'.[65] It therefore asked the Chamber 'to ensure that the duly considered judgment is appropriate for the destiny and necessities of the persons whose lives are bound up in the matter'.[66] The Chamber, however, responded that its task was 'to declare what areas are, and what are not, already part of the one State and the other. If Salvadorians have settled in areas of Honduras, neither that fact, nor the consequences of the application of Honduran law to their properties, can affect the matter'.[67]

[64] Memorial of the Republic of El Salvador (1 June 1988) [7.16].
[65] Ibid.
[66] Ibid [7.2].
[67] *El Salvador/Honduras: Nicaragua intervening* (n. 18) 419 [97].

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A similar example where human concerns invoked by state litigants were rejected by the Court was in *Frontier Dispute (Burkina Faso/Niger)* (2013), where Niger argued extensively that populations should be taken into account in the delimitation of the territorial boundary. It argued that the 1927 Arrêté and Erratum that the Court was anticipated to rely on to resolve the dispute 'raised problems for the nomadic populations'[68] given that they are not sufficiently precise to fix the frontier at issue.[69] Furthermore, Niger submitted that the territorial colonial partitions constituted a 'socially disruptive factor' which provoked 'population movements motivated by the preservation of communal or cultural identities, or the safeguard of interests'.[70] While the Court did not directly factor in such considerations, it used a map produced by the French *Institut géographique national* (IGN map)[71] as a reflection of the colonial *effectivités*[72] in its resolution of the dispute, pursuant to the parties' request.[73] Given that the map was drawn on the basis of information, provided by the local authorities[74] and consultations with village chiefs and local people,[75] on the boundaries of their cantons,[76] it was deemed by Judge Antônio Augusto Cançado Trindade to be 'the appropriate frontier line therein from the perspective of the relations between people and territory'.[77]

Human concerns aside, state litigants have also made historical claims as title. This title is typically rooted in the idea that a certain state possessed a certain territory first or for a significant period of time. It therefore sheds light on a community who historically inhabited the disputed territory. However, the Court has typically discarded these arguments if it has been able to rely on legal titles or, eventually, *effectivités*. In *Preah Vihear*, the Court, satisfied with the 1904 Boundary

[68] *Burkina Faso/Niger* (n. 33) 101–2 [13] (Separate opinion of Judge Cançado Trindade).
[69] Memorial of Niger (20 April 2011) [2.1-4].
[70] Ibid [6.6].
[71] *Burkina Faso/Niger* (n. 33) 75–76 [67] and 105 [24] (Separate opinion of Judge Cançado Trindade).
[72] Memorial of Niger (20 April 2011) [68].
[73] *Burkina Faso/Niger* (n. 33) 75–76 [67] and 105 [24] (Separate opinion of Judge Cançado Trindade).
[74] Ibid 116 [58] (Separate opinion of Judge Cançado Trindade).
[75] Ibid 117 [61] (Separate opinion of Judge Cançado Trindade).
[76] Ibid 116 [58] (Separate opinion of Judge Cançado Trindade).
[77] Ibid 132 [102] (Separate opinion of Judge Cançado Trindade).

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Treaty, explicitly stated that it was unable to regard other arguments relied on by the parties 'of a physical, historical, religious and archaeological character' as legally decisive.[78] In *Territorial dispute (Libya/Chad)*, Libya had submitted to the Court that prior to French colonialism, part of the disputed territory (the "Borderlands") was already inhabited by peoples under Libyan dominance,[79] but the presence of a treaty eclipsed this argument.[80] As explained earlier (Section 7.1), in *El Salvador/Honduras*, El Salvador argued that the *uti possidetis* boundaries should be drawn based on the indigenous delimitation of the early Indian settlement ('poblaciones'), as opposed to the Spanish colonial administration's boundaries.[81] The Court, however, rejected any historical titles pre-dating the parties' independence in 1821.[82] In brief, historical claims have yet to be upheld by the Court in a territorial dispute.

State litigants have therefore expressed concerns for their people in various ways. French jurist Pierre-Marie Dupuy has commented that doing so benefits not only the local populations but also the litigants themselves: '[S]i, devant la Cour internationale de Justice ou tout autre tribunal international, un Etat était demain amené à défendre sa souveraineté sur la portion d'un fleuve ou d'un lac, il le fera d'autant mieux sur le plan juridique qu'il pourra s'appuyer sur le droit de sa population à l'eau.'[83]

The rejection of both human concerns and historical claims indicates that the Court is trapped within the parameters of the notion of legal title. Beyond the parties' arguments, the consideration of populations will depend on their inclusion in legal sources recognised as legitimate by the Court. Arguments and titles raised outside of the title system have no place in the Court's decision-making in territorial disputes.

[78] *Temple of Preah Vihear* (n. 23) 15.

[79] Memorial written by the Great Socialist People's Libyan Arab Jamahiriya (26 August 1991), [3.36].

[80] *Libyan Arab Jamahiriya/Chad* (n. 21) 21–26 [40]–[52].

[81] *El Salvador/Honduras: Nicaragua intervening* (n. 18) 392–93 [49]–[50].

[82] Ibid 392–93 [50] and 544–46 [307]. See also Sumner (n. 20) 1799.

[83] Pierre-Marie Dupuy, 'Le droit à l'eau, un droit international?' (2006) European University Institute Department of Law Working Paper 2006/06. See also Aznar (n. 56) 334. Author's translation: If tomorrow, before the International Court of Justice or any other international tribunal, a State were to defend its sovereignty over the portion of a river or a lake, it would be better off relying on the right of its population to water, from a legal perspective.

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7.4 P.S.: Questions, Rights and Needs

While the Court may not acknowledge historical claims nor human concerns, its inquiry into the human dimensions of the dispute through questions during oral proceedings has been noteworthy. For example, in the oral proceedings of *Burkina Faso/Niger*, Judge Cançado Trindade asked the parties to indicate, with precision, to what extent will the fixing of the frontier have a bearing on the nomadic populations in the relevant areas.[84] Burkina Faso responded that the reduction of pastoral spaces posed by international borders may cause difficulties to the nomads, but in the instant case, any frontier that is determined between it and Niger will have no detrimental effect on the populations (nomads or otherwise) living in the border area.[85] Niger, on the other hand, replied that while the authorities of both states do not rigorously apply the regulations for the movement of populations, this forms part of the *modus vivendi* between them (arrangement allowing for peaceful coexistence).[86] Judge Cançado Trindade concluded from this that 'any frontier to be determined does not seem likely to have an impact on the population, as long as both States continue to guarantee the free movement to the nomads and semi-nomads, and their living conditions do not change as a consequence of the fixing of the frontier (by the Court)'.[87]

The practice of asking questions indicates a certain interest from the judges on the bench in the fate of such populations and hints to a possible discussion in the judges' deliberations. The practice also suggests that if the parties not provide this information *proprio motu*, the Court can inquire into the potential impact of boundary delimitation on the local populations of one or both countries.

Given the rarity of this practice and reliance on the interests of specific judges, a more common approach has been for the Court to acknowledge individual rights and needs of populations *post scriptum*, directing state litigants to address the repercussions of its judgments. The affirmation of individual rights *post scriptum* has been observed in four instances. First,

[84] Verbatim record 2012/26, 59–60 (Judge Cançado Trindade).
[85] Replies of Burkina Faso and Niger to the questions put by Judge Cançado Trindade at the end of the public sitting held on 17 October 2012 (translation) (16 November 2012), [16]–[17], [19].
[86] Ibid 6.
[87] *Burkina Faso/Niger* (n. 33) 114 [47] (Separate opinion of Judge Cançado Trindade); Verbatim record 2018/20, 86 [37] (Judge Gaja).

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refuting El Salvador's human-centric claims explained before (Section 7.3), the appointed Chamber noted in *El Salvador/Honduras* that

> The situation may arise in some areas whereby a number of the nationals of one Party will, following the delimitation of the disputed sectors, find themselves living in the territory of the other, and property rights apparently established under the laws of the one Party will be found to have been granted over land which is part of the territory of the other. The Chamber has every confidence that such measures as may be necessary to take account of this situation will be framed and carried out by both Parties, in full respect for acquired rights, and in a humane and orderly manner.[88]

Second, although it was decided in *Kasikili/Sedudu Island* that the island forms part of the territory of Botswana,[89] the Court decided that there should be unimpeded access for the craft of the nationals and flags of the parties in the two channels of the river around the island irrespective of sovereignty on an equal treatment basis.[90] This followed Botswana stressing its policy on free navigation during the oral hearings.[91]

Third, in resolving the *Cameroon v. Nigeria* dispute, the Court was required to delimit the vicinity surrounding the Cameroonian village of Turu,[92] which had expanded onto Nigerian territory over time,[93] and the boundary in the vicinity of the Nigerian village of Kotcha, which had spread over onto the Cameroonian side of the boundary.[94] Predictably applying the treaty before it (the Thomson-Marchand Declaration) to resolve the matter, it stated that 'It is instead up to the Parties to find a solution to any resultant problems, with a view to respecting the rights and interests of the local population'.[95] It later stated in the judgment that 'the implementation of the present Judgment will afford the Parties a beneficial opportunity to cooperate in the interests of the population concerned, in order notably to enable it to continue to have access to educational and health services comparable to those it currently

[88] *El Salvador/Honduras: Nicaragua intervening* (n. 18) 400 [66].
[89] *Botswana/Namibia* (n. 46) 1106 [101].
[90] Ibid 1107–8 [103]. See also 1112 (Declaration of Judge Abdul Koroma), 1110 (Declaration of Judge Ranjeva), and 1148–51 [25]–[35] (Separate opinion of Judge Kooijmans).
[91] Ibid 1106–7 [102].
[92] More specifically, the watershed from Ngosi to Humsiki (Roumsiki)/Kamale/Turu (the Mandara Mountains).
[93] *Cameroon v. Nigeria: Equatorial Guinea intervening* (n. 45) 369 [104]; Rejoinder of Nigeria (4 January 2001), [7.135].
[94] Ibid (*Cameroon v. Nigeria*) 373 [121].
[95] Ibid 373–74 [123].

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enjoys'.[96] This resulted in the establishment of a mixed commission to protect the right of affected populations through the Greentree Agreement.[97] Its Article 3 accords rights to Nigerian nationals of the Bekassi Peninsula that must be respected by Cameroon.[98]

The fourth example where the Court acknowledged populations' rights *post scriptum* is in *Frontier Dispute* (*Benin/Niger*) (2005) where Benin had argued that its people on the Nigerian bank had the acquired right to use the waters of the Niger River and that such rights should not be interfered with.[99] The Court, following the precedent established by its predecessor that private rights acquired under existing law do not cease on a change of sovereignty,[100] ruled that 'the determination in regard to the attribution of islands effected above is without prejudice to any private law rights which may be held in respect of those islands'.[101]

Beyond recalling individual rights or inviting state litigants to pay attention to them *post hoc*, the Court requested on one occasion for state litigants to have due regard for populations' needs. It stated in *Burkina Faso/Niger* that 'each Party, in exercising its authority over the portion of the territory under its sovereignty, should have due regard to the needs of the populations concerned, in particular those of the nomadic or semi-nomadic populations, and to the necessity to overcome difficulties that may arise for them because of the frontier. The Court notes the cooperation that has already been established on a regional and bilateral basis between the Parties in this regard, in particular under Chapter III of the 1987 Protocol of Agreement and encourages them to develop it further'.[102] The Court therefore likely considers that in certain cases,

[96] *Cameroon v. Nigeria: Equatorial Guinea intervening* (n. 45) 452 [316]. It also stated: "The Court takes note with satisfaction of the commitment thus undertaken in respect of these areas where many Nigerian nationals reside" ([317]).

[97] Laurence Boisson de Chazournes and Antonella Angelini, '"After the Court Rose": The Rise of Diplomatic Means to Implement the Pronouncements of the International Court of Justice' (2012) 11 *Law and Practice of International Courts and Tribunals* 1; Affef Ben Mansour, *La mise en oeuvre des arrêts et sentences des juridictions internationales* (Larcier 2011) 496–97.

[98] Greentree Agreement, 12 June 2006, Article 3. See also Egede (n.10) 80.

[99] Memorial of the Republic of Benin (27 August 2003) [2.182] and [3.4]; Reply of the Republic of Benin (17 December 2004), [0.13]; Verbatim record 2005/1, 20 [1.23] (M. Biaou).

[100] *Certain German Interests in Polish Upper Silesia* (Judgment) [1926] PCIJ Series A, 42; *German Settlers in Poland* (Advisory Opinion) [1923] PCIJ Series B, 6, 36.

[101] *Benin/Niger* (n. 28) 140–41 [118].

[102] *Burkina Faso/Niger* (n. 33) 90–92 [112].

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reminding the parties to consider local populations can help mitigate the negative repercussions of its judgment.

7.5 Reasons for the Court's Approach

It has been established at this stage that the link between the legitimacy of territorial title and the fate of the residing population is seldom underlined in the Court's judgments.[103] A robust system has been woven into the Court's jurisprudence, where legal titles, such as treaties, take precedence (Section 7.1). Only in the absence of such titles will the Court turn to *effectivités* (Section 7.2) where various acts by individuals may be valuable only as proof of the government's *acte de souverain* over the territory in question. They serve more as a means of establishing the state's sovereignty, rather than reflecting where individuals themselves feel a sense of belonging. This system leaves little room for other arguments such as human concerns or historical claims, although states have occasionally raised them (Section 7.3). However, such arguments have yet to be considered, with the Court only acknowledging individuals' rights and needs *post scriptum* (Section 7.4).

It should be mentioned that the opportunities for the Court to address the repercussions on local populations are generally limited to states raising such concerns in their pleadings. Indeed, the Court is not authorised to raise such concerns upon its own initiative but is bound by the principle of *non ultra petita* ('not beyond the request'). This principle holds that the Court may not decide more than it has been asked to and may not innovate outside of the parties' submissions.[104] The Court has recognised the principle in its own jurisprudence.[105] It implies that unless

[103] Kohen and Tignino (n. 35) 100.

[104] *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru)* (Judgment) [1950] ICJ Rep 395, 402. See also *Oil Platforms* (n. 19) 221 [7] (Declaration of Vice-President Ranjeva); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius Publications 1986) 531; Friedlich Rosenfeld, '*Iura Novit Curia* in International Law' in Franco Ferrari et al (eds), *Iura Novit Curia in International Arbitration* (JurisNet LLC 2018) 453; Hugh Thirlway, *The International Court of Justice* (OUP 2016) 85–86.

[105] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 14, 72–73 [168]; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] ICJ Rep 13, 23–24 [19]; *France/United Kingdom* (n. 37) 52; *Barcelona Traction Light and Power Company Ltd. (Belgium v. Spain)* (Second Phase) (Preliminary Objections) (Judgment) [1970] ICJ Rep 3, 34 [40].

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state litigants raise concerns about their local populations in their pleadings, the Court may not take up the matter on its own accord. While state litigants have done so on many occasions presented in this chapter, the opportunity has not always presented itself for the Court to give due consideration to local populations.

However, in instances where such concerns have been raised, the Court has rejected them for two main reasons. The first reason is to respect the principle of the stability of boundaries (Section 6.1). The Court has made clear that the exercise of territorial delimitation has the objective 'to achieve stability and finality'.[106] This principle finds its origins in Article 62(2)(a) of the Vienna Convention on the Law of Treaties, which prohibits the invocation of a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty establishing a boundary.[107] The International Law Commission specified that this principle had the objective of avoiding 'dangerous frictions' by allowing changes to be made to boundary treaties, which are 'instrument[s] of peaceful change'.[108]

While the principle of the stability of boundaries is important, the extent to which it should dictate the Court's delimitation process has been questioned in scholarship. Charles de Visscher stated in 1969 that it is the sole criterion for interpreting boundary treaties.[109] However, scholars have since challenged this, arguing that the exercise of delimiting territorial boundaries offers 'great flexibility' to judges,[110] who have a notably large discretionary power when delimiting territorial boundaries.[111] My view, supported by certain scholars, is that the principle of the stability of boundaries serves to resolve *preliminary* questions related to the function of the boundary, such as the legal nature of the delimitation, its legal effects, or its domain of application. However, it is not necessarily relevant to the actual delimitation process, that is deciding whether

[106] *Temple of Preah Vihear* (n. 23) 34. See also *Libyan Arab Jamahiriya/Chad* (n. 21) 37 [72]–[73].
[107] Vienna Convention on the Law of Treaties, 1155 UNTS 331, Article 62. See also Vienna Convention on Succession of States in respect of Treaties, 1946 UNTS 3, Article 11.
[108] Draft Articles on the Law of Treaties with commentaries [1966] *Yearbook of the ILC*, vol II, 259 [11].
[109] Charles de Visscher, *Problèmes de confins en droit international public* (Pedone 1969) 28.
[110] Giraudeau (n. 24) 281–82.
[111] Jacqueline Dutheil de la Rochère, 'Les procédures de règlement des différends frontaliers' in Société française du droit international, *La frontière* (Pedone 1980) 143.

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the line should go here or there.[112] Massimo Starita reasons that 'Cela pour la simple raison que le but atypique des traités établissant des frontières (. . .) et le principe de sécurité qui l'accompagne semblent trop génériques pour aider l'interprète à choisir entre un tracé et un autre'.[113] It is therefore possible that the Court has occasionally applied the principle further than necessary.[114]

The second reason for the Court's approach to local populations in territorial disputes is its desire to respect formalism. As discussed in Chapter 6, legal formalism pleads for an exclusive application of law without consideration for non-juridical elements, such as morality, substantive values, politics or humanitarian, or social or economic considerations (Section 6.1). In the view of the Court, considering local populations in territorial disputes would contradict formalism, which is critical for a decision's objectivity, neutrality, and credibility.[115] In the context of territorial disputes, the Court has been careful to note that it has not stepped outside the legal realm to reach its decision where it may be suspected that it has done so.[116]

However, no formalist can deny the existence of the principle of equity (Section 6.3.1). Equity may be a tool to peacefully adapt laws at the drastic disservice of state litigants' local populations. Its mere existence confirms the viable coexistence between the law and other considerations.[117] Indeed, equity is often considered *alongside* stability in the process of delimitation, as one arbitral tribunal stated.[118] Resorting to it would appear to be innate to a court carrying 'justice' in its name.[119] The next section examines its potential application in the context of territorial disputes to the benefit of local populations.

[112] Giuseppe Nesi, 'Boundaries' in Marcelo Kohen and Mamadou Hébié (eds), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing 2018) 231–32.

[113] Massimo Starita, 'L'interprétation des traités établissant la frontière' in Société française pour le droit international, *Droit des frontières internationales* (Pedone 2016) 73–76. Author's translation: "This for the simple reason that the atypical purpose of treaties establishing borders (. . .) and the principle of security which accompanies it seem too generic to help the interpreter choose between one line and another."

[114] Suedi (n. 63) 43. See also Giraudeau (n. 24) 291–98.

[115] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 27.

[116] *Burkina Faso/Republic of Mali* (n. 4) [149].

[117] Giraudeau (n. 24) 342, 344–45.

[118] *Guyana v. Suriname* (2007) (Award) PCA Case No. 2004-04, 108 [334] (emphasis added).

[119] Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 133.

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7.6 The Principle of Equity as a Tool to the Benefit of Local Populations

Equity may provide greater consideration of local populations than would be possible if only legal titles were applied. It allows for individuals to be integrated into the hierarchical framework developed through the Court's jurisprudence on territorial disputes. Applying the principle of equity would typically result in a zone being split in half and equally attributed to each party. While the Court has stated that '[e]quity does not necessarily imply equality',[120] it has clarified that 'where there are no special circumstances the latter is generally the best expression of the former'.[121]

The Court has resorted to the principle of equity when it has had no other option and no evidence pointing to a legal title or effective control that could help it delimit the boundary. It has applied equity twice in the context of territorial disputes: in *Burkina Faso/Mali* (1986) where it divided the Soum pool equitably between the two states who had not submitted any evidence indicating where the boundary could run,[122] and in *Burkina Faso/Niger* (2013) to delimit a boundary river. Applying equity *infra legem*, it decided that 'the requirement concerning access to water resources of all the people living in the riparian villages is better met by a frontier situated in the river than on one bank or the other'.[123]

Both times, the Court claimed to be applying equity *infra legem* – considered as an intrinsic attribute of the rules of law. As explained in Chapter 6, equity may also denote a means for filling the gaps in international law (equity *praeter legem*) or be used in derogation from the law, to remedy its social inadequacies (equity *contra legem*).[124] This distinction is important to note, as it explains in part the Court's reluctance to apply it altogether.

Chapter 6 explained that the Court has explicitly shown disapproval for equity *contra legem* (Section 6.3.1). It has been careful to specify in the scarce instances of applying equity that it was not doing so *contra*

[120] *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3, 49–50 [91].
[121] *Burkina Faso/Republic of Mali* (n. 4) 633 [150].
[122] *Burkina Faso/Republic of Mali* (n. 4) 633 [150] (see also [28] and [149]). See also Kohen and Tignino (n. 35) 103–4.
[123] *Burkina Faso/Niger* (n. 33) 85 [101].
[124] Zimmermann (n. 119) 874.

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legem, as this is tantamount to *ex aequo et bono* where other considerations are taken into account *instead of* the law and not in parallel to it.[125] The Court would not wish for state litigants to feel like it was disregarding the applicable law.

It has therefore stated that it would be unjustified to resort to equity in order to modify a frontier that has already been defined by valid sources of international law – no matter what deficiencies may exist.[126] This stance is not ideal for local populations who may face repercussions from the Court's decision in a territorial dispute. However, the principle of equity can be employed in the context of territorial disputes in order to allow for the consideration of individuals. Unlike in maritime disputes where equity is 'the very content of the applicable rules',[127] equity in land territorial disputes is 'seen as an attribute of the rules to be applied'.[128]

There are ways to innovate the application of equity in light of the above. For instance, the consideration for the needs of local populations in territorial disputes could be a 'relevant circumstance', akin to the second stage of the maritime delimitation process (Section 6.2 *in fine*). One author has described the recognition of such rights in judgments such as *Burkina Faso/Niger* as 'a crystallization of a trend that consecrates [human rights] as a relevant circumstance in boundary delimitation cases'.[129] Human rights of relevance in the context of territorial disputes could include access to food, water, subsistence, and the rights of indigenous peoples. Dissenting in *Kasikili/Sedudu Island*, Judge Christopher Weermantry proposes that the Court 'should consider itself empowered to make a slight deviation from the strict geometric path indicated by the boundary treaty, but always preserving a balance between the entitlements of the two parties to the enjoyment of this precious asset'.[130] This is similar to the Court's practice in maritime delimitation, where it may adjust its provisional line upon the basis of relevant circumstances and must be sure that the line respects the principle of equity.

[125] Ibid 794 and 797.
[126] *Burkina Faso/Republic of Mali* (n. 4) 633 [149].
[127] *Fisheries Jurisdiction (UK v. Iceland)* (Merits) (Judgment) [1974] ICJ Rep 3, 33 [78].
[128] Zimmermann (n. 119) 880, fn 413.
[129] Aznar (n. 56) 330–40.
[130] *Botswana/Namibia* (n. 46) 1184 [92] (Dissenting opinion of Vice-President Weermantry).

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Indeed, instead of only employing equity when no title is available in territorial disputes, it could be an overarching principle overseeing that the Court's adopted approach is fair and appropriate, as is also the case in maritime disputes. Thus, equity would be an element the Court will always check even after having applied a treaty or a colonial agreement through *uti possidetis*, to ensure that the applied law is 'flexible and responsive', in the words of Elihu Lauterpacht.[131] This aligns with the understanding of equity *infra legem*, which was described by the Court in *Burkina Faso/Mali* as 'a method of interpretation of the law in force, and one of its attributes'.[132] This type of equity would interpret and guide the delimitation exercise.

Such a proposal comes with three important caveats. First, the application of equity in territorial disputes could generally be applied to any legal title whose implementation would affect local populations to some extent. The Court could apply the 'catastrophic repercussions' doctrine established in maritime disputes, despite criticisms of this threshold (Section 6.3.2). For example, cases whereby entire populations are uprooted to another country could qualify as meeting this threshold, warranting equitable considerations to interpret the legal title in more justice and fairness.

Second, this exercise cannot be used to outright *contradict* the legal title in question. Judges must remain within the boundaries of law. This is because treaties, as sources of international law enshrined in Article 38 of the Court's Statute, reflect the paramount principle of state consent (Section 7.1).[133] To question the content of the treaty by violating it (*contra legem*) would be questioning the parties' wishes. The use of equity should therefore not change the sense of a clear text to create a new rule altogether that state litigants did not anticipate. Rather, it should be applied as far as possible to rectify justice through the interpretation of the relevant clauses of the legal title. This is a delicate exercise, nonetheless possible through the boundless discretion attributed to the Court in applying the principle of equity.[134]

[131] Elihu Lauterpacht, 'Equity, Evasion, Equivocation and the Evolution in International Law' (1977–78) 33 *Proceedings and Committee Reports of the American Branch of the International Law Association* 33, 46.

[132] *Burkina Faso/Republic of Mali* (n. 4) 567 [28].

[133] See n. 19.

[134] Maria De La Colina, *Judicial Discretion in International Law through the Recourse to Equity by the International Court of Justice* (Graduate Institute of International and Development Studies 2012) 70.

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Third, the application of the principle of equity by the Court in favour of local populations would only be applicable if concerns for these populations were initially raised by the state litigants in their pleadings or, where relevant, in a Special Agreement. Otherwise, the Court would be perceived as overstepping. Such behaviour may cause states to take their distance if they perceive that the Court is taking excessive liberties within its assigned duties.

To conclude, the principle of equity is treated in the context of territorial disputes as an afterthought in the absence of other titles. But it can be applied alongside any title to guarantee more fairness. Therefore, if the application of a treaty or a colonial agreement through *uti possidetis* negatively impacts the relevant population (for example, causing catastrophic repercussions) and if concern for this has been expressed by the parties, then equity *infra legem* should be applied at the Court's discretion to control the damage as far as possible without contravening the title.

7.7 Conclusion

This chapter sought to outline how individuals are factored into the exercise of delimiting a contested territory. The overarching observation may be summarised as follows: 'Territorial disputes have been a *domain reservé* for states and their diplomatic lexicon. Solely states have invoked peoples' traditions, rights and fates in international adjudications. States have defended the former as a state's historic rights or needs, giving normally a "territorial look" instead of a "population approach"'.[135] Indeed, in territorial disputes, the Court sticks to its clearly developed system of hierarchised legal titles, which only involves individuals if they serve to prove an *acte de souverain* with regard to a sovereign state's effective control. Only equity, applied *ultima ratio*, can allow for individuals' needs to be considered. Thus, the Court's delimitation process in both territorial disputes is largely no more than a purely geometrical exercise.

In this chapter, I reflected on how both *effectivités* and the principle of equity can be enhanced to allow for greater inclusivity in territorial disputes. This is because reducing the resolution of such disputes to a purely geometrical exercise may cause strife to many human beings and

[135] Aznar (n. 56) 334.

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therefore be characterised as unjust. This, in turn, calls into question the legitimacy of the decision from the approach of social idealism. In the words of Judge Weermantry,

> A court (. . .) cannot end its responsibilities with the mechanical exercise of a geometric delineation of boundaries on the ground. (. . .) [A] sacred site which is one and entire, (. . .) may need to be divided in two if merely geometrical considerations are to be followed. Likewise, a village may be separated from a grazing ground which for centuries had been integral to it, or the village itself may be divided into two parts whose residents thus became citizens of two different States, however closely they may be connected. It would be a diminution of a court's inherent jurisdiction if it were expected in such hypothetical circumstances to turn its glance away from these very real and vital problems and proceed with the task of delineation as if it were a purely geometrical exercise.[136]

This chapter opened by explaining that territorial disputes rightfully allow states to reinforce their sovereignty. However, it is not absurd to claim that individuals concerned by the outcome of territorial inter-state disputes should be considered in decisions that will affect their everyday lives. As Judge Bennouna has aptly stated, 'It is true that the Court, as the principal judicial organ of the United Nations, must contribute to the strengthening of peaceful relations between States (. . .). Nowadays, however, the search for peace among States also entails ensuring human security, namely respect for the fundamental human rights of the persons concerned and their protection, including by international justice. The exercise of sovereignty has thus become inseparable from responsibility towards the population. This new approach to sovereignty should certainly be present when the Court rules on the course of boundaries between States.'[137]

[136] *Botswana/Namibia* (n. 46) 1184 [91] (Dissenting opinion of Vice-President Weermantry).
[137] *Burkina Faso/Niger* (n. 33) 95 (Declaration of Judge Bennouna).

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