**SUBJECT: EXPLANATION OF THE TERMS “RIGHT”, “TITLE”, AND “CLAIM” UNDER INTERNATIONAL LAW/TREATY LAW, ESPECIALLY IN CONTEXT OF SAN FRANCISCO PEACE TREATY, 1952**

1. **Explanation of the term “Right” under International Law**

The term "Right" comes from the Latin word "Rectus" meaning "Straight". The word right is a highly important term. One may understand them respectfully as "that which ought to exist as of its own right" and that which one ought to do". Rights are the basic conditions of good life, which are recognized by the state. Right is a claim, a social claim necessary for the development of human personality. Rights are our claims against others as are others' claims on us. Legal rights refers to rights according to law. It exists under the rules of some particular legal system. A legal right is a claim recognizable and enforceable at law.

A thing can be considered a holder of legal rights only if three criteria are satisfied: "[F]irst, that the thing can institute legal actions at its behest; second, that in determining the granting of legal relief, the court must take injury to it into account; and, third, that relief must run to the benefit of it."[[1]](#footnote-1)

* 1. **“Right” and Treaty Law under Vienna Convention on Law of Treaties**

A treaty does not create either obligations or rights for a third State without its consent.[[2]](#footnote-2) A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides. A State exercising a right in accordance with above paragraph shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.[[3]](#footnote-3)

* 1. **Example of “Right” and “Duty” under International Law**

Under International Law, if state A is obligated to behave in a given way towards the nationals of state B, the obligation is thought to be owed to the aggregate of the individuals making up state B. If state A violates an obligation, it becomes responsible not to the national, but to state B as a society. If it does not repair the injury, state B is permitted by international law to set in motion the machinery of international law for sanctioning violations of the relevant international law norm. State B, however, has the discretion not to pursue an international claim; it may subordinate the interests of the individual to those of the larger society.

* 1. **Concept of Primary Right and Treaty Law**

The concept of a primary duty is “the central conception of regulatory law.” A primary duty is “an authoritatively recognized obligation . . . not to do something, or to do it, or to do it if at all only in a prescribed way.” A primary right “is the mere obverse of the duty.” Thus, an individual has a primary right under a treaty if the treaty imposes a duty on the state party “not to do something” to that individual, “or to do it” for that individual, “or to do it if at all only in a prescribed way.” For the purposes of this article, therefore, a treaty “protects individual rights,” or “creates individual rights,” if an individual has a primary right under the treaty. Treaties frequently create or protect individual rights.

1. **Definition and Explanation of the term “Title” under International Law**
	1. **Definition of the term “Title”**

The concept of ‘title’ is used in public international law to show that a territory belongs to a state. Title to territory is usually defined as ‘a vestitive fact of territorial sovereignty’ or ‘a source of territorial sovereignty’.[[4]](#footnote-4) A state acquiring such title is vested with sovereignty. In other words, when a state has title to a certain territory, that state’s control over the territory in question is legally justified and other states must respect that state’s control over said territory. At the same time, territorial control without title is never accepted as legitimate.[[5]](#footnote-5) There are generally five modes of acquiring title: occupation, accession or accretion, prescription, cession and subjugation.[[6]](#footnote-6)

* 1. **The Palmas Case**

The Palmas case, the leading case on the law of territory, found that all modes of acquiring title are based on ‘an act of effective apprehension’. Palmas advanced this famous finding: ‘[S]o true is this, that practice, as well as doctrine, recognizes – though under different legal formulae and with certain differences as to the conditions required – that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title.’[[7]](#footnote-7)

* 1. **Acquisition of Title under International Law**

Under international law, there are several legal mechanisms for recognising the sovereign rights of a particular State to a defined territory. They are based on the concept of legal title to such territory. The legal title is created by both legal acts and factual circumstances. It decides whether a particular State may, in accordance with international legal standards, be recognised as a subject with a position of power over an object, i.e. physical territory. The widest possible range of competences associated with legal title arises from exclusive sovereignty.

The concept of sovereignty is often assumed to be coincident with and arise out of the legal title itself. Accordingly, factual restrictions on sovereignty do not automatically infringe on legal title, for example the occupation of territory by rebellion would not change the nature of the legal title possessed by the original sovereign, even though factually it might reduce the size of administered territory.

The methods recognised by international law for acquisition of a territory are usually divided into two categories: primary and secondary. Primary acquisition occurs in situations where occupation and control is obtained over territory which never belonged to another sovereign entity or, if it once did, does not any longer. Secondary acquisition occurs with regard to territory which the original sovereign surrenders to another. It should be pointed out that this division is sometimes considered as relative. International agreement is capable to cover any type of transfer of sovereign rights, so long as it does not violate the basic norms encompassed by *juris cogentis*, irrespective of whether treaty provisions relate to primary or secondary acquisition.

Territorial cession is the most spectacular example of a consensual transfer of sovereign rights to a particular territory from one entity to another. However, an agreement can also, at least in theory, determine rules binding upon specific states on acquisition of territory as a result of geographical changes. Sometimes consensual agreement is the only way to obtain legal title over territory.

* 1. **Original Title andTerra Nullius**

Original title can be understood literally as ‘a title that is originally acquired’. However, this explanation is a complete tautology unless one elaborates the meaning of the words ‘originally acquired’. Original acquisition is usually understood as the new acquisition of a territory that has never belonged to any state or of a territory that has been abandoned.

Original acquisition is sometimes explained as the acquisition of terra nullius (a territory of no master). On the contrary, derivative acquisition is usually understood to mean the act of obtaining title by virtue of certain legal facts or through legal acts by another state. In applying the distinction to the five modes of acquisition of title to territory, occupation and accession are both classified as original acquisition, while cession is a classic example of derivative acquisition.[[8]](#footnote-8)

The classifications of subjugation and prescription have not yet been resolved. They might be classified as derivative acquisition because they involve a former title holder, while they might be considered to constitute original acquisition because the acquisition occurs irrespective of the will of the former title holder.[[9]](#footnote-9)

Being terra nullius is not only a negative justification, as in it does no harm to others; it could justify the acquisition positively when combined with the teleology of civilization. The doctrine based on the teleology of civilization might be called a ‘doctrine of ownerless sovereignty’ 29 or ‘doctrine of dominance’[[10]](#footnote-10) – that is, the idea that a territory of no master ( terra nullius ) should be occupied and utilized effectively. In its original form (‘doctrine of occupation’), this doctrine in international law is very simple: the first state to occupy an ownerless territory has title to it.[[11]](#footnote-11) It was transformed from the original conception of the idea, wherein, in the process of colonization, it implied the assumption that non-European states were not qualified to acquire title to, or sovereignty over, a territory because they could not utilize such territory effectively due to their lack of civilization.[[12]](#footnote-12)

1. **Definition and Explanation of the term “Claim”**
	1. **Definition of the term “Claim”**

In ordinary law, a claim is a legal assertion; a legal demand; taken by a person wanting compensation, payment, or reimbursement for a loss under a contract, or an injury due to negligence.[[13]](#footnote-13) Under International law, there are three important classes of contract claims: first, those arising out of contracts concluded between individuals, citizens of different countries; second, those arising out of contracts between the citizen abroad and a foreign government; and third, claims arising out of the unpaid bonds of a government held by the citizen of another.

* 1. **Major forms of “Claims” under International Law**

Since territory and sovereignty play a crucial role in any discussion of a State, it has been difficult to arrive at an objective set of rules to explain or define the character of changes that affect States and give raise to claims of succession or continuity. Territory and sovereignty are the concepts that traditionally generate different views. They are essential for the exsistance of any State, but at the same time those States set the rules of international law, including those concerning any changes affecting them. Another form of claim is war-relate claims.

When there is a dispute of international law between two states or a claim under international law, the same may be referred to the International Court of Justice (“**ICJ**”) by both the states. The ICJ, whose decisions are binding upon the parties and extremely influential generally, possesses both contentious and advisory jurisdiction. Contentious jurisdiction enables the court to hear cases between states, provided that the states concerned have given their consent. This consent may be signaled through a special agreement (French: “compromise”); through a convention that gives the court jurisdiction over matters that include the dispute in question (e.g., the genocide convention); or through the so-called optional clause, in which a state makes a declaration in advance accepting the ICJ’s jurisdiction over matters relating to the dispute. The ICJ has issued rulings in numerous important cases, ranging from the Corfu Channel case (1949), in which Albania was ordered to pay compensation to Britain for the damage caused by Albania’s mining of the channel, to the territorial dispute between Botswana and Namibia (1999), in which the ICJ favoured Botswana’s claim over Sedudu (Kasikili) Island.

1. **Claims under San Francisco Peace Treaty**
	1. **Territorial Clauses**

The Territorial Articles of the Japanese Treaty are Articles 2, 3, 4, 10 and 21. Under these Articles, Japan renounces all right, title and claim to Korea (including the islands of Quelpart, Port Hamilton, and Dagelet), to Formosa and the Pescadores, to South Sakhalin and the Kurile Islands, and to the Spratly and Paracel Islands. Japan consents to United States' trusteeship over the Ryukus, the Bonins, and certain other small islands, to the already-established trusteeship over Japan's formerly mandated Pacific Islands, and "renounces all special rights and interests in China" (Article 10).

* 1. **Claims and Property**

Articles 14-17 and 18-21 of the Peace Treaty dispose of claims and property matters.

* + 1. **Property in the jurisdiction of Allied Powers**

Japan recognizes the right of all Allied Powers which sign and ratify the Treaty to seize and retain property of Japan and Japanese nationals which are subject to their jurisdiction. A concrete example is the approximately $85,000,000 worth of Japanese property in the United States; the treaty recognizes the right of the United States to retain and dispose of this property as it wishes. Since the War Claims Act of 1948 provides that the net proceeds of Japanese and German assets shall not be returned, but shall be placed in a War Claims Fund from which payments are made to certain classes of Americans who suffered as a consequence of the war, this property in fact as well as in law is lost to Japan and Japanese nationals.

* + 1. **Property in Neutral Jurisdiction**

According to the Peace Treaty, Japan "will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers, or, at its option, the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund to appropriate national agencies, for the benefit of former prisoners of war and their families.." This will be done as an expression of Japan's "desire to indemnify the members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan" (Article 16) in response to the deep resentment of those Allied Powers whose prisoners of war suffered greatly.

* + 1. **Allied Property in Japan**

Two types of allied property are dealt with in the Peace Treaty. One is the property of Allied Powers and their nationals which was located in Japan at the time of outbreak of war. The other is Allied property which was brought to Japan *after* the outbreak of war, being removed from Allied territory. The first is referred to under the rubric of "restoration" or "return" of property, and the second as "restitution".

Both types of property are disposed of in Article 15 of the Treaty. Under that Article, Japan is obliged within six months afterapplication therefor (which must be made within nine months of the coming into force of the Treaty between Japan and the Allied Power concerned), to return tangible and intangible property and all rights or interests of any kind of Allied Powers and their nationals" which was within Japan at any time between December 7, 1941 and September 2, 1945, unless the owner has freely disposed thereof without duress or fraud." (Article 15(a)).

The property is to be returned free of all encumbrances and charges to which it may have been subjected because of the war, and without any charges for its return; if not applied for by or on behalf of the owner or by his Government within the nine-month period, it may be disposed of by the Japanese Government. It will be noted that Japan must "return" and "restitute" existing property of the Allied Powers.

* + 1. **Claims waived by Japan**

In Article 19 of the Treaty, Japan makes a most comprehensive waiver of claims. It waives all of its claims and those of Japanese nationals against the Allied Powers and their nationals "arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty." This waiver specifically includes any claims arising out of actions taken by any Allied Power with respect to Japanese ships between September 1, 1939 and the coming into force of the Treaty as well as claims and debts which may have arisen regarding Japanese prisoners of war and civilian internees in the hands of Allied Powers. These specific waivers were necessary because many actions affecting ships and armed or civilian personnel were taken outside Japanese territory.

* 1. **Reparation**

In the SFPT, the central provision as to reparations established that Japan was to negotiate arrangements with former occupied countries, and that these negotiations would follow the principle of "viability." Thus, reparations would be limited to "services of the Japanese people in production, salvaging and other work," thereby excluding financial payments or reparations in kind:

*It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering. ... Therefore, Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question.[[14]](#footnote-14)*

The basic principle of subsuming individual claims in the inter-governmental arrangements for reparations was expressed in Art. 14 (b) of the San Francisco Treaty, patterned after Art. 2 of the 1946 Paris Agreement regarding German reparations, except that claims by the Japanese nationals were not explicitly covered in Paris. Art. 14 (b) states that, except as otherwise provided in the Treaty, “the Allied Powers waive all reparation claims of the Allied Powers (and) other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war....”[[15]](#footnote-15)

Japanese courts, when subsequently confronted with war-related claims by foreign nationals, consistently held that such claims could not be brought under the general norms of the Civil Code.[[16]](#footnote-16) Also, the Japanese Courts consistently found that the Hague and the Geneva Conventions, even if meant to benefit individuals, could not be interpreted so as to serve as the basis for individual claims.

Following the peace treaty, Japan negotiated a number of bilateral treaties tailored to the specific circumstances and issues with the formerly occupied states; Japan agreed, in various ways, to extend the principle of "services only" to include services for products and also the provision of loans.

1. **Interpretation of Article 2 (b) of the Peace Treaty**

**Article 2 (b)**

“Japan renounces all right, title and claim to Formosa and the Pescadores.”

* 1. **“Right”**

It is to be noted that the choice of words in Article 2 (b) is limited to “right”, “title” and “claim” to “Formosa and the Pescadores” which Japan has “renounced” under the Peace Treaty. It appears as if all three words have been used in relation to “territories” of Formosa and the Pescadores.

The word “right” as used in Article 2 (b) of the Peace Treaty means Japan’s recognized and protected interest over Formosa and Pescadores, the violation of which was a wrong. It was the interest, claim, or ownership that Japan had over the territory of these islands.

A state has rights to territory and property. The state's territory is the physical space over which the state exercises sovereignty. The state's property is the set of tangible and intangible objects over which the state exercises ownership, such as embassies, buildings, vehicles, and documents. A right is "general" if any interference with it gives rise to a cause of action. The state has a general right to territory.

When Japan renounced all “right” to Formosa and the Pescadores under the Peace Treaty, it declared that it formally gave up or abandoned all rights and interests in these islands and that it would no longer institute legal actions at their behest. The word “renounce” means “to give up or abandon formally (a right or interest)” or “to disclaim”.

* 1. **“Title”**

The word “title” is the union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property. It is the legal link between a person who owns property and the property itself.

*"Though employed in various ways, [title] is generally used to describe either the manner in which a right to real property is acquired, or the right itself. In the first sense, it refers to the conditions necessary to acquire a valid claim to land; in the second, it refers to the legal consequences of such conditions. These two senses are not only inter related, but inseparable: given the requisite conditions, the legal consequences or rights follow as of course, given the rights, conditions necessary for the creation of those rights must have been satisfied. Thus, when the word 'title' is used in one sense, the other sense is necessarily implied."-* Kent McNeil, Common Law Aboriginal Title 10 (1989).

According to Article 2(b) of the Peace Treaty, Japan also renounced its “title” to Formosa and the Pescadores. ‘Title’ is used in public international law to show that a territory belongs to a state. Before signing of the Peace Treaty, Japan had the title to territory of Formosa and the Pescadores, which was ‘a source of its territorial sovereignty’ over these islands. In other words, Japan’s control over these islands was legally justified and other states were required to respect that control. Because of the Peace Treaty, Japan made territorial cession or consensual surrender of sovereign rights to a Formosa and the Pescadores.

* 1. **“Claim”**

According to Black’s Law Dictionary, Claim is the aggregate of operative facts giving rise to a right enforceable by a court. It is the assertion of an existing right. Japan’s assertion of its existing right over the territories of Formosa and the Pescadores was also renounced or abandoned by it as per Article 2 of the Peace Treaty. This implied that Japan could no longer ask any international court of law for any remedy in regards to the territories of Formosa and the Pescadores. By renouncing “all claim”, Japan gave up both its existing as well as future claims over these territories and henceforth, Japan is now barred from asserting or claiming any right in respect of the same.

* 1. **Does Article 2 (b) include “territorial sovereignty”**

Territorial Sovereignty is the exclusive right of a state to exercise its powers within the boundaries of its territory. When Japan renounced all “title”, it in effect abandoned its territorial sovereignty over the two islands.

* 1. **Does the treaty recognize that Taiwan has been placed under the jurisdiction of a U.S. federal agency – the United States Military Government (USMG)?**

Yes. The Peace Treat does recognize that Taiwan has been placed under the jurisdiction of the United States Military Government (USMG). The USMG delegated the administration of this area to the Chinese Nationalists by means of the “law of agency.” The law of agency is the body of legal rules and norms concerned with any principal –agent relationship, in which one person (or group) has legal authority to act for another. The law of agency is based on the Latin maxim "Qui facit per alium, facit per se," which means "he who acts through another is deemed in law to do it himself."

The following Articles of the Peace Treaty are important to highlight the role of USMG.

***Article 2(b):*** *Japan renounces all right, title and claim to Formosa and the Pescadores.*

***Article 4(b):*** *Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to directives of the United States Military Government in any of the areas referred to in Articles 2 and 3.*

***Article 23:*** *. . . . . including the United States of America as the principal occupying Power, . . . . .*

In the peace treaty, Japan ceded “Formosa and the Pescadores” but no receiving country was designated. This is a “limbo cession.” Japan ceded Taiwan in the peace treaty. In effect, upon the date of cession, Japan ceded Taiwan to the “United States Military Government” and that was done as an interim status condition. After consideration by all relevant parties, no agreement was reached to specify any other country as the “receiving country” for the cession. Hence, none is stipulated. Importantly, upon the date of cession, under international law, an authorized civil government for Taiwan, to whom the principal occupying power can relinquish the territory, does not yet exist. Moreover, no country has been authorized to pass relevant legislation to establish a civil government for Taiwan. Taiwan remains under “United States Military Government” until USMG is legally supplanted.

It is important to recognize that under the military government of the (principal) occupying power (USMG), Taiwan has not yet reached a final political status. During this period, Taiwan is in “interim status” under the law of occupation. This “interim status” condition shall continue until the military government of the principal occupying power is legally supplanted.

I hope that the above information is helpful to you.

Regards,

Awais Bajwa

Attorney at Law

Advocate High Courts

awaisbajwalawyer@live.com

1. See Verdugo, 939 F.2d at 1352. [↑](#footnote-ref-1)
2. *Article 34 [General rule regarding third States] of Vienna Convention on the Law of Treaties* [↑](#footnote-ref-2)
3. *Article 36 [Treaties providing for rights for third States] of Vienna Convention on the Law of Treaties* [↑](#footnote-ref-3)
4. Brownlie, Principles of Public International Law (6th edn, 2003), at 129. However, Brownlie doubted the existence of the abstract notion of ‘title to territory’ in public international law from a programmatic perspective. [↑](#footnote-ref-4)
5. E.g., the Iraqi invasion of Kuwait was never considered to entail the acquisition of title, even though Iraq took control of the territory, SC Res. 660 (1990). Cf. E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (2006); Distefano, ‘The Conceptualization (Construction) of Territorial Title in the Light of the International Court of Justice Case Law’, 19 *Leiden Journal of International Law* (2006) 1041, at 1067–1074. [↑](#footnote-ref-5)
6. E.g., Lauterpacht, *supra* note 6, at 91; P. Malanczuk (ed.), *Akehurst’s Modern Introduction to International Law* (7th edn, 1997), at 147–154; D. Alland (ed.), *Droit international public* (2000), at 128–130; P.-M. Dupuy, *Droit international public* (2nd edn, 1993), at 24–29; N.Q. Dinh *et al.*, *Droit International Public* (1999), at 524–532; Verzijl, *supra* note 5, at 347. [↑](#footnote-ref-6)
7. see Island of Palmas Case (Netherlands and United States ) ( Palmas case), Decision of 4 April 1928, reprinted in UNRIAA, vol. 2, 831, at 839. [↑](#footnote-ref-7)
8. J. Combacau and S. Sur, *Droit international public* (2001), at 409. [↑](#footnote-ref-8)
9. See, e.g., T.J. Lawrence, *The Principle of International Law* (3rd edn, 1900), s. 74; For an eminent example, see R. Jennings and A. Watts, *Oppenheim’s International Law* , vol. 1: *Peace* (Parts 2–4) (9th edn, 1996), at 498. [↑](#footnote-ref-9)
10. Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery, Doc. E/C.19/2010/13, 4 February 2010. [↑](#footnote-ref-10)
11. This ‘doctrine of occupation’ of international law should not be considered as stemming fully from Roman law, although it was adapted from it. For a detailed discussion, see G. Distefano, *L’ordre international entre légalité et effectivité; Le titre juridique dans le contentieux territorial* (2002), at 74. [↑](#footnote-ref-11)
12. For a typical argument for European supremacy, see J. Westlake, *Chapters on the Principles of International Law* (1894), 131–142; W.E. Hall, *A Treatise on International Law* (8th edn, 1924), at 125, 127; Lawrence, *supra* note 26, at 146–149; C.G. Fenwick, *International Law* (2nd edn, 1934), at 251. [↑](#footnote-ref-12)
13. https://thelawdictionary.org/claim/ [↑](#footnote-ref-13)
14. Treaty of Peace with Japan, September 8, 1951, 3 U.S.T. 3169 [↑](#footnote-ref-14)
15. For details see Japan's Settlement, supra note 44, at 63; Japanese House of Councilors, 12th Extraordinary Session of the Diet, No. 14 (Nov. 9, 1951) at 5. [↑](#footnote-ref-15)
16. See Masahiro Igarashi, Post-War Compensation Cases, Japanese Courts and International Law, 43 JAPANESE ANN. INT'L. L. 64 (2000) [hereinafter Post -War Compensation]. [↑](#footnote-ref-16)