

**STATUS OF OWNERSHIP OF THE KURL ISLAND UNDER INTERNATIONAL LAW (DISPUTS BETWEEN JAPAN AND RUSSIA)****Nursofia<sup>1</sup>, Lembang Palipadang<sup>2</sup>, Baliana Amir<sup>3</sup>, Ikbal<sup>4</sup>,  
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**Abstract**

*The formulation of the problem in this research are: 1) How is the regulation on how to acquire territory by a State according to international law?. 2) What is the status of ownership of Kuril Island which is disputed by Japan and Russia?. The research objectives in this paper are: To determine the arrangement of how to obtain the territory of a country according to international law. To find out the status of ownership of the Kuril Island which is disputed by Japan and Russia. Research is a tool used by humans to strengthen, foster and develop knowledge. Science which is knowledge that is systematically arranged by using the power of thought, which knowledge can always be examined and critically studied, will continue to develop on the basis of research conducted by its caregivers. This research uses normative research methods. Normative legal research is legal research that puts law as a building system of norms. The system of norms in question is about principles, norms, rules of laws and regulations, court*

*decisions, agreements and doctrines (teachings). The conclusions in this study are: Judging from the agreements that form the basis of Russia's claim, namely the Yalta Agreement, the Postdam Agreement, the Cairo Declaration and the San Francisco Peace Agreement and the agreements that Japan claims are the Shimoda Agreement, the St. Petersburg and the Joint Declaration of Russia and Japan relating to International Law. Judging from the way the territory was acquired, namely the occupation (occupation) of Japan and Russia on the four disputed islands, it is related to historical facts.*

**Keywords:** *International Law; Kuril Island Ownership Status*

## INTRODUCTION

Territory is a space which includes land area, sea area, and airspace. Airspace includes space in accordance with the boundaries of land and sea areas. Land area is an area that has clear boundaries to become the territory of the state. Meanwhile, the sea area is the water area close to the coast.<sup>1</sup> In this area, the state has the authority to implement its national law. This means that all people who are in an area are in principle subject to the power of the law of the country that owns the territory.<sup>2</sup>

Thus, the territory has clear boundaries and is recognized or agreed upon by each party who owns the area. As stipulated in Article 1 of the 1933 Montevideo Convention, that one of the elements that must be met by a country is the existence of territory, so it is not surprising that

sometimes conflicts arise due to territorial problems. This conflict can be caused, among other things, because of the desire to expand the territory or because there is no clear boundary line between two or more countries.

After knowing the definition of an international agreement, we also need to know the basic criteria or parameters that must be met by a treaty document to be designated as an international agreement. According to the 1969 Vienna Convention and Law No. 24 of 2000 concerning International Agreements, namely: 1) The agreement must have an international character (an international agreement), so that it does not include agreements on a national scale such as agreements between states or local governments of a national state. 2) The agreement must be made by the state and/or international organization (by subject of international law), so that it does not include agreements which, although international in nature, are made by non-subjects of international law, such as

<sup>1</sup>Suryo Sakti Hadiwijoyo, *Perbatasan Negara Dalam Dimensi Hukum Internasional*, Graha Ilmu, Yogyakarta, 2011, hlm. 5.

<sup>2</sup>Huala Adolf, *Aspek-Aspek Negara Dalam Hukum Internasional Edisi Revisi*, PT. Raja Grafindo, Jakarta, 2002, hlm. 111.

agreements between countries and multinational companies. 3) The agreement is not subject to the regime of international law (governed by international law) which by Law no. 24 of 2000 concerning International Agreements is referred to as "regulated in international law and gives rise to rights and obligations in the field of public law". Agreements subject to national civil law are not covered by this criterion.<sup>3</sup>

Towards the end of World War II through an agreement between the allies held in Yalta and Postdam in 1945, new boundaries were determined for the territories of the countries that lost the war, especially Japan. Where in the agreement it was stated that the Sakhalin part was returned to Russia and the Kurile Islands were handed over to Russia. However, Japan still demands the return of the four islands, namely Etorofu, Habomai, Kunashiri and Shikotan, saying that Russia's occupation of the four islands was carried out with violence. Two years after Russia took control of the islands, Russia expelled Japanese residents living in the Kuril Islands. This made Japan heat up again and called for the return of the islands that

were in Russian hands to Japan. Parties to international disputes can resolve disputes that occur between them to an international judicial body such as the International Court of Justice, without having to go through diplomatic channels. The United Nations does not impose any settlement procedures on its member states. With the freedom to choose dispute resolution procedures, countries usually choose to give priority to diplomatic settlements.<sup>4</sup>

In the discussion of this territorial dispute, it is also inseparable from agreements, both bilateral agreements involving Japan and the Soviet Union as well as international agreements related to this territorial dispute, namely: the Shimoda Agreement (1855), the St. Petersburg (1875); Portsmouth Peace Treaty (1905); Yalta Agreement (1945); Postdam Declaration (1945); the San Francisco Peace Treaty (1951); and the Japan-Soviet Joint Declaration (1956).

The definition of international agreement itself is contained in Article 2 paragraph (1) letter a of the 1969 Vienna Convention which stipulates that: "An international agreement concludes between states in written form and governed by

<sup>3</sup>Damos Dumoli Agusman, *Hukum Perjanjian Internasional*, PT. Refika Aditama, Bandung, 2010, hlm. 20.

<sup>4</sup>Boer Mauna, *Hukum Internasional Pengertian, Peranan Dan Fungsi Dalam Era Dinamika Global*, Alumni, Bandung, 2003, hlm. 195.

international law, whether embodied in a single instrument or in two or more instruments and whatever its particular designation”, (an international agreement made between countries in written form and governed by international law, whether embodied in a single instrument or in two or more instruments and whatever their particular designation is).<sup>5</sup> Whereas in Article 2 paragraph 1 letter a of the 1986 Vienna Convention it is emphasized that the subject of international agreements is further expanded as follows: "Between international organisations, whether that agreement is embodied in a single instrument or in two or more related instruments whatever its particular designation", (between international organizations, whether the treaty is embodied in a single instrument or in two or more related instruments whatever their particular designation).<sup>6</sup>

Some experts also provide an understanding of international agreements as formulated by Mochtar Kusumaatmadja that international agreements are agreements entered into by members of the

community of nations with the aim of causing certain legal consequences.<sup>7</sup> The agreement is a fundamental thing in a cooperation carried out by the parties who bind themselves.<sup>8</sup> An agreement is a legal relationship regarding property between two parties, in which one party promises or is deemed to have promised to do something binding, while the other party demands the implementation of the promise.<sup>9</sup>

International treaties have various definitions put forward by experts. Mochtar Kusumaatmadja stated that an international agreement is an agreement entered into between members of the community of nations and aims to result in certain legal consequences.<sup>10</sup> International legal arrangements regarding international agreements discussed in this study are contained in the 1969 Vienna Convention. This convention regulates

<sup>5</sup>Anthony Aust, *Handbook of International Law*, Penerbit Cambridge University Press, New York, 2010, hlm. 50.

<sup>6</sup>I Wayan Parthiana, *Hukum Perjanjian Internasional Bagian I*, Penerbit Mandar Maju, Bandung, 2002, hlm. 15.

<sup>7</sup>Eddy Pratomo, *Hukum Perjanjian Internasional (Pengertian, Status Hukum, dan Ratifikasi)*, Penerbit PT. Alumni, Bandung, 2011, hlm. 46.

<sup>8</sup>Eka Amanda Putri, "PERLINDUNGAN HUKUM BAGI PARA PIHAK DALAM PERJANJIAN USAHA WARALABA (FRANCHISE)," *Tadulako Master Law Journal* 4, no. 2 (20 Juni 2020): 174–200. Akses 22 Desember 2021.

<sup>9</sup>Wirjono Prodjodikoro, *Asas-Asas Hukum Perjanjian*, PT. Bale Bandung, Bandung, 1981, hlm. 9.

<sup>10</sup>Mochtar Kusumaatmadja dan Etty R. Agoes, *Pengantar Hukum Internasional*, Alumni, Bandung, 2003, hlm. 117.

international agreements between countries comprehensively, starting from preparation, making, implementing, until when and how an international agreement ends. This convention which consists of eight parts and 85 articles was produced by the International Law Commission (ILC) or the United Nations International Law Commission which was established based on United Nations General Assembly Resolution No. 174/II 1947.<sup>11</sup>

Although these agreements have been in place for a long time, until now the territorial disputes involving Japan and Russia remain unresolved until now.

### Formulation of the problem

Based on the description of the background, the main studies in this study are:

1. How is the arrangement for obtaining territory by a State according to international law?
2. How is the ownership status of the Kuril Islands disputed by Japan and Russia?

## DISCUSSION

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<sup>11</sup>Ian Brownlie, *Instrumen-Instrumen Penting Hukum Internasional*, Sinar Baru, Jakarta 1992, hlm. 349.

### How to Acquire Territory Under International Law

Based on the method of acquiring territory according to international law that has been described previously, the method that can be used to resolve the ownership status of the Kuril Islands is occupation.

The Occupation principle is the occupation of terra nullius, which means "land that no one owns". There are two things that are required in this principle, namely discovery and effective control. So, according to this principle the discovery of an area alone is not enough but must be followed by effective supervision. This principle was once used to decide the case of Western Sahara. The General Assembly sought the legal opinion of the International Court of Justice to determine whether or not the terra nullius status could be granted to Western Sahara at the time Spain "discovered" the territory. The International Court of Justice examined this matter with 16 judges. The legal opinion given by the International Court of Justice unanimously ruled that Western Sahara is not in a state of terra nullius.

The opinion of the court which rejected the opinion that Western Sahara was not an area that was categorized as terra nullius when Spain came to the re-

gion to carry out colonization, was based on the fact that the region had settled with nomadic tribes that already had social and political organization. While the consideration of the court's opinion which rejected the existence of legal ties both between Mauritania and Western Sahara and between Morocco and Western Sahara, was motivated by the fact that the nomadic ethnic groups of Western Sahara had never entered into an agreement which consequently subordinated the sovereign status of the territory to Morocco or to Mauritania. and the socio-cultural characteristics of the nomadic tribes that inhabit the Western Sahara region are very distinctive and different from the Moroccans and the Mauritians.

If it is drawn into the dispute between Russia and Japan, it seems that there are similarities where when the Kuril Island was originally a "terra nullius" area until the Ainu tribe occupied the four areas and the four disputed islands fell into the hands of Russia, namely in military operations during World War II. . The Ainu are an indigenous ethnic group in Hokkaido, the Kuril Islands, and much of Sakhalin and according to recent DNA research suggest that they are descended from the ancient Jomon people of Japan.

In addition, Japan and Japan have carried out effective surveillance, as detailed below:

- a) The Matsumae clan opened the Kunashiri trading zone by sending merchant ships to the area (1754).
- b) Mogami Tokunai visits Etorofu to study the Russian situation (1786)
- c) The shogunate sent Kondo Juzo and the others to Etorofu. The Kondo group put up a sign saying "Dainihon Etorofu" (Etorofu, Greater Japan) at Tannemoui, Etorofu. (1798).
- d) The shogunate took direct control of eastern Hokkaido, including the four disputed islands (1799).
- e) Takataya Kahei opened 17 fishing spots around Etorofu (1800).
- f) Construction of trading posts (bashi) and permanent settlements for the Japanese in Kunashir, Shikotan, Habomai and also the construction of an elementary school in Etorofu.
- g) The four disputed islands are still under Japanese control but this time it is under the leadership of Taisho.

If viewed from the principle of occupation, Russia's occupation of the four disputed islands is invalid because the Ainu people have previously settled on these islands, which indicates that the

islands are not in a state of terra nullius and that Japan has exercised continuous control (effectivites) since the 19th century. 17. In addition, it is still in the second condition relating to the implementation of state sovereignty. This can be accomplished by showing concrete evidence of ownership or control. A physical assumption of sovereignty can be demonstrated through various agreements with other countries that recognize the sovereignty of the country that submits the claim and or by establishing territorial boundaries. The four disputed islands are in the Shimoda Agreement where this agreement was the first to determine the boundaries of the two countries. Finally, the veracity of Japan's demands for the return of its four northern islands lies in the following considerations:

- a) These four disputed islands were in a state of "terra nullius" until the Ainu came and inhabited the Island.
- b) The delimitation of the Japan-Russia territory for the first time through the Shimoda Agreement (1855) in the area between Etorofu (Japan) and Urruppu (Russia), when interpreted extensively means Russia's recognition of Japanese sovereignty over the four northern

islands of Japan which are disputed today..

- c) c) Japan carried out the occupation of these four disputed islands peacefully and continuously from the seventeenth century until the Soviet occupation of the territory since 1945.

### **Status of Ownership of Kuril Island**

In addition to using the occupation method, the agreement that arises between the two countries can also be used as a basis for determining the ownership status of the Kuril Island, as described below.

First, against the Yalta Treaty and the Cairo Declaration which stated that Japan must relinquish all the territories it had taken through "violence and greed" during military expansion before and after World War II. However, this statement does not apply to the Northern Territories, as these islands never belonged to Russia and were not annexed by Japan during the period of Japanese expansion. In addition, the Yalta Agreement was a secret agreement between the Allied leaders aimed at gathering strength to face Japan in World War II. Soviet political demands in the Yalta Treaty were the return of Sakhalin and the Kurile which Russia said included the four disputed islands and which Russia

considered captured by Japan in the 1904-1905 war. The Yalta Agreement is considered by Japan to be nothing more than a general statement from the three allied leaders in order to deal with Japanese forces on the Pacific Front, this is why the Yalta Agreement and the Cairo Declaration do not provide legally binding force to Japan. On the other hand, historical facts show that the four disputed islands became Russian territory through military operations when World War II was about to end, at that time Japan was ready to surrender due to the atomic bombing that hit Hiroshima, which at that time made Russia violate the Neutrality Pact which affirmed that if one side wants to withdraw it must inform the other one year in advance of the fact that Russia announced its resignation and declared war 48 hours after the atomic bomb was dropped on Hiroshima. So, the statement in the Cairo Declaration which was also confirmed in the Yalta Agreement that Japan occupied the four disputed islands by means of violence and greed is not true when viewed from the historical facts.

One of the principles of international law which reads *Pacta tertiis nec nocent nec prosunt* which means the agreement does not give rights and obligations to

third parties without their consent where this principle is also in line with article 34 of the 1969 Vienna Convention which states that there are no obligations for third countries without their consent. , the same provisions are also stated in article 35 of the Convention. So, based on the explanation above, the provisions contained in the Yalta Agreement which states that Japan must return the Kurile to Russia do not apply to Japan or Japan is not obliged to carry out the contents of the Agreement because it is not a country that signed the agreement.

Second, against the Postdam Agreement, Japan refused based on customary international law where the boundaries of the losing country were determined through a Peace Treaty such as the post-World War I German territorial arrangement and if it was linked to the previous treaty, the same as the Portsmouth Peace Agreement which also contained territorial arrangements. between the two countries. So, Japan's refusal if viewed from customary international law becomes true that the territory of a country that lost the war was not carried out unilaterally through a declaration from the party who won the war. The reason for Japan's refusal was confirmed when the



San Francisco Peace Treaty also regulated the provisions of Japan's territory after World War II, but Russia did not sign this Peace Agreement because this agreement also did not mention Russia as the owner of the island being disputed..

Third, to the San Francisco Peace Agreement. Japan's rejection of this Agreement is still based on the 1969 Vienna Convention. In the San Francisco Peace Agreement it is explained that Japan must relinquish all rights to the Kuril Islands, but returns to the historical fact that this Agreement does not apply to the four disputed islands, namely Kunashiri, Etorofu, Shikotan. and Habomai because the four islands are Japanese territory that cannot be separated from Japan when viewed based on the 1855 Shimoda Agreement. This is confirmed by the Saint Petersburg Treaty which states that the Kuril Islands only consist of 18 islands and the four islands do not include the Kuril Islands. Both of these treaties have been approved by both countries, which means that both Japan and Russia had previously agreed to all the provisions of the treaty before the 1904-1905 war. However, because of this war, the reason for the Soviets to cancel the agreement that had occurred between the two coun-

tries and at the same time rejected the basis of Japan's claim which indeed Japan included the Shimoda and St. Petersburg as the basis for the ownership of the Kuril Islands. However, when viewed from the arrangements for the cancellation of the treaty regulated in the 1969 Vienna Convention, it has been explained that the Vienna Convention does not at all regulate either directly or indirectly the cancellation of the treaty caused by war, especially between two countries. However, this problem is almost the same as the provisions in Article 63 of the 1969 Vienna Convention on the Severance of Diplomatic Relations between two warring countries.

Article 63 states that the severance of diplomatic relations between the two countries does not affect the provisions contained in the agreements that have been made previously and the existence of this agreement continues and only delays the agreement because the war that occurred between the two countries made the provisions in the agreement unable to be carried out effectively. However, when the war ends and diplomatic relations between the two countries return to normal, the agreement will be carried out again as usual, and as we know that diplomatic re-

lations between Russia and Japan have now returned to normal as evidenced by the signing of the Joint Declaration of Russia and Japan to mark the end of the war and for the restoration of relations. diplomatic relations between the two countries, this is stated in Article 2 which states: “Diplomatic and consular relations shall be restored between the Union of Soviet Socialist Republics and Japan. For this purpose, it is intended that the two States shall proceed forthwith to exchange diplomatic representatives with the rank of Ambassador and that the question of the establishment of consulates in the territories of the USSR and Japan respectively shall be settled through the diplomatic channels”. So by referring to the provisions of the Vienna Convention, the Japanese reason which states that the Shimoda Agreement and the St. Petersburg was canceled because the war that occurred between the two countries was not true because the war did not cancel the agreement but only delayed its implementation and will return to normal when the war is over and diplomatic relations between the two countries have improved.

In addition, if viewed based on the *pacta sunt servanda*, the four agreements that Russia claims are not legally binding

between the two countries. However, only the Treaty of Shimoda, the Treaty of St. Petersburg, the Treaty of Portsmouth and the Joint Declaration of Russia and Japan which are legally binding on the two countries, although the Shimoda Treaty and the St. Petersburg was declared null and void by Russia because of the war that occurred in 1904-1905, but if viewed from the rules of the 1969 Vienna Convention, in fact the war did not cancel the agreement, it only postponed it, the provisions in the two agreements still apply to both countries at the signing of the 1956 Joint Declaration, in addition to the Joint Declaration. Russia and Japan with Russia's promise to return Shikotan and Habomai after the signing of a peace agreement by the two countries (Article 9) two other islands, namely Etorofu and Kunashiri, were promised their return after America returned the island of Okinawa to Japan. is being disputed. In addition, the reason Japan refused to give the four disputed islands was because the provisions of the San Francisco Peace Treaty were still ambiguous because it was not stated to which side the territories would be given.

## **CLOSING**

## **Conclusion**

1. There are five (5) ways to acquire territory according to international law, namely Occupation, Annexation, Accretion and Avulsion, Prescription, Cession and Referendum.
2. In addition to using the method of acquiring territory according to international law, the treaties that form the basis of Japan's and Russia's claims can be used as the basis for determining the ownership status of the Kuril Islands, in which these agreements prove that Japan has more rights over the Kuril Islands than Russia..

### Suggestion

1. It is hoped that countries in dispute, especially in determining territorial boundaries, use the method of acquiring territory according to international law to resolve disputes that occur.
2. Treaties that have been agreed upon by the two disputing countries can also be used as the basis for resolving the status of a territory by analyzing these agreements using International Law.

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