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## Sovereignty, Territory and the International Lawyer's Dilemma

Donald W. Greig

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## Sovereignty, Territory and the International Lawyer's Dilemma

### Abstract

A historical perspective of the rules of territorial acquisition and of Antarctic sovereignty provides a basis for an examination of the conflict between international law and state sovereignty. While there may not be any immediate redress against the unlawful action of powerful states, the evolution of international law provides a value system and rule-making capacity which does not grant legitimacy to such actions.

### Keywords

Conflict of laws; Sovereignty; Territorial expansion

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# SOVEREIGNTY, TERRITORY AND THE INTERNATIONAL LAWYER'S DILEMMA\*

BY DONALD W. GREIG\*\*

A historical perspective of the rules of territorial acquisition and of Antarctic sovereignty provides a basis for an examination of the conflict between international law and state sovereignty. While there may not be any immediate redress against the unlawful action of powerful states, the evolution of international law provides a value system and rule-making capacity which does not grant legitimacy to such actions.

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## I. THE DILEMMA

International lawyers are often on the defensive about their discipline. They are faced with attacks and criticisms from the legal fraternity in general who sense that their discipline is different and are perturbed by its very unfamiliarity, and from scholars of international relations theory who perceive law as of marginal relevance to the great events which mould the world in which nation states struggle for power and survival. It is in this latter context that the lawyer's dilemma is most starkly seen: how is it possible to reconcile the notion of law as a mechanism for the control of conduct with the ultimate claim of states to act as they wish?

Symptomatic of what might be termed an "international relations" approach was the work of Hedley Bull. In *The Anarchical Society*,<sup>1</sup> Bull wrote that what he called the "structure of international coexistence" depended on "norms or rules conferring rights and duties upon states — not necessarily moral rules, but procedural rules or rules of the game which in modern society are stated *in some cases* in international law." As for the role of morality, Bull added that "ideas of interstate and international justice may reinforce the compact of coexistence between states by adding a moral imperative to the imperatives of enlightened self-interest and of law on which it rests."<sup>2</sup> Despite this apparent acknowledgement of some role for morality and justice, Bull's message was essentially pessimistic. International order, he continued, was "preserved by means which systematically affront the most basic and widely agreed principles of international justice."<sup>3</sup>

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<sup>1</sup>H. Bull, *The Anarchical Society* (London: MacMillan, 1977) at 91 (emphasis added).

<sup>2</sup>*Ibid.* at 91. As opposed to "ideas of world justice" which may seem entirely at odds with the structure of international society and to "notions of human justice" which "entail a possible threat to its foundations".

<sup>3</sup>*Ibid.* By this Bull did not "mean simply that at the present time there are states and nations which are denied their moral rights or fail to fulfil their moral responsibilities, or that there is gross inequality or unfairness in their enjoyment of these rights, or exercise of responsibilities. This is of course the case, but it has always been the case, and it is the normal condition of any society. What I have in mind is rather that the institutions and

Among the examples given by Bull were "the role ... played in international order by the institution of the balance of power"<sup>4</sup> and the function of war which "plays a central role in the maintenance of international order, in the enforcement of international law, the preservation of the balance of power and the effecting of changes which a consensus maintains are just."<sup>5</sup> In the last situation, however, war might equally be "the instrument of overthrowing rules of international law, of undermining the balances of power and of preventing just changes or of effecting changes that are unjust."<sup>6</sup> Nor is international law without its shortcomings. According to Bull:<sup>7</sup>

It is not merely that international law sanctifies the *status quo* without providing for a legislative process whereby the law can be altered by consent and thus causes the pressures for change to consolidate behind demands that the law should be violated in the name of justice. It is also that when the law is violated, and a new situation is brought about by the triumph not necessarily of justice but of force, international law accepts this new situation as legitimate, and concurs in the means whereby it has been brought about.... Moreover, contrary to much superficial thinking on this subject, it is not as if this tendency of international law to accommodate itself to power politics were some unfortunate but remediable defect that is fit to be removed by the good work of some high-minded professor of international law or by some ingenious report of the International Law Commission. There is every reason to think that this feature of international law, which sets it at loggerheads with elementary justice, is vital to its working; and that if international law ceased to have this feature, it would so lose contact with international reality as to be unable to play any role at all.

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mechanisms which sustain international order, even when they are working properly, indeed especially when they are working properly, or fulfilling their functions ... necessarily violate ordinary notions of justice."

<sup>4</sup>*Ibid.*, described by Bull as "an institution which offends against everyday notions of justice by sanctioning war against the state whose power threatens to become preponderant, but which has done no legal or moral injury," to say nothing of the tendency to sacrifice "the interests of small states, which may be absorbed or partitioned in the interests of the balance."

<sup>5</sup>*Ibid.* at 91-92.

<sup>6</sup>*Ibid.* at 92.

<sup>7</sup>*Ibid.*

Although some of Bull's views tend to be simplistic,<sup>8</sup> they do help illustrate the contrast or conflict between international law (the mechanism for control) and international relations (the claim of states to freedom of action in pursuit of their own self-interest). His views are particularly open to criticism in so far as they are based upon an outdated view of the differences between the international legal order and municipal systems of law. In pointing to the "limitations of the domestic analogy," Bull commented<sup>9</sup> that "[s]tates, after all, are very unlike human beings. Even if it could be contended that government is a necessary condition of order among individual men, there are good reasons for holding that anarchy among states is tolerable to a degree to which among individuals it is not." It is a debatable and scarcely verifiable proposition that international society is more or less peaceful or orderly than municipal society. It may be that the streets of Canberra, Oxford or Toronto are relatively safe to the individual, at least partly because of the presence of police. But this might not be true of areas of Sydney, London, New York or Chicago. Moreover, where political unrest verges on the edge of civil war, as in Northern Ireland or the

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<sup>8</sup>This is certainly true of his distinction between a "society of states" -- which he describes as existing "when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions" and an "international system". For Bull, the former, (an international society), presupposes the latter, but the latter (an international system) may exist that is not the former (*ibid.* at 13-14). Thus, a system may exist where two or more states "may be in contact with each other and interact in such a way as to be necessary factors in each other's calculations without their being conscious of common interests or values, conceiving themselves to be bound by a common set of rules, or cooperating in the working of common institutions" (*ibid.*). The unhelpful nature of this analysis is that while there may be intellectual value in positing whether or not there is an international society or system, it is not of great assistance to provide a definition likely to lead to the conclusion that there are a large number of overlapping systems, some of which may be societies and others not. Illogically, Bull made this approach the basis of a survey of *the* (single) anarchical society.

Even less acceptable is the chameleon nature of his concept. At one stage Bull adopted a more normal use of international society when he observed that in "modern international society ... there is no central authority able to interpret and enforce the law." (*ibid.* at 48). Soon afterwards, he reverted to his defined meaning (though giving it a wholly global interpretation) in suggesting that "international society is no more than one of the basic elements at work in modern international politics, and is always in competition with the elements of a state of war and of transnational solidarity or conflict" (*ibid.* at 51).

<sup>9</sup>*Ibid.* at 49.

townships of South Africa, international society might seem, by comparison, to be a haven of relative peace. Even within apparently stable domestic societies there can exist an underworld of violence or threatened violence through the imposition of rules which are completely different from those by which ordinary citizens lead their lives. Anarchy (in the sense of lawlessness, including the regulation of conduct by rules which are outside or even contrary to the recognised legal code) is neither exclusively nor predominantly the preserve of the international community.

## II. INTERNATIONAL LAW AND MUNICIPAL LAW

Despite Bull's apparent rejection of the value of analogy between international law operating on the relations of states and municipal law governing the activities of individuals, there are a number of parallels worth drawing.

At one level, the legal nature of the two systems share similarities because of the role played by lawyers as rule selectors. The judge or jurist expounds the law, though for different purposes, not least because their perceptions as to the function of law and their objective in defining it might differ. The attorney or adviser is employed to carry out certain tasks, such as achieving a particular aim (that is, draw up a treaty or contract), or to solve a problem that has arisen in a situation where a claim has already been made or litigation threatened.

At a less superficial level, both legal orders are based upon community values, whether those values are promoted in the interests of a few or of a majority. It is hardly surprising that states or groups of states (like the powerful interest groups which operate in the municipal sphere) seek to develop a conception of law and rules that suit their interests and further the objectives that they regard as important.

The very interdependence of states establishes the need for a basic degree of orderliness in their relations. The similarity

between the international arena and the municipal sphere in this regard was drawn by Henkin in the following passages:<sup>10</sup>

As for international law, much misunderstanding is due to a failure to recognise law where it exists. That failure may be due to a narrow conception of law generally. The layman tends to think of domestic law in terms of the traffic policeman, or judicial trials for the thief or murderer. But law is much more and quite different. I do not invoke any esoteric or eccentric definition of law when I say that in domestic society law includes the scheme and structure of government, and the institutions, forms, and procedures whereby a society carries on its daily activities; the concepts that underlie relations between government and individual and between individuals; the status, rights responsibilities, and obligations of individuals and incorporated and non-incorporated associations and other groups, the relations into which they enter and the consequences of these relations. Men establish families, employ one another, acquire possessions and trade them, make arrangements, join groups for ill or good, help or hurt each other, with little thought to law and little awareness that there is law that is relevant. By law, society formalises these relationships, creates new ones, legitimates some and forbids others, determines the content and consequences of relationships. The individual remains hardly or hazily aware that he is enmeshed and governed by "law" ....

In relations between nations, too, one tends to think of law as consisting of a few prohibitory rules (for instance, that a government may not arrest another's diplomats or the law of the U.N. Charter prohibiting war) but international law is much more and quite different. Although there is no international "government," there is an international "society"; law includes the structure of that society, its institutions, forms, and procedures for daily activity, the assumptions on which the society is founded and the concepts which permeate it, the status, rights, responsibilities, obligations of the nations which comprise that society, the various relations between them, and the effects of those relations. Through what we call foreign policy, nations establish, maintain, change, or terminate myriads of relations; law – more or less primitive, more or less sophisticated – has developed to formalise these relationships, to regulate them, to determine their consequences.

The misapprehension of this position as far as international law is concerned is due to the lack of publicity given to the more

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<sup>10</sup>L. Henkin, *How Nations Behave*, 2d ed. (New York: F.A. Praeger, 1979) at 13-15. Not that Bull would deny the need for rules establishing orderliness, though he downplayed the need for such rules to be legal. As he himself suggested (*supra*, note 1 at 54):

Order in any society is maintained not merely by a sense of common interests in creating order or avoiding disorder, but by rules which spell out the kind of behaviour that is orderly. Thus the goal of security against violence is upheld by rules restricting the use of violence; the goal of stability of agreements by the rule that they should be kept; and the goal of stability of possession by the rule that rights of property, public or private, should be respected. These rules may have the status of law, of morality, of custom or etiquette, or simply operating procedures or 'rules of the game'.



normal operations of the system. As McDougal and Reisman have pointed out:<sup>11</sup>

The most pervasive popular conceptions of the contemporary international system are derived from the incomplete and often anecdotal images of mass media. As many have observed, these images tend to emphasize crisis and conflict; the mundane but less dramatic patterns of inter-stimulation, inter-dependence and collaboration are less likely to win large audiences, high ratings and great advertising revenues.

Even if one does accept the concept of a legal system, including the international system, as emanating from a society in a form which reflects a compromise between the competing interests of groups within that society, there are obvious and significant differences between international law and municipal law.

In the international sphere, the absence of a legislature or courts with universal competence are patent manifestations of the absence of a law-maker. This law-making process is left, therefore, to states themselves. What the law is depends upon what they say or do. Hence, Article 38.1 of the *Statute of the International Court of Justice* stresses as the primary means for the determination of rules of law:

- a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- b. international custom, as evidence of a general practice accepted as law....

It is possible for conventional rules to come into existence by virtue of the legal act which signifies the entry into force of the instrument in question for parties to it. But, the emergence of customary rules is dependent upon a process of action and reaction which constitutes the necessary acceptance of that particular pattern of conduct as normative. It follows that, if international law is to have the capacity to change, other than through the unlikely event of a near universal treaty that is contemporaneously ratified by all or most contracting parties, then allowance must be made for actions by states that are contrary to an existing rule.

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<sup>11</sup>"International Law in Policy-Oriented Perspective" in R. St. J. Macdonald and D.M. Johnston, eds, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague: Martinus Nijhoff, 1983) at 103.

It may be necessary to assess the legality of a State's actions by reference to an initial classification *and* to a later re-examination in the light of subsequent events. It is in this context that there is force to Bull's contention that, when the law is violated and a new situation is brought about, international law will accept the change as legitimate.<sup>12</sup> However, if international law has any claim to be considered as sufficiently analogous to municipal systems of law to merit being classified as law, there must be some methodology for testing whether the illegitimate conduct will remain proscribed, or will, in time, become accepted as the basis of a new legal rule. There is no such problem for municipal law where the illegitimate conduct of the individual or group of individuals will be *de jure* illegal<sup>13</sup> until the law is changed by clearly identifiable processes.

There are two possibilities in the international arena. First, acquiescence of the other party to a particular confrontation will legitimize the conduct *inter partes* and may, considering other evidence of state practice, suggest that a new rule is emerging to replace the old.<sup>14</sup> Second, even if there is objection to the conduct in question, the attitude of other states will be of crucial significance.<sup>15</sup> That is, when faced with an action that is contrary to

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<sup>12</sup>Quoted *supra*, note 7.

<sup>13</sup>Even here, in the interim, conduct might achieve a *de facto* legitimacy from the fact that authorities refrain from prosecuting the protestors pending an attempt to achieve legislative reform. Certainly, there is a degree of unreality in the view of municipal society as being free of breaches of the law designed to bring about social or political change. As R.A. Falk wrote in *The Status of Law in International Society* (Princeton, N.J.: Princeton University Press, 1970) at 22-23:

Even in domestic society, threats and symbolic eruptions of violence are the motive force behind a successful social protest on a fundamental issue. Contentions that social and political change can be adequately assured by processes of persuasion appear to reflect a dubious interpretation of human experience; at best, such contentions represent slogans that have been uncritically built into democratic ideology. It would appear that this relationship between violence and change applies *a fortiori* to international society.

<sup>14</sup>As occurred in the *Fisheries Case (United Kingdom v. Norway)*, [1951] I.C.J. Rep. 116.

<sup>15</sup>It seems unnecessary to refer a Canadian audience to the *Arctic Waters Jurisdiction Act*, 1970, the accompanying diplomatic interchanges between Canada and the United States, and to the subsequent provisions of Part XII of the *Law of the Sea Conventions*, 1982. Nor, for the purposes of the present exposition, is it necessary to construct an explanatory edifice for

international law, reacting states can be divided into categories: the subjective reactors who are involved because of a personal interest and the objective reactors who, although not personally involved, are able to provide a community response.<sup>16</sup> The reaction may well depend upon the nature and circumstances of the breach. The more reasonable and justifiable the breach is, in terms of future legal development, the less likely will it encounter an unfavourable response. As Falk has argued:<sup>17</sup>

... the degree and manner of violation may be more crucial than the alleged fact of violation. The possibility that a violation of international law may be a matter of degree should be introduced explicitly into international legal theory. A conception of compliance and of violation that draws inspiration from the idea of a spectrum or a prism, rather than insists upon a rigid dichotomy between legal or illegal conduct, would appear well adapted to a largely decentralised legal system such as exists in international society.

International law is based upon custom<sup>18</sup> and the range of issues which the law has to answer is subject to rapid change. Therefore, it is not "a mere static body of rules but is rather a whole decision-making process."<sup>19</sup> In examining this process of what

the creation and identification of rules of international law as complete as that provided in M. Bos, *A Methodology of International Law* (New York: North Holland, 1984).

<sup>16</sup>The dividing line between the two cannot always be drawn with certainty. However, it is a helpful distinction in that it brings out the need to examine the motives of states for their actions.

<sup>17</sup>*Supra*, note 13 at 26.

<sup>18</sup>Even many conventional rules were originally, and still are for some states, applicable as part of customary international law: see *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* [1969] I.C.J. Rep. 3.

<sup>19</sup>M.S. McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea" (1955) 49 *Am. J. Int. L.* 356; M.S. McDougal *et al.*, *Studies in World Public Order* (New Haven, Conn.: Yale Univ. Press, 1960) at 1014-16; and for critical analysis see Falk, *supra*, note 13 at 642-59. Or, as A. Sheikh, *International Law and National Behaviour* (New York: J. Wiley, 1974) at 47, expressed what he regarded as the distinctive features of international law:

- (1) It is a legal phenomenon but heavily dependent on political considerations, because it is generally the outcome of a successful political process ...
- (4) It is no longer, perhaps never was, a mere "body of rules" and should not be characterised as such.

states do and say, the question has been raised as to whether both action and words are components of practice, or whether a distinction between them need be made.

D'Amato was of the firm view that pronouncements made on behalf of a state did not constitute part of state practice. Such claims were of value only in so far as they provided an articulation of the rule as *opinio juris*.<sup>20</sup>

Many contradictory rules may be articulated, but a state can only act in one way at one time. The act is concrete and usually ambiguous. Once the act takes place, the previously articulated rule that is consistent with the act takes on life as a rule of customary law, while the previously articulated rules contrary to it remain in the realm of speculation. The state's act is visible, real, and significant; it crystallises policy and demonstrates which of the many possible rules of law the acting state has decided to manifest. The conjunction of rule and action becomes a powerful precedent for future similar situations...

... In most cases, a state's action is easily recognised.... On the other hand, a claim is not an act. As a matter of daily practice, international law is largely concerned with conflicting international claims. But the claims themselves, although they may *articulate* a legal norm, cannot constitute the material component of custom. For a state has not done anything when it makes a claim; until it takes enforcement action, the claim has little value as a prediction of what the state will actually do.

On the other hand, the predominant view is probably that expressed by McDougal. He believed that what states say is equally important to what they do, thus constituting the corpus of state practice from which customary international law might be deduced. Having suggested that international law is "a whole decision-making process," McDougal continued.<sup>21</sup>

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(5) It is more of a *process* than anything else, subject to frequent changes and interpretation at a time when it is being applied to concrete acts of state.

<sup>20</sup>A. D'Amato, *The Concept of Custom in International Law* (New York: Cornell Univ. Press, 1971) at 88. Sir G.G. Fitzmaurice adopted a similar view. He stated in "Some Problems Regarding the Formal Sources of International Law" *Symbolae Verzijl* (Hague: Martinus Nijhoff, 1958) at 153:

... if State practice ... is a source of law, it would be incorrect to regard such things as documents embodying diplomatic representations, notes of protest, *etc.*, as constituting sources of law. They are evidences of it because they demonstrate certain attitudes on the part of States, but is [sic] the State practice so evidenced which is the source of law.

<sup>21</sup>M.S. McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea" (1955) 49 Am. J. Int. L. 356 at 356-57.

The international law of the sea is ... a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and which other decision-makers, external to the demanding state including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is a living, growing law, grounded in the practices ... of ... state officials, and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena.

The McDougal view is undoubtedly correct in that collections of state practice issued by or on behalf of various foreign offices comprise mainly statements as to the attitudes of the individual state concerned as expressed by its officials. The d'Amato approach introduces a cautionary note of realism. To pay too high a regard to what states say is to risk being accused of gullibility. Lawyers suffer from undue deference to words. While this may not be too harmful a characteristic when dealing with the text of a statute or a judgment in municipal law, such deference is misplaced when confronted with the pronouncements of politicians or officials on the international plane. It is especially inappropriate in a situation where the words used are no more than a pretext for blatantly inconsistent actions. The following is an attempt by the International Court to give words their face value.<sup>22</sup>

It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States would have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way \*prima facie incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

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<sup>22</sup>*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, [1986] I.C.J. Rep. 14 at 98.

One may have sympathy with the situation with which the International Court was faced. Yet, it is hardly flattering to the cause of international law as an intellectual discipline for the Court itself to suggest that, in the circumstances, such conduct has the effect of confirming rather than weakening the rule in question. Scholars of international relations do not suffer from the same inhibitions. They are justifiably skeptical of what states say. For them, actions speak louder than words. If the activities of states conform to a particular pattern there is no need to attach the soubriquet "law." It may be necessary to the orderly conduct of international relations to recognise rules which are not "legal." Predictability can be achieved independently of legal controls.

Amongst the "rules of the game" thus recognised are those relating to the hegemony of the superpowers: the Soviet Union in Eastern Europe and Central Asia, the United States in the Caribbean and Central America.<sup>23</sup> The existence of these rules poses obvious difficulties for the international lawyer. To what extent should such practices be recognised as giving rise to legal norms?

The arena of superpower politics is not the only field of conduct which creates problems for the lawyer. In the attempt to give legal content to demands, especially of Third World countries, for a variety of rights (for example, the right to food, to an ecologically balanced environment, to development),<sup>24</sup> some international lawyers have made use of a theoretical distinction between hard and soft law. There was a difficulty in establishing these rights according to the rigorous requirements envisaged by Article 38.1 (b) of the *Statute of the International Court of Justice* which speaks of "international custom, as evidence of a general practice accepted as law." It was interpreted by the International

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<sup>23</sup>See P. Keal, *Unspoken Rules and Superpower Dominance* (London: MacMillan, 1982).

<sup>24</sup>See S.P. Marks, "Emerging Human Rights: A New Generation for the 1980's?" (1981) 33 Rutgers L. Rev. 435 at 442-44. For the right to development, see O. Schachter, "The Evolving International Law of Development" (1976) 15 Colum. J. of Transnat'l L. 1; R.Y. Rich, "The Right to Development as an Emerging Human Right" (1982-83) 23 Virginia J. Int. L. 287.

Court in the *Asylum* case<sup>25</sup> to involve the need to prove both "a constant and uniform usage" and that the usage amount to "the expression of a right".

It was felt necessary by the principal protagonists of such rights to argue for their legal recognition by reference to less demanding criteria. Rules which fell into the former category as satisfying the characteristics sought for by the International Court could be classified as "hard". Those falling into the latter were regarded as "soft".<sup>26</sup> The trend was towards accepting as law a variety of rights, largely designed to balance the economic equation between the rich and poor states of the world, which fell *far* short of the criteria laid down by the International Court. This development was in danger of going too far and led some of its supporters to argue for the application of at least minimum standards to the assessment of claims that such new rights should be acknowledged as constituting "soft law".<sup>27</sup>

Contemporary debates about hard and soft law, are only peripheral issues in this discussion. We are concerned with the dilemma facing the international lawyer in trying to reconcile the need for certainty and stability inherent in the legal order with the

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<sup>25</sup>*Asylum Case (Columbia v. Peru)*, [1950] I.C.J. Rep. 266 at 276. Or, as the Court said subsequently in the *North Sea Continental Shelf* cases, (*Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands*), [1969] I.C.J. Rep. 3 at 44:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.

<sup>26</sup>See generally I. Seidl-Hohenveldern, "International Economic 'soft law'" (1979 - II) 163 *Academie de Droit Int'l Rec. des Cours* 169; J. Gold, "Strengthening the Soft International Law of Exchange Arrangements" (1983) 77 *Am. J. Int. L.* 443. An alternative use of the terminology is where hard law is taken as referring to rules of precise content, while soft law would signify rules which lack precision, but which are nevertheless of a binding nature: see P. Weil, "Towards Relative Normativity in International Law?" (1983) 77 *Am. J. Int. L.* 413 at 414, n. 7. Soft law could also signify agreements between states which do not, for a variety of reasons, constitute precise treaty obligations. See O. Schachter, "The Twilight Existence of Nonbinding International Agreements" (1977) 71 *Am. J. Int. L.* 296; M. Bothe, "Legal and Non-legal Norms - A Meaningful Distinction in International Relations?" (1980) 11 *Neth. Y.B. Int. L.* 65; R.R. Baxter, "International Law in 'Her Infinite Variety'" (1980) 29 *I.C.L.Q.* 549.

<sup>27</sup>See P. Alston, "Conjuring up New Human Rights: A Proposal for Quality Control" (1984) 78 *Am. J. Int. L.* 607.

demand for change and the tendency of states, when their interests so require, to act in a way that is inconsistent with existing legal rules. A major illustration of how this reconciliation has been made, throughout the life of the present state system, is provided by the rules of territorial acquisition.

### III. TERRITORIAL ACQUISITION

#### A. *Origins*

In the fifteenth century there were no rules, save those for absorption by conquest or cession, because international relations was not concerned with uninhabited or newly discovered territories. The only exception concerned islands newly emerged from the sea, which were *res nullius* and could be acquired by *occupatio*. This principle applied in favour of the landowner who acquired *dominium*. If the landowner happened to be a prince, he would acquire *imperium* by virtue of the act of occupation.

The expansion of Europe, which commenced in the middle of the fifteenth century, presented entirely new problems as far as the regulation of relations between states was concerned.<sup>28</sup> With the initial Portuguese discoveries, the issues raised related solely to the relationship between the discoverer and the discovered. On the basis that the world belonged to God and that all its inhabitants were subject to His commands, Papal approval was sought for Portugal's activities. Hence, the Bull *Romanus Pontifex*,<sup>29</sup> issued by Pope Nicholas V on 8 January 1455, authorised Portugal to subjugate lands inhabited by infidels and confirmed Portuguese claims to Africa and lands beyond toward India.

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<sup>28</sup>Much of the material upon which this section is based comes from Donald W. Greig, "Sovereignty and the Falkland Islands Crisis" (1983) 8 *Aust. Y.B. Int. L.* 20.

<sup>29</sup>Text in S.Z. Ehler & J.B. Morrall, *Church and State through the Centuries* (New York: Biblo and Tannen, 1967) at 144-46.



The first dispute came with Christopher Columbus' first voyage. Were his discoveries Spanish or Portuguese? Although his expedition had sailed under the aegis of the Spanish crown, there were a number of factors which supported Portuguese pretensions. A Genoan by origin, Columbus had become a resident of Portugal, where he had married. More importantly, the lands he discovered were believed to be part of the "Indies" and so, according to the 1455 grant, were already allocated to Portugal. Given the circumstances, it is not surprising that the two most Catholic States of Europe should turn to the Pope as arbiter, law-giver and God's representative. The outcome of this appeal to the Pope was the Bull *Inter Caetera Divinae* of 4 May 1493 which provided:<sup>30</sup>

And, in order that you may enter upon so great an undertaking with greater readiness and heartiness endowed with the benefit of our apostolic favor, we, of our own accord, not at your instance nor the request of anyone else in your regard, but of your own sole largess and certain knowledge and out of the fullness of apostolic power, by the authority of Almighty God conferred upon us in blessed Peter and of our vicarship of Jesus Christ, which we hold on earth, do by tenor of these presents, should any of said islands have been found by your envoys and captains, give, grant, and assign to you and your heirs and successors, kings of Castile and Leon, forever, together with all their dominions, cities, camps, places, and villages, and all rights, jurisdictions, and appurtenances, all islands and mainlands found and to be found, discovered and to be discovered towards the west and south, by drawing and establishing a line from the Arctic Pole, namely the north, to the Antarctic pole, namely the south, no matter whether the said mainlands and islands are found and to be found in the direction of India or towards any other quarter, the said line to the distant one hundred leagues towards the west and south from any of the islands commonly known as the Azores and Cape Verde. With this proviso however that none of the islands and mainlands, found and to be found, discovered and to be discovered, beyond that said line towards the west and south, be in the actual possession of any Christian king or prince up to the birthday of our Lord Jesus Christ just past from which the present year one thousand four hundred and ninety-three begins. And we make, appoint, and depute you and your said heirs and successors lords of them with full and free power, authority, and jurisdiction of every kind; with this proviso however, that by this our gift, grant, and assignment no right acquired by any Christian prince, who may be in actual possession of said islands and mainlands, prior to the said birthday of our Lord Jesus Christ, is hereby to be understood to be withdrawn or taken away. Moreover

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<sup>30</sup>Text taken from F.G. Davenport, *European Treaties Bearing on the History of the United States and its Dependencies*, vol. 1 (Gloucester, Mass.: P. Smith, 1967) at 77-78. The geographical division was later amended by the *Treaty of Tordesillas, 1494* (text in Davenport at 95-96) running from pole to pole, "one hundred leagues towards the east and south from any of the islands commonly known as The Azores and Cape Verde" as laid down in the Bull of 1493, to a line "at a distance of three hundred and seventy leagues west of the Cape Verde Islands."

we command you in virtue of holy obedience that, employing all due diligence in the premises, as you also promise – nor do we doubt your compliance therein in accordance with your loyalty and royal greatness of spirit – you should appoint to the aforesaid mainlands and islands worthy, God-fearing, learned, skilled, and experienced men, in order to instruct the aforesaid inhabitants and residents in the Catholic faith and train them in good morals. Furthermore, under penalty of excommunication *late sententie* to be incurred *ipso facto*, should anyone thus contravene, we strictly forbid all persons of whatever rank, even imperial and royal, or of whatsoever estate, degree, order, or aforesaid heirs and successors, to go for the purpose of trade or any other reason to the islands or mainlands, found and to be found, discovered and to be discovered, towards the west and south, by drawing and establishing a line from the Arctic pole to the Antarctic pole, no matter whether the mainlands and islands, found and to be found, lie in the direction of India or toward any other quarter whatsoever, the said line to be distant one hundred leagues towards the west and south, as is aforesaid, from any of the islands commonly known as the Azores and Cape Verde; apostolic constitutions and ordinances and other decrees whatsoever to the contrary notwithstanding...

There are a number of aspects of this instrument which need to be emphasized. First, it was framed as a grant or assignment of lands; those already discovered and those yet to be discovered. The Bull was, therefore, designed and received as a root of title: it constituted law for the parties and was intended to be operative *vis-à-vis* third parties. Second, it was patently a classical example of an allocation of disputed land by the definition of a boundary between the respective territories of the parties. In order to given effect to this allocation, the *Treaty of Tordesillas, 1494* made detailed provision for the drawing of the boundary by what amounted to a commission of representatives from the two countries.<sup>31</sup> Third, it

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<sup>31</sup> According to the Davenport translation (*supra*, note 30 at 96), clause 3 of the *Treaty* provided: Item, in order that the said line or bound of the said division be made straight and as nearly as possible of the said distance of three hundred and seventy leagues west of the Cape Verde Islands, as hereinbefore stated, the said representatives of both the said parties agree and assent that within the ten months immediately following the date of this treaty their said constituent lords shall despatch two or four caravels, namely, one or two by each one of them, a greater or less number, as they may mutually consider necessary. These vessels shall meet at the Grand Canary Island during this time, and each one of the said parties shall send certain persons in them, to wit, pilots, astrologers, sailors, and any others they may deem desirable. But there must be as many on one side as on the other, and certain of the said pilots, astrologers, sailors, and others of those sent by the said King and Queen of Castile, Aragon, *etc.*, and who are experienced, shall embark in the ships of the said King of Portugal and the Algarves; in like manner certain of the said persons sent by the said King of Portugal shall embark in the ship or ships of the said King and Queen of Castile, Aragon, *etc.*; a like number in each case, so that they may jointly study and examine to better advantage the sea, courses, winds, and the degrees of

laid down a principle of exclusive sovereignty by forbidding "all persons of whatever 'rank'" from going "to the islands or mainlands, found or to be found" in the allocated areas "for the purpose of trade or any other reason."<sup>32</sup>

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the sun or of north latitude, and lay out the leagues aforesaid, in order that, in determining the line and boundary, all sent and empowered by both the said parties in the said vessels, shall jointly concur.

<sup>32</sup>The process of conflict and accommodation in the development of international law can also be seen in the varying claims made by coastal states to maritime jurisdiction. These claims took two major forms. The more extreme form was jurisdiction or sovereignty over entire seas or sea areas. A number of European states, including Britain, claimed such rights: see, A.P. Higgins & C.J. Colombos, *The International Law of the Sea*, rev'd ed. (London: Longman Green & Co., 1945) at 38-39, 41-42. The more significant examples related to attempts by Portugal and Spain to employ the doctrine of *mare clausum* to protect their trading monopoly with the new territories to which they became entitled under the 1493 Bull. It was a conflict that was waged by the sword and by the pen. Grotius' work, *Mare Liberum* (1609), was an attack against such pretensions: see T.W. Fulton, *The Sovereignty of the Sea* (Ann Arbor, Mich.: Univ. Microfilms, 1911) at 338 ff. Despite Queen Elizabeth's earlier views to the contrary, it was the English who were Grotius' chief opponents and a major preoccupation. This opposition arose from Britain's claims to control the narrow seas around its shores. The other basis of jurisdiction was the notion, emanating from the Italian city states, that a state was entitled to exercise control for two day's sailing distance (100 miles) from its shores, partly to protect its own interests, and partly to protect the rights of all mariners from the dangers of piracy (*ibid.* at 539-41). Although such a doctrine was never formally adopted by English courts, it was a factor in diplomatic correspondence of the early 17th century (*ibid.* at 360-61).

Fulton suggested that this latter concept survived only in the Mediterranean Sea until the 18th century. He failed to mention that it remained a matter of discord and conflict in relations between Spain and its rival colonizers in the Americas. J. Goebel, in *The Struggle for the Falkland Islands* (Washington: Kennikat Press, 1927) at 186, fn. 40, suggested that the *guarda costas* was increased in size in 1732. Therefore the 100 mile limit and the notion of *mare clausum* were being enforced in the Americas well past the middle of the century. Indeed, Article XII of the *Treaty of Utrecht, 1713* granted rights to French fishermen in waters 30 leagues from the coast of Nova Scotia. This provision only makes sense if a coastal state was then recognised as having the authority to *exclude* foreigners from such areas.

It was this provision that was referred to by the Russians to justify their *Ukase* of 1821. This instrument applied to the coasts and waters of the west coast of America from the Behring Straits to 51°N. It excluded all foreign vessels, *inter alia*, not just from landing on the coasts and islands of the region, but also from approaching them within less than 100 Italian miles. Both the British and Americans were concerned to depict such claims as totally devoid of legal foundation. It seems reasonable to suppose that they were compatible with the former views espoused by Spain, the overseas Empire in the Americas of which had only recently disintegrated.

The only reservation one can have about the otherwise thorough examination of the Dixon Entrance dispute by C.B. Bourne & D.M. McRae is their failure to give due weight to the historical continuity of such claims. (See, "Maritime Jurisdiction in the Dixon Entrance: The Alaska Boundary Re-examined" (1976) 14 Can. Yb. Int. L. 175). Whether or not Russia

The legal principle upon which these allocations of territory were based, was essentially the dispositive authority claimed for himself by the Pope and recognised by Spain and Portugal. It placed the second wave of colonizers (*i.e.* the French, the English and the Dutch), at a disadvantage. It was necessary for them to advance some alternative basis for territorial acquisition. They relied upon the proposition that "no one is sovereign of a thing which he himself has never possessed, and which no one else has ever held in his name."<sup>33</sup> Even earlier, in her famous reply of 1580 to the Spanish Ambassador Mendoza who had complained about Drake's incursions on Spanish territory during his voyage around the world, Queen Elizabeth had asserted that:<sup>34</sup>

she would not persuade herself that (the Indies) are the rightful property of Spanish donation of the Pope of Rome in whom she acknowledged no prerogative in matters of this kind, much less authority to bind Princes who owe him no obedience, or to make that New World as it were a fief for the Spaniard and clothe him with possession: and that only on the ground that the Spaniards have touched here and there, have erected shelters, have given names to a river or promontory: acts which cannot confer property. So that this donation of *res alienae* which by

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actually exercised the powers asserted in the 1821 *Ukase* was not crucial, (despite what was stated in the context of the *Fur Seal* arbitration of 1893 in J.B. Moore, *International Arbitrations*, vol. 1 (Washington: Government Printing Office, 1898, 755 at 948), to the issue of the interpretation of the *Russo-British Convention of 1825* upon which United States rights as against Canada (and *vice versa*) in the Dixon Entrance are in part ultimately based. Certainly the United States argued in its case to the tribunal that the *Ukase* had been regarded by Russia as merely declaratory of existing rights (*ibid.* at 810) and that, in any case, extensive maritime claims of the sort in issue were recognised in international law (*ibid.* at 811). The rejection of such claims by the tribunal may have been an assertion of international law as it existed in 1893 and as it was to exist for the ensuing half century or more. This does not mean that the tribunal's views were an accurate representation of the legal situation in the critical period 1821-25.

<sup>33</sup>H.Grotius, *Mare Liberum* trans. R. van D. Magoffin c.1633 text (New York: Oxford University Press, 1916) at 11. The section from which this quotation is taken was part of a tirade against Portuguese pretensions to the East Indies with which the Dutch claimed the right to trade. Thus, Grotius went on to assert that, as possession was a prerequisite of sovereignty, "in those places the Portuguese have no title at all to sovereignty" (*ibid.*).

<sup>34</sup>This version is taken from Goebel, *supra*, note 32 at 63. For a more authentic version, see A. Darcie, *The True and Royall History of the Famous Emperesse Elizabeth Queene of England* (1625) being a translation of the first three parts of W. Camden, *Annales rerum Anglicarum et Hibernicarum regnante Elizabetha ad annum salutis MDLXXXIX* from the French edition of P. de Bellegent (London: Richard Field, 1624), reproduced in H.R. Wagner, *Sir Francis Drake's Voyage round the World* (San Francisco: H. Howell, 1926) repr. 1969, at 323.

law (*ex jure*) is void, and this imaginary proprietorship, ought not to hinder other princes from carrying on commerce in these regions and from establishing colonies where Spaniards are not residing, without the least violation of the law of nations, since without possession prescription is of no avail (*haud valeat*), nor yet from freely navigating that vast ocean since the use of the sea and air is common to all men; further that no right to the ocean can inure to any people or individual since neither nature nor any reason of public use permits occupation of the ocean.

By the middle of the eighteenth century it would seem that the Anglo-Dutch view as to the need for actual occupation to perfect title to territory had prevailed. Thus, the Swiss jurist, Vattel, was able to write:<sup>35</sup>

All men have an equal right to things which have not yet come into the possession of anyone, and these things belong to the person who first takes possession. When, therefore, a Nation finds a country uninhabited and without an owner, it may lawfully take possession of it, and after it has given sufficient signs of its intention in this respect, it may not be deprived of it by another Nation. In this way navigators setting out upon voyages of discovery and bearing with them a commission from their sovereign, when coming across islands or other uninhabited lands, have taken possession of them in the name of their Nation; and this title has usually been respected, provided actual possession has followed shortly after.

But it is questioned whether a Nation can thus appropriate, by the mere act of taking possession, lands which it does not really occupy, and which are more extensive than it can inhabit or cultivate. It is not difficult to decide that such a claim would be absolutely contrary to the natural law, and would conflict with the designs of nature, which destines the earth for the needs of all mankind, and only confers upon individual Nations the right to appropriate territory so far as they can make use of it, and not merely to hold it against others who may wish to profit by it. Hence the Law of Nations will only recognise the *ownership* and *sovereignty* of a Nation over unoccupied lands when the Nation is in actual occupation of them, when it forms a settlement upon them, or makes some actual use of them. In fact, when explorers of other Nations had passed, leaving some sign of their having taken possession, they have no more troubled themselves over such empty forms than over the regulations of Popes, who divided a large part of the world between the crowns of Castile and Portugal.

### *B. Disadvantages of the Requirement of Possession*

The need for actual possession was not a prescription that always found favour, even amongst its principal protagonists. Further, it raised a number of obvious practical difficulties. First,

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<sup>35</sup>E. de Vattel, *The Law of Nations*, trans. c.1758 ed. (New York: Oceana Publications Inc., 1964) at 84-85.

territory, unlike the *res nullius* of Roman law (a wild horse or swarm of bees belonging to no one), could not normally be "occupied" by a single act. Second, there was the problem of how to deal with lands which had an indigenous population. These two matters will be dealt with before consideration is given to the disadvantages of the new rule from the point of view of the colonizers.

### 1. Taking of Possession

There are two different approaches that were adopted to the taking of possession of territory. One was to attempt to assimilate the act as much as possible to the taking of possession of a horse, a swarm of bees etc. under municipal law; the other was to invent an entirely new doctrine, that of inchoate title.

As far as the former was concerned, there was already the example of islands, the acquisition of which by *occupatio* had been recognised by the civilians since the fourteenth century. This possibility was expressed in modern form by the award in the *Clipperton Island* arbitration as follows:<sup>36</sup>

It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected. But this step is, properly speaking, but a means of procedure to the taking of possession, and, therefore, is not identical with the latter. There may also be cases where it is unnecessary to have recourse to this method. Thus, if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed....

Despite the implication in this pronouncement that it was of general application (i.e. if a territory, by virtue of the fact that it was completely uninhabited, was at the absolute disposition of the claimant state), the absolute disposition requirement was dependent upon more than the absence of an existing population. There had

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<sup>36</sup>(1931) text in 26 Am. J. Int. L. 390 at 393-94.

to be some geographical limitation upon such a criterion. It could be said of a moderately sized island or a relatively well defined area of mainland territory that possession could be claimed *ab initio* of the entire island or area. In the cases of larger islands or larger or less well defined areas, however, the concept of "absolute and undisputed disposition" could not readily be applied.<sup>37</sup>

To deal with the fact that settlement of claimed territories was inevitably a slow process,<sup>38</sup> the concept of inchoate title was introduced to justify the priority of a first claimant's position. As described by Hall:<sup>39</sup>

An inchoate title acts as a temporary bar to occupation by another state, but it must either be converted into a definite title within reasonable time by planting settlements or military posts, or it must at least be kept alive by repeated local acts showing an intention of continual claim. What acts are sufficient for the latter purpose, and what constitutes a reasonable time, it would be idle to attempt to determine. The effect of acts and of the lapse of time must be judged by the light of the circumstances of each case as a whole. It can only be said, in a broad way, that when territory has been duly annexed, and the fact has either been published or has been recorded by monuments or inscriptions on the spot, a good title has always been held to have been acquired as against a state making settlements within

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<sup>37</sup>See T.J. Lawrence, *The Principles of International Law*, 7th ed. rev'd (London: Macmillan & Co. Ltd., 1929) at 152.

<sup>38</sup>The inevitability stemmed partly from the slowness of communications between Europe and other areas which were the objects of colonial expansion (Africa, Asia and the Pacific Islands), and partly from the scarcity of resources that could be allocated to colonial ventures. The fact that much exploration was carried out by privately funded expeditions and exploitation under the aegis of chartered companies was due to the lack of public funds for such purposes. Moreover, as W.E. Hall pointed out in *International Law*, 8th ed. (Oxford: At the Clarendon Press, 1924) at 125:

States have not however been content to assert a right of property over territory actually occupied at a given moment, and consequently to extend their dominion *pari passu* with the settlement of unappropriated lands. The earth-hunger of colonising nations has not been so readily satisfied; and it would besides be often inconvenient and sometimes fatal to the growth or perilous to the safety of a colony to confine the property of an occupying state within these narrow limits. Hence it has been common, with a view to future effective appropriation, to endeavour to obtain an exclusive right to territory by acts which indicate intention and show momentary possession, but which do not amount to continued enjoyment or control; and it has become the practice in making settlements upon continents or large islands to regard vast tracts of country in which no act of ownership has been done as attendant upon the appropriated land.

<sup>39</sup>*Ibid.* at 126-27. See also L.F.L. Oppenheim, *International Law*, Vol. 1, 8th ed. (New York: D. McKay, 1955) at 558-59.

such time as, allowing for accidental circumstances or moderate negligence, might elapse before a force or a colony were sent out to some part of the land intended to be occupied; but that in the course of a few years the presumption of permanent intention afforded by such acts has died away, if they stood alone, and that more continuous acts of actual settlement by another power became a stronger root of title. On the other hand, when discovery, coupled with the public assertion of ownership, has been followed up from time to time by further exploration or by temporary lodgments in the country, the existence of a continued interest in it is evident, and the extinction of a proprietary claim may be prevented over a long space of time, unless more definite acts of appropriation by another state are effected without protest or opposition.

## 2. Territories having an Indigenous Population

From the inception of European colonization, there had been a doctrinal dispute, in religious and legal terms, about the status of indigenous peoples and their rights over the land in which they lived. At the time, it suited the apologists of the second wave of colonizers to deny Spanish and Portuguese claims by reference to the rights of the original inhabitants. As Grotius pointed out:<sup>40</sup>

But in addition to all this, discovery *per se* gives no legal rights over things unless before the alleged discovery they were *res nullius*. Now these Indians of the East, on the arrival of the Portuguese, although some of them were idolators, and ... therefore sunk in grievous sin, had none the less perfect public and private ownership of their goods and possessions, from which they could not be dispossessed without just cause. The Spanish writer Victoria, following other writers of the highest authority, has the most certain warrant for his conclusion that Christians, whether of the laity or of the clergy, cannot deprive infidels of their civil power and sovereignty merely on the ground that they are infidels, unless some other wrong has been done by them.

For religious belief, as Thomas Aquinas rightly observes, does not do away with either natural or human law from which sovereignty is derived. Surely it is a heresy to believe that infidels are not masters of their own property; consequently, to take from them their possessions on account of their religious belief is no less theft and robbery than it would be in the case of Christians.

Victoria then is right in saying that the Spaniards have no more legal right over the East Indians because of their religion, than the East Indians would have had over the Spaniards if they had happened to be the first foreigners to come to Spain.

By the nineteenth century, however, the inconvenience to the colonizing powers of having to recognize the territorial rights of

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<sup>40</sup>*Supra*, note 33 at 12. See also M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (New York : Negro University Press, 1926) at 11 ff.



the native inhabitants had become apparent. While earlier writers had contended for or acknowledged the existence of these rights, there was an increasing trend away from such recognition by writers which reached its extreme point in the later part of the nineteenth century.<sup>41</sup> Thus, according to Oppenheim,<sup>42</sup> only "such territory can be the object of occupation as belongs to no State, whether it is entirely uninhabited, for instance, an island, or inhabited by natives whose community is not to be considered as a State". Indeed, this attitude towards native rights was implicit in Article 35 of the *Final Act of the Congress of Berlin 1888*.<sup>43</sup> It required signatory powers "to insure the establishment of authority in the regions occupied by them on the coasts of the African continent, sufficient to protect existing rights". This requirement was based on the supposition that the acquisition of sovereignty was dependent upon the establishment of a "regular government that could guarantee the rights of the native inhabitants, the settlers and all who traded there".<sup>44</sup>

The complete disregard of the rights of native inhabitants rested uneasily on the conscience of writers from Victoria on. Lindley struggled against the rising tide of racial superiority by suggesting that where the native peoples possessed "organised institutions of government", it could not be said<sup>45</sup>

that the territory inhabited by such races is not under any sovereignty. Such sovereignty as is exercised there may be of a crude and rudimentary kind, but, so

<sup>41</sup>Lindley, *supra*, note 40 at 12-17.

<sup>42</sup>Oppenheim, *supra*, note 39 at 555; Lawrence, *supra* note 37 at 148; see also J. Westlake, *Collected Papers* (Cambridge: Cambridge University Press, 1914) at 138:

it does not mean that all rights are denied to such natives, but that the appreciation of their rights is left to the conscience of the state within whose recognised territorial sovereignty they are compromised, the rules of international society existing only for the purpose of regulating the mutual conduct of its members.

<sup>43</sup>Text in E. Hertslet, *The Map of Africa by Treaty*, vol. 2, 3d. ed. (London: H.M.S.O. 1909), repr. 1967, 468 at 485.

<sup>44</sup>See J. Westlake, *International Law*, Part 1 (Cambridge: At the University Press, 1910) at 109-110.

<sup>45</sup>Lindley, *supra*, note 40 at 20.

long as there is some kind of authoritative control of a political nature ..., so long as the people are under some permanent form of government, the territory should not, it would seem, be said to be unoccupied.

Thus, it "would follow that if a tract of country were inhabited only by isolated individuals who were not united for political action, so that there was no sovereignty in exercise there, such a tract would be *territorium nullius*."<sup>46</sup>

This understandable squeamishness towards the racial arrogance assumed by others was reflected in certain aspects of state practice. The acquisition of British sovereignty over Australia was consistently explained on the ground of occupation because the aboriginal population did not have the degree of political organization necessary to rebut the presumption that Australia was *res nullius* at the time of the first settlement. As Gibbs J. pointed out in *Coe v. Commonwealth of Australia*:<sup>47</sup>

it is sought to treat the aboriginal people of Australia as a domestic dependent nation, to use the expression which Marshall C.J. applied to the Cherokee Nation of Indians: *Cherokee Nation v. State of Georgia* (1831) 5, Pet. 1 at 17. However, the history of the relationships between the white settlers and the aboriginal peoples has not been the same in Australia and in the United States, and it is not possible to say, as was said by Marshall C.J. (at p. 16) of the Cherokee Nation, that the aboriginal people of Australia are organised as a "distinct political society separated from others", or that they have been uniformly treated as a state. The judgments in that case therefore provide no assistance in determining the position in Australia...

It is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest. It is hardly necessary to say that the question is not how the manner in which Australia became a British possession might appropriately be described. For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction was drawn between a colony acquired by conquest or cession, in which there was an established system of law of European type, and a colony acquired by settlement in a territory which, by European standards, had no civilised inhabitants or settled law. Australia has always been regarded as belonging to the latter class: see *Cooper v. Stuart* (1898) 14 App. Cas. 286 at 291.

In contrast, the Maoris of New Zealand, at least in the North Island, did have a sufficient degree of political organization

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<sup>46</sup>*Ibid.* at 23.

<sup>47</sup>(1979), 24 A.L.R. 117 at 129. See also Lindley, *supra*, note 40 at 40-41; and generally, E.Evatt, "The Acquisition of Territory in Australia and New Zealand," in C.H. Alexandrowicz, ed., *Grotian Society Papers* (The Hague : Martinus Nijhoff, 1970) 16.

for their chiefs to participate in the *Treaty of Waitangi of 1840*. They purported to "cede to Her Majesty the Queen of England, absolutely and without reservation, all the rights and powers of sovereignty which the said Confederation or individual chiefs respectively exercise or possess, or may be supposed to exercise or possess over their territories as sole sovereigns thereof." As a result, British sovereignty was proclaimed over the North Island on the ground of cession, but over the South Island the claim was founded upon its prior discovery by Captain Cook.<sup>48</sup>

One of the principal objections to recognizing the rights of indigenous peoples, even where an agreement had been entered into between their chiefs and persons acting for the colonizing power, was that such agreements had no validity under international law because only agreements between recognised states constituted treaties cognisable by that law. Despite the obvious circular nature of this belittling of such arrangements, they were nevertheless relied upon in the allocation of boundaries, whether between claimed territories or between spheres of influence to which claims would later be asserted.<sup>49</sup>

Given the fact that they were not treaties, the classification and explanation of such agreements posed obvious theoretical

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<sup>48</sup>*Webster claim (1925)*, 6 R.I.A.A. 166; K.J. Keith, "International Law and New Zealand Municipal Law" in J.F.Northey, ed., *The A.G. Davies Essays in Law* (London: Butterworths, 1965) at 130; Evatt, *supra*, note 47 at 39. It may be that the *Webster* decision represents a partial reinterpretation of history (see the *Island of Palmas case*, *infra*, note 50), because a number of writers were of the view that British sovereignty pre-dated the *Treaty of Waitangi* (Letters Patent were issued in 1839 extending the limits of the Colony of New South Wales to include any New Zealand territory "which is or may be acquired in sovereignty by her Majesty"), and that the Treaty was no more than a "concession to humanitarian opinion in England and a bid for cooperation from the Maoris in New Zealand" (C.C.Aikman and J.L.Robson, "Introduction" to J.L. Robson, ed., *New Zealand*, 2d ed. (London: Stevens, 1967) at 5, citing N.A. Foden, *The Constitutional Development of New Zealand in the First Decade 1839-1849* (Wellington: L.T. Watkins, 1938) at 56; Rutherford, *The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand, 1849* (Auckland: Auckland University College, 1949) at 47.

<sup>49</sup>See generally Hertslet, *supra*, note 43, 3 vols. These volumes contain a wide range of agreements, some between European officials and native chiefs, others between trading companies and such chiefs; see for example those listed involving the Royal Niger Company, vol. 1 at 131-154.

problems for the lawyer. Nevertheless, they did have practical significance. As the Arbitrator said in the *Island of Palmas* case:<sup>50</sup>

As regards *contracts between a State or a Company such as the Dutch East India Company and native princes or chiefs or peoples* not recognised as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties. But, on the other hand, contracts of this nature are not wholly void of indirect effects on situations governed by international law; if they do not constitute titles in international law, they are nonetheless facts of which the law must in certain circumstances take account.

As to the circumstances in which the law would have to take cognisance of such arrangements, the Award went on to say:<sup>51</sup>

The form of the legal relations created by such contracts is most generally that of suzerain and vassal, or of the so-called colonial protectorate. In substance, it is not agreement between equals; it is rather a form of internal organization of a colonial territory, on the basis of autonomy for the natives. In order to regularise the situation as regards other States, this organization requires to be completed by the establishment of powers to ensure the fulfillment of the obligations imposed by international law on every State in regard to its own territory. And thus suzerainty over the native State becomes the basis of territorial sovereignty as towards other members of the community of nations. It is the sum-total of functions thus allotted either to the native authorities or to those of the colonial Power which decides the question whether at any certain period the conditions required for the existence of sovereignty are fulfilled. It is a question to be decided in each case whether such a regime is to be considered as effective or whether it is essentially fictitious, either for the whole or a part of the territory.

Regardless of whether these pronouncements were a reinterpretation of history,<sup>52</sup> they certainly constituted a skilful attempt to bring the

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<sup>50</sup>(1928), 2 R.I.A.A. 829 at 858.

<sup>51</sup>*Ibid.* at 858-59.

<sup>52</sup>Certainly A.S. Keller, O.J. Lissitzyn & F.J. Mann, *Creation of Rights of Sovereignty through Symbolic Acts 1400-1800* (New York: Columbia University Press, 1938) suggested that, for the most part, the numerous agreements made by the English and French governments in their dealings with native peoples, even if the agreements were called "treaties", "had no international significance, but were legislative acts on the part of the European state or devices and subterfuges whereby domestic peace was promoted or the interests of the European government advanced, while sovereignty at all times resided in the European state" (*ibid.* at 14-15). Dutch (*ibid.* at 15-22) and Portuguese (*ibid.* at 23-32) practice in the East tended to be different. The Dutch East India Company made it a policy to seek to acquire rights by making such agreements. This led the three authors to conclude that "very rarely did the Christian monarchs of Europe regard these peoples as possessing sovereignty or any recognised international status, with the possible exception of certain native 'states' in the East,

law into line with reality. It was a development which was very much in harmony with the subsequent attitude of the International Court in the era of decolonization. When asked whether the Western Sahara was "at the time of colonization by Spain a territory belonging to no one (*terra nullius*)",<sup>53</sup> the Court responded by referring to the law in force at the time of the assumption of Spanish sovereignty in 1884.<sup>54</sup>

Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of *terra nullius* by original title but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an "occupation" of a "*terra nullius*" in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*.

Although differing views had been "expressed concerning the nature and legal value of agreements between a State and local chiefs", the Court had not been asked "to pronounce upon the legal character or the legality of the titles which led to Spain becoming the administering power of Western Sahara". It had only been asked whether Western Sahara had, at the time of colonization, been *terra nullius*. The answer was in the negative. In the Royal Proclamation of 26 December 1884, Spain had stated that the territory was being taken under its protection "on the basis of agreements which had been entered into with the chiefs of the local tribes".<sup>55</sup>

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such as those in India or Ceylon, the Arab Kingdoms, or China, which the Portuguese and the Dutch regarded as entities having sovereignty in the international sense and therefore the ability to transfer it" (*ibid.* at 150).

<sup>53</sup>*Western Sahara case*, [1975] I.C.J. Rep. 12.

<sup>54</sup>*Ibid.* at 39.

<sup>55</sup>*Ibid.* at 39-40.

C. *Problems of applying the concept of occupatio*

Difficulties with the 18th century principle of occupation, as deduced originally from Roman law rules as to *occupatio* of a *res nullius*, were not only of a general nature. When it came to applying the principle to specific circumstances, other shortcomings emerged. The history of the Falkland Islands dispute provides a striking illustration.<sup>56</sup>

To Spain and its Latin-American successors, the Falklands (Malvinas) were part of the Spanish Empire. It was a cardinal feature of Spanish policy to maintain the integrity of the Falklands. It was an integrity which included a prohibition on trade.<sup>57</sup>

Spain had little success in the north of the Continent. The contest was more even in the Caribbean, though France and Britain broke the trading monopoly by seizing islands from Spain and using them as springboards for running the gauntlet of the Spanish navy. Only the southern part of the Continent remained intact, though the French and English interest in the Falklands may be seen as an attempt to employ the tactics they had used so successfully in the Caribbean to breach the integrity of the southern mainland. In simplified form, the following sequence of events occurred:

1764 — In April, Bougainville took formal possession of the Islands on behalf of Louis XVI of France from a camp on East Falkland Island.

1765 — In January, formal possession was taken of the Islands by Britain from a camp on West Falkland Island.

1766 — The British contingent came across the French colony and addressed a letter to its commander saying that, as the Islands had been discovered first by a subject of the English King,<sup>58</sup> no other nation had a right to be there.

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<sup>56</sup>It is not possible to deal with this matter in great detail. For further treatment, see Donald W. Greig, "Sovereignty and the Falkland Islands Crisis" (1983) 8 Aust. Y.B. Int. L. 20.

<sup>57</sup>A policy which dated back to the Papal Bull of 1493; see *supra*, note 30.

<sup>58</sup>This was an assertion that cannot be substantiated: see Greig, *supra*, note 56 at 25.

1766 — Following protests from the Spanish government, France agreed to forego its claim in favour of Spain, in the interests of the Family Compact between the Bourbon rulers of the two countries, and that Bougainville should be compensated by Spain.

1767 — On 1 April, a formal handing over ceremony took place at the French Settlement.

1770 — Spanish forces seized the British encampment. There was the possibility of the British government falling and being replaced by a ministry disposed to go to war with Spain.

1771 — In January, an exchange of documents took place in London which provided for the restoration of the British possession. It included a disclaimer by Spain that this demarche "cannot nor ought in any wise to affect the question of the prior right of sovereignty".

1773 — The British garrison was reduced as an economy measure.

1774 — Although the British presence was withdrawn altogether, a plaque was left which stated that the Islands were "the sole right and property of His Most Sacred Majesty George the Third." (This was subsequently removed and taken to Buenos Aires, where it was recaptured 30 years later.)

1807 — The last resident Spanish governor abandoned his post.

1810 — A provisional government was established in Buenos Aires.

1811 — With increasing troubles on the mainland, the Spanish settlement was withdrawn.

1816 — The United Provinces of Rio de la Plata declared their independence, it subsequently being claimed that the transfer of sovereignty from Spain to the new Latin-American states should be taken as having occurred in 1810.

1820 — A ship from the United Provinces was sent to the Islands to take possession of them "in the name of the country to which they naturally appertain".

1826 — Louis Vernet undertook a second expedition to the Islands and sought permission to establish a colony.

1828 — In a Decree of 5th January, Vernet was granted the Islands of East Falkland and Staten. 1828 also marked the final break up of the United Provinces with the secession of Uruguay.

1829 — Under a Decree of 10th June, Vernet was appointed Governor of the Malvinas and Tierra del Fuego, although the Decree itself admitted that "circumstances have hitherto prevented

this Republic from paying the attention to that part of the Territory which, from its importance, it demands". This formal act elicited a protest note from Britain on 19th November, 1829, in which it was asserted that the Islands were a British possession.

1831 – Following the arrest of two American ships by Vernet for allegedly illegal fishing and sealing in the waters around the Islands, and the refusal by the Argentine authorities to deliver up Vernet to be tried by the United States for "piracy and robbery", the U.S. *Lexington* destroyed the Argentine colony on the Islands. A British naval vessel, HMS *Clio*, entered Port Egmont on 20th December of that year.

1833 – On 2nd January, the *Clio* encountered an Argentine ship. The British flag was raised on shore in place of the Argentine flag which was returned to that ship. The latter then complied with an order from the *Clio* to leave.

1834 – A small British presence was maintained from this year on.

1843 – The Westminster Parliament passed "An Act to enable Her Majesty to provide for the Government of Her Settlements on the Coast of Africa and in the Falkland Islands". A Governor was appointed by Letters Patent.

1845 – Under the direction of the Governor, an Executive Council and a Legislative Council were established in the course of the year.

The facts of the origins of the Falklands dispute do not fit into any simple formula derived from Roman law. Both sides treat the Islands as a single entity, although the initial settlements were established in different places. On this hypothesis, there would be some ground for claiming that the French and, therefore, the Spanish/Argentine claim, had precedence. British apologists of the time felt obliged to call in aid the prior discovery of the Islands by English seafarers (an assertion, which, as has already been pointed out, cannot be substantiated, though it was probably believed at the time). It was this prior discovery that allegedly gave British pretensions primacy over a contemporaneous claim by right of possession.

Even if this special pleading of the British position could be accepted, there is the additional difficulty arising from the sixty years absence following the withdrawal of 1774. The argument that, despite leaving behind the plaque, any title would have lapsed is



strong<sup>59</sup> particularly when a rival claimant was left in possession of at least part of the disputed territory.

The last factor was not as important as it might have been, even at the time, given that the Spanish settlement was itself withdrawn in 1811. Britain could reasonably argue that, as the assertion of sovereignty in the 1820s was on behalf of a new entity (and not necessarily a successor to Spain as far as the Islands themselves were concerned), the sovereignty issue was still open. Britain, therefore, was just as much entitled to reassert its earlier claim. Moreover, the crucial matter was the commencement in 1834 of an uninterrupted period of British settlement and governmental activity.

While the practical significance of actual possession in this form cannot be denied, there remains the problem of translating it into legal terms. There is no doubt that conquest was a recognised mode of territorial acquisition in the early nineteenth century, although it usually took the form of a forced cession (i.e. express agreement to the transfer by a defeated power under a treaty of peace), or of annexation by the acquiring State followed by the acquiescence (implied assent) of the deprived power. Similarly, in the case of acquisitive prescription (adverse possession), the theory (drawn from municipal law) was that the transfer of title was dependent upon the acquiescence of the former sovereign. In the case of the Falklands, it was difficult to contend that Argentina had at any time consented to British possession of the Islands, given that there have been intermittent protests over most of the 150 year period. This included an offer to arbitrate the dispute as long ago as 1844. An American or British response would be of the view that title would be perfected in the interests of international stability

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<sup>59</sup>Hence Lindley's observation (*supra*, note 40 at 51) that "it cannot be said that the notice left on the fort was sufficient evidence, over the whole intervening period, of [Britain's] intention to retake the islands, and it would appear that any rights they may have had in 1774 had been abandoned long before 1832" (brackets added).

and legal order, even if the act of annexation was followed only by "an exercise of sovereignty over it for some time".<sup>60</sup>

In opposition to such attitudes, Argentina could rely upon the twin pillars of public order that Latin American states of the region strove to establish in their relations with each other and the outside world. These are the principles *uti possidetis* and "no conquest". The object of the first principle (less important in the Falklands context because of the existence of competing claims in 1810 and of the withdrawal of the Spanish settlement after that date) was that the new states that emerged from the Spanish Empire after 1810 were the successors to the entire territory of the administrative units of the former Empire and out of which they themselves were formed.<sup>61</sup>

The "no conquest" principle, in its application to the southern part of the continent, was linked in spirit to the Monroe doctrine: the United States and the southern Republics were in harmony in wishing to prevent future conquests by European powers. Although the United States was not prepared to commit

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<sup>60</sup>E. Maxey, *International Law with Illustrative Cases* (St Louis: F.H. Thomas Law Book, 1906) at 144; Lawrence, *supra*, note 37 at 159-160; an approach endorsed by A.S. Hershey, *The Essentials of International Public Law and Organisation*, rev'd ed. (New York: The MacMillan Company, 1939) at 278-9; H. Wheaton, *Elements of International Law* (Oxford: At the Clarendon Press, 1936) being a reprint of the 8th ed. 1866 at 200, the original being quoted by J. Westlake, *International Law*, Part I (Cambridge: At the University Press, 1910) at 112. There were even those who suggested that undisturbed possession alone was sufficient: see Hall, *supra*, note 38 at 566-569.

<sup>61</sup>As the Tribunal explained in the *Beagle Channel Arbitration* (1978) 17 Int. Leg. Mat. 634 at 645:

As the Court understands the matter, the doctrine has two main aspects. First, all territory in Spanish America, however remote or inhospitable, is deemed to have been part of one of the former administrative divisions of Spanish colonial rule (vice-royalties, captaincies-general, etc.). Hence there is no territory in Spanish-America that has the status of *res nullius* open to an acquisition of title by occupation. Secondly, the title to any given locality is deemed to have become automatically vested in whatever Spanish-American State inherited or took over the former Spanish administrative division in which the locality concerned was situated (*uti possidetis, ita possideatis*, - the full formula). Looked at in another way, *uti possidetis* was a convenient method of establishing the boundaries of the young Spanish-American States on the same basis as those of the old Spanish administrative divisions, except that the latter were themselves often uncertain or ill-defined or, in the less accessible regions, not factually established at all, - or again underwent various changes.

itself to military action on behalf of its neighbours to the south, it tried to encourage them to enter into mutual undertakings for their own protection and to serve as a warning to would-be European predators.<sup>62</sup> The *Treaty of Lima 1848*,<sup>63</sup> although it never came into force, was typical of the many reassertions of the overriding principle. Article II.1 of that instrument specified certain acts as constituting breaches of the treaty, including the situation that would arise if "any foreign nation shall occupy or attempt to occupy any portion of the territory included within the boundaries of the Confederated Republics, or shall make use of force to exclude such territory from under the rule and domain of the said republic under any pretence whatsoever".

In both the writings of the Anglo-American school and in the attitude and actions of Latin American countries, there are illustrations of the attempt to explain or mould international law to suit the special interests of the states concerned. The consequence will often be that, in relation to a particular dispute, there are differing rules which support the claims of the rival states. This can be clearly seen in the investment disputes over the past twenty years or so, when capital exporting and importing countries have advanced conflicting rules to be applied in disagreements between them as to the applicable law and as to the assessment of compensation for a particular asset that has been taken over by the capital importer. The Falklands dispute has some similarities, although the outcome could depend in part upon one of two factors: whether the Falklands should be considered as part of (formerly Spanish) Latin America and subject to the "no conquest" principle; or as a territory falling outside that political region and subject to acquisition by the general rules of international law applicable at the relevant time. To a large extent, the issue of whether the Falklands were politically part of Latin America, was unresolved in the period 1764-1832 and has remained so until this day.

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<sup>62</sup>See generally A. Alvarez, *The Monroe Doctrine: Its Importance in the International Life of the States of the New World* (New York: Oxford University Press, 1924) at 165-191.

<sup>63</sup>*Ibid.* at 171. For a brief survey of other examples, see Greig, *supra*, note 56 at 52-54.

D. *Subsequent developments in the law of territorial acquisition*

A number of the inadequacies in the classical doctrine, which required actual possession as a basis for acquiring title through occupation, have already been considered. Two particular problems are worth emphasizing: the fact that, given the size of the territories involved, the acquiring state could not assume possession with immediate effect (hence the invention of the notion of inchoate title); and the existence of an indigenous population with whom, in many cases, various treaties or agreements had been made by officials or representatives of the acquiring state.

The changing attitudes towards this last problem and the way in which the status of the native peoples has gradually been reinterpreted by international law have already been dealt with. This reinterpretation has come about, in more recent years at any rate, as a result of pressures exerted by the new states of Africa and Asia, whose inhabitants are the descendants of the very peoples whose rights and interests international law and society so long ignored.

Even if this issue is put to one side and the matter of possession is examined more closely, it is apparent that a rule based upon the need to establish physical control over territory (even when coupled with inchoate title) was inconvenient to the colonizing powers. The tyranny of distance and the scarcity of resources led to claims being made to vast areas of hinterland on the basis of coastal settlements of relatively small size. By the end of the century, hinterland as a doctrine was of decreasing practical relevance as the colonizing powers divided up the interior of the African continent between them by agreement.<sup>64</sup> Its uncertainty as a legal principle was due largely to the fact that jurists explained the circumstances which it was intended to cover in a different way.

Hinterland doctrine (or the sector principle) was based upon a quasi-geometrical construct that land lying "behind" a coastline

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<sup>64</sup> See Lindley, *supra* note 40 at 234-35. The concept, together with, or transformed into, the so-called sector principle, continued to exercise an influence in polar regions: see F.M. Auburn, *Antarctic Law and Politics* (London: C. Hurst & Co., 1982) at 17-31.

already legitimately under the sovereignty of the claimant could also be claimed. The boundaries of the claim would be on some equidistance allocation between adjoining states in a manner similar to that later adopted in Article 6 of the *1958 Convention on the Continental Shelf* for the division of off-shore rights. Where the territory claimed abutted a polar region the division would, however, take account of this fact by making the construct by lines drawn from the outer edges of the claimed coastline or territory to the pole itself.

The weakness of an assertion of title on such a basis alone was that the claimant would have no actual possession or control over the inland territory to which the claim related. Legal theory, to justify claims to inland or contiguous areas, took an elastic view of what was necessary for such possession. In the *Clipperton Island* case<sup>65</sup> the Award equated the taking of possession with a situation where a territory, because of the circumstances, was "at the absolute and undisputed disposition" of the claimant.<sup>66</sup> The transposition of possession, meaning physical possession of at least a significant part of the territory claimed, to some less tactile concept was more apparent in the terminology used by the arbitrator in the *Island of Palmas* case.<sup>67</sup> Having asserted that "practice, as well, as doctrine, recognises — 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 title",<sup>68</sup> the arbitrator referred to the "principle that continuous and peaceful display of the functions of State within a given region is a constituent element of territorial sovereignty."<sup>69</sup> This rationale was very much a product of the requirement of Article 35 of the *Berlin Final Act 1885* with its

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<sup>65</sup>*Supra*, note 36.

<sup>66</sup>(1931) 26 Am. J. Int. L. 390 at 394.

<sup>67</sup>(1928), 2 R.I.A.A. 829.

<sup>68</sup>*Ibid.* at 839.

<sup>69</sup>*Ibid.* at 840.

emphasis on the need for a claimant to be in a position to protect the rights of others.<sup>70</sup> It was also a sign of a further aspect of legal development in line with the requirements of colonization. Because of the size of the territories being claimed in relation to the resources that could be allocated to the task by the claimants, these manifestations of occupation were largely by decree rather than by actual settlement. In case of Australia, a coastal presence was the basis of claims to vast areas of unexplored territory. The legal seal of approval to such policies was given by the Permanent Court in the *Eastern Greenland case*.<sup>71</sup>

Parts of the Eastern Greenland coast had been used for centuries by seamen from Norway as temporary bases when they had been fishing and sealing in the area. There were a number of Danish settlements on the western and southern coasts of Greenland, but Denmark let it be known that it intended to pass legislation covering activities in the remainder of the island. One of the purposes of the legislation was to exclude all foreigners, including the Norwegians, from the coasts and waters of eastern Greenland. Faced with this threat, the Norwegian government put forward a claim of its own to a part of eastern Greenland, alleging that it was *terra nullius* and, therefore, open to occupation by Norway.... The Court rejected this possibility, upholding the Danish case that the whole island was subject to the sovereignty of Denmark. In the circumstances, Denmark had sufficiently established its claim before the critical date, that is, the announcement by Norway of its occupation of the territory in question.

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<sup>70</sup>*Supra*, note 43. Hence the arbitrator's comment, 2 R.I.A.A. at 839:

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.

<sup>71</sup>(1933), P.C.I.J. Ser. A/B, No. 53.

In reaching this conclusion, the Court discarded any notion of possession of, in the sense of a physical presence in, the disputed territory. In its view "a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign and some actual exercise or display of such authority."<sup>72</sup>

#### IV. ANTARCTIC SOVEREIGNTY

It is beyond the scope of this paper to deal in detail with the factual elements behind the claims to territorial sovereignty over parts of Antarctica by Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom. The relevant matter is the way in which the *Eastern Greenland* case was used as authority supporting the various claims. Most notably, two aspects of the decision were relied upon. The first, was that actual possession of the disputed territory, in the form of a physical presence on, seemed to have been discarded. The second concerned the Court's admission that:<sup>73</sup>

In most cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger....

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with

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<sup>72</sup>*Ibid.* at 45-46.

<sup>73</sup> *Ibid.* at 46. See also the following remarks of the arbitrator in the *Island of Palmas* case (1928), 2 R.I.A.A. 829 at 840:

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas. It is true that neighbouring States may by convention fix limits to their own sovereignty, even in regions such as the interior of scarcely explored continents where such sovereignty is scarcely manifested, and in this way each may prevent the other from any penetration of its territory. The delimitation of Hinterland may also be mentioned in this connection.

very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.

It was argued therefore that, given the similarity between Antarctica and Greenland as far as terrain and climate were concerned, Antarctic sovereignty had been established by the time of the Antarctic Treaty on the basis of legislative and other governmental acts, together with intermittent exploration and research activity. The absence of any physical possession or control (other than research bases at specific locations) of the area in question was excused because of its remote and inhospitable nature. For example, in the view of the Australian government:<sup>74</sup>

Australia's title in international law rests on acts of discovery and formal claims of title by British and Australian explorers, the formal transfer of the territory from Britain to Australia and Australian acceptance by legislation, and subsequent acts showing an intention by Australia to exercise sovereignty over the Territory. This intention is demonstrated, inter alia, by the application by Australia of legislation to the Territory, the negotiation and conclusion of Treaties affecting the Territory and by engagement in a degree of administrative activity there. Having regard to the particular conditions experienced in Antarctica, a principal form of Australian administrative activity is related to the presence of Australian scientific research bases and a program of exploration and scientific work in the Australian Antarctic Territory.

Australian writers have been less sanguine about their country's position, although they have favoured the view that Australia at least has a priority in areas subject to its claims which international law will, for the time being, protect.<sup>75</sup>

There are a number of weaknesses in this thesis which will be addressed soon. But, there are additional factors at work which

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<sup>74</sup>Written answer of 22 November 1979 by Mr. Peacock, Minister for Foreign Affairs (Aust. H.R. Deb. 1979, Vol. 116, para 3502; 8 Aust. Y.B. Int. L. at 306). See to similar effect a statement by Senator Webster, the Minister of Science, on 24 August 1977 (Aust. S. Deb. 1977, Vol. 74, paras 443-4; 7 Aust. Y.B. Int. L. at 454); and the evidence given by Mr. E. Lauterpacht Q.C. to the Parliamentary Sub-Committee on Territorial Boundaries on 12 October 1977 (8 Aust. Y.B. Int. L. at 306-307).

<sup>75</sup>See G. Triggs, "Australian Sovereignty in Antarctica" Part II (1982) 13 Melb. Univ. L. Rev. 302 at 332; A.C. Castles, "The International Status of the Australian Antarctic Territory" in O'Connell, ed., *International Law In Australia*, 1st ed. (London: Stevens, 1965) at 355-56. For a divergent opinion, see Donald W. Greig "Territorial Sovereignty and the Status of Antarctica" (1978) 32 Aust. Outlook 117.



are undermining the position of the claimant states. Since 1961, the *Antarctic Treaty* has provided a basis upon which a regime has developed for the adjustment of the interests of consultative parties<sup>76</sup> to ensure the peaceful administration of activities taking place there. The *Treaty* itself appears to retain the status quo by virtue of Article IV which provides:<sup>77</sup>

1. Nothing contained in the present Treaty shall be interpreted as: (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise; (b) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.
2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial

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<sup>76</sup>The original parties to the *Treaty* which included, in addition to the claimant States listed in the text, Belgium, Japan, South Africa, the United States and the Soviet Union. By Article XIII, the *Treaty* is "open for accession by any State which is a member of the United Nations, or by any other State which may be invited to accede to the Treaty with the consent of all Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX of the Treaty." It is the latter provision which establishes the notion that certain States are entitled to "consultative" status i.e., to consult together "on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty" (Article IX.1). The same paragraph bestows this right on the Contracting Parties "named in the preamble to the present Treaty" (i.e. the original members) and Article IX.2 does so with respect to Contracting Parties acceding to the *Treaty* under Article XIII, but only "during such time as that Contracting Party demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the dispatch of a scientific research expedition." Among States that have qualified for consultative status under this requirement are (with date of accession as well as subsequent acceptance as having so qualified): Poland (1961) (1977); Brazil (1978) (1983); F.R.G. (1979) (1981); Uruguay (1980) (1985); P.R.C. (1983) (1985); India (1983).

<sup>77</sup>Parallel provisions have been included in various instruments adopted for the regulation of activities taking place within the *Antarctic Treaty* area, defined by Article VI as "the area south of 60 degrees South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within the area." In the *Convention on the Conservation of Antarctic Marine Living Resources 1980*, the invitation was issued to States making use of the resources of the waters in the area, to join in the conservation regime provided for in the *Convention*. Article IV of that instrument contained a reaffirmation of the principles contained in Article IV of the *Treaty* itself. See also the *Convention on the Regulation of Antarctic Mineral Resource Activities 1988*, Article 9.

sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

However, there is no doubt that the activities of two non-claimants, the Soviet Union and the United States, greatly outweigh in significance the activities of other states. While those two countries have rejected the validity of existing claims to sovereignty, they have not excluded the possibility of one day becoming claimants themselves. If the *Treaty* were to come to an end, the protection of Article IV would be removed and other states would be faced with a Soviet and American presence on a much greater scale than in 1961.

The mere fact of inter-state regulation of Antarctic activities is to diminish the significance of assertions of sovereignty. The incantation of Article IV becomes an increasingly hollow ritual. In the recent negotiations for a minerals regime to cover the eventuality of the discovery of land based resources which would be economically viable to exploit, the demands of the claimants for recognition of some priority for them struck an unsympathetic response. If territorial rights mean anything, then they should have received some recognition in the context of a minerals regime.<sup>78</sup>

To return to the discussion of the pre-existing weakness of the claimants' position, their real difficulty stems from a misunderstanding of the legal situation, based upon a misinterpretation of the relevant authorities. The basis of their view seems to be that the *Eastern Greenland* case represented the law until the time the Antarctic Treaty came into force and that activities of states like Australia satisfied the minimum control requirements applicable to such a remote and inhospitable region. Insofar as international law might have been changing to meet the demands of post-1945

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<sup>78</sup>The degree of recognition under the *Convention on the Regulation of Antarctic Mineral Resource Activities 1988* is minimal. The most significant mention of the claimants' position is to be found in the membership of Regulatory Committees provided for in Article 29.2. In addition, by Article 32, the voting position of the claimant states as a group in decision making by the Regulatory Committees may be of some importance. These Committees have the power, in accordance with Article 31, *inter alia* to approve Management Schemes and issue exploration and development permits, as well as to monitor exploration and development activities, in areas identified by the Commission under Article 41 for the possible exploration and development of a particular mineral resource or resources.

international society, it could be explained by reference to the concept of the intertemporal law "which subjects the act creative of a right to the law in force at the time the right arises"; and tests "the existence of the right, in other words its continued manifestation" by reference to "the conditions required by the evolution of the law."<sup>79</sup> In other words, Australia's title was valid by the law in force prior to the time when legal changes began and its activities were sufficient to preserve that existing title even in the new order that developed in the post war era.<sup>80</sup>

The fallacy is, of course, that there is no acceptance of the proposition that Australia's sovereignty had become established according to the less stringent criteria that international tribunals were once prepared to apply in territorial disputes in various "remote" areas. Despite the lip-service paid to occupation as a traditional mode of acquisition, it had long since lost its municipal law characteristics of "intention" plus "act". The "act" had become "activities" and the activities extended over lengthy periods of time. The process of acquisition had become one of historical consolidation. In such a case, the concept of consolidation required a different application of the principle of the intertemporal law. Because the process is an extended one, it must be assessed by reference to the changing requirements of the law in order to ascertain whether title has been definitively established. In the case of Antarctic claims, it is difficult to show that title had become definitively established. Until that situation occurs the maintenance of a particular claim, depends upon the changing requirements of the law as to acquisition, including the effects of the Antarctic Treaty.

There is a second ground for suggesting that the earlier precedents have been misunderstood. Commentators have explained the minimal manifestations of sovereignty by reference to the remote

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<sup>79</sup>*Island of Palmas* case (1928), 2 R.I.A.A. 829 at 845.

<sup>80</sup>See G. Triggs, "Australian Sovereignty in Antarctica" Part I (1981) 13 *Melb. U. L. Rev.* 123 at 145-55.

and sparsely populated nature of the territory in question.<sup>81</sup> Reference is also made to the fact that, in choosing between rival claimants, victory went to the party which pointed to the greater connection with the territory, even though the contact had in fact been minimal.<sup>82</sup> The crucial point in these various cases would seem to be, however, the absence of external interest; a preparedness on the part of other states to allow an allocation of sovereignty to be made between the contesting states.<sup>83</sup> The references by international tribunals to the remote and inhospitable nature of the territory and the scarceness or absence of a population are explicable, in part, by the fact that such territories are unlikely to give rise to the interest of possible alternative claimants.

It is in this respect that Antarctica differs fundamentally from the territorial disputes considered in cases like *Eastern Greenland* or *Palmas*. Antarctica has been a matter of concern to states other than the claimants. Both the Soviet Union and the United States have refused to acknowledge the validity of existing claims on the ground that the requirements of international law for the acquisition of sovereignty have not been satisfied. However, both countries have let it be known that, if some lesser standard were applied, they believe that they have grounds for submitting claims of their own.<sup>84</sup> What remains unclear, of course, is the extent to which "permanent" scientific bases with a changing "population" could constitute a

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<sup>81</sup>See Triggs, *ibid.* at 139; Castles, *supra*, note 75 at 350-351, 353-356; H. Waldock, "Disputed Sovereignty in the Falkland Island Dependencies" (1948) 25 Brit. Y.B. Int. L. 311 at 324-325, 334-337, 344-345.

<sup>82</sup>See Triggs, *supra*, note 80 at 129, 143-144.

<sup>83</sup>This was certainly true in the *Eastern Greenland* case (1933), P.C.I.J. Ser. A/B, No. 53 in which various governments that might have had an interest in opposing Denmark's claim were approached, but each of them "replied in terms which satisfied the Danish Government" (at 37). In the *Clipperton Island* arbitration (1931), 26 Am. J. Int. L. 390, a report that Britain had designs on the island was "afterwards acknowledged to be inaccurate" (at 392), and the United States, when faced by a demand for an explanation by France of the fact that an American flag had been sighted on the island, "responded that it ... did not intend to claim any right of sovereignty over Clipperton" (*ibid.*).

<sup>84</sup>See P. A. Toma, "The Soviet Attitude towards the Acquisition of Territorial Sovereignty in the Antarctic" (1956) 50 Am J. Int. L. 611; Auburn, *supra*, note 64 at 61-78 (USA), 78-83 (USSR).

settlement from which to give some semblance of control over surrounding areas.

## V. THE DILEMMA RECONSIDERED

The purpose of this paper is not to foretell the future as far as Antarctic sovereignty is concerned. The purpose of the discussion of the rules of territorial acquisition has been to demonstrate the way in which their development has been influenced by the interests and demands of the colonizing powers. It was a struggle for supremacy in which the victims had no say. Only in more recent times have the rules once more been reexamined in the light of the needs of the new Third World states. As far as the Antarctica is concerned, the *Antarctic Treaty*, despite Article IV, is gradually modifying the position of the claimants. Even if Third World interest in establishing a regime there based upon the common heritage principle may be on the wane, the notion that the area has an international status based upon international regulation within the present Treaty has come to be accepted by claimants and non-claimants alike.

What has the discussion of the rules of territorial acquisition to say about the inherent conflict between law as a fetter on state conduct and the interest of states to have maximum freedom to act as they wish? First, the rules as to acquisition of territory were moulded and re-articulated over an extensive period of time; they were not subject to violent and sudden change. Second, in addition to the corpus of legal rules, various special regimes have been established to preserve the international order, some partly legal, partly political, and others more obviously political in nature. The *Final Act of the Berlin Congress* and the *Antarctic Treaty* fall into the former category, the concept of spheres of influence falls into the latter category.

The nineteenth century conception of a sphere of influence was intimately bound up with the acquisition of territory. For the most part, spheres of influence took the form of agreements or understandings between colonizing powers with respect to the areas within which they could be guaranteed a free hand to extend their control to establish sovereignty. At times, in a less formal way, they

denoted an application of the notion of contiguity. A colonizing power would have priority in establishing sovereignty over areas adjoining an existing and recognised claim.<sup>85</sup>

In the contemporary world of superpower politics, the concept of spheres of influence constitutes one of the rules of the game for the ordering of international society and the avoidance of nuclear war.<sup>86</sup> It has its most obvious manifestation in the Brezhnev doctrine. In August 1968, troops from the Soviet Union and other Warsaw Pact countries entered Czechoslovakia to suppress the liberalization movement that had developed in that country's ruling Communist Party. This action was subsequently justified by Soviet President Brezhnev in a speech in Poland in December 1968. The substance of what he said had already appeared in a *Pravda* article of September 1968,<sup>87</sup> in which it was stated:

The peoples of the socialist countries and Communist parties certainly do have and should have freedom for determining the ways of advance of their respective countries. However none of their decisions should damage either socialism in their country or the fundamental interests of other socialist countries, and the whole working class movement, which is working for socialism. This means that each Communist party is responsible not only to its own people, but also to all the socialist countries, to the entire Communist movement.

It followed therefore that.<sup>88</sup>

the Communists of the fraternal countries could not allow the socialist states to be inactive in the name of an abstractly understood sovereignty, when they saw that the country stood in peril of antisocialist degeneration.

The actions in Czechoslovakia of the five allied socialist countries accords also with the vital interests of the people of the country themselves.

American actions in Grenada and Nicaragua project a "mirror image." One of the principal criticisms (apart from doubts raised

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<sup>85</sup>Lindley, *supra*, note 40 at 207 ff.

<sup>86</sup>See generally P. Keal, *Unspoken Rules and Superpower Dominance* (New York: St Martin's Press, 1983).

<sup>87</sup>"Sovereignty and International Duties of Socialist Countries" (1968) 7 Int. Leg. Mat. 1323.

<sup>88</sup>*Ibid.* at 1324.

as to their legality)<sup>89</sup> has been that they appear to legitimize the Soviet attitude towards states falling within their sphere of influence in Eastern Europe and, more recently, in the context of Afghanistan.

Despite Bull's views towards the passive attitude of international law with respect to breaches of its rules, there is an underlying distinction between the approach of the Soviet Union and that of the United States. A right of Soviet intervention is openly claimed for states within its orbit as a matter governed by terms of "Socialist International Legal Principles and Norms".<sup>90</sup> According to Tunkin:<sup>91</sup>

As an aspect of interstate relations, the principle of socialist internationalism is the result of applying the principle of proletarian internationalism to relations between states of the socialist type. Proletarian internationalism has signified and does signify above all the unity of the proletariat of various countries in the class struggle against capital for a socialist reconstruction of society. Therefore, the principle of socialist internationalism as a principle of relations among socialist states signifies above all the unity of the socialist states in that class struggle between socialism and capitalism which takes place in the international arena in specific forms and which comprises the basic content of contemporary international relations. An important part of this struggle is the joint defense of the socialist system from any attempts of forces of the old world to destroy or subvert any socialist state of this system.

In contrast, the United States has preferred to explain its conduct by reference to recognised exceptions to the proscription of the use of force in Article 2.4 of the United Nations *Charter*. The Grenada action was variously justified on the grounds of the invitation of the Governor, the right of humanitarian intervention to protect the safety of American nationals and the authorization granted by the Organisation of East Caribbean States.<sup>92</sup> American

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<sup>89</sup> On Grenada, see F.A.Boyle *et al.*, "International Lawlessness in Grenada" (1984) 78 Am. J. Int. L. 172; for Nicaragua, see the judgment of the International Court in the *Nicaragua* case, [1986] I.C.J. Rep. 14.

<sup>90</sup> This is the title given by G.I. Tunkin, *Theory of International Law* (Cambridge: Harvard Univ. Press, 1974) to Chapter 19 of his book.

<sup>91</sup> *Ibid.* at 434; see also at 440; W.E. Butler, "Socialist Principles of International Relations?" (1971) 65 Am. J. Int. Law 796; N. Rostow, "Law and the Use of Force by States: the Brezhnev Doctrine" (1981) 7 Yale J. World Pub. Order 209.

<sup>92</sup> J.N. Moore, "Grenada and the International Double Standard" (1984) 78 Am. J. Int. L. 145; C.J. Joyner, "Reflections on the Lawfulness of Invasion" (1984) 78 Am. J. Int. L. 131.

policy towards Nicaragua has been explained on the basis of the need for the United States to act in the exercise of a right of collective self-defence in conjunction with states neighbouring Nicaragua. They claimed to be threatened by the latter's alleged attempts to export the Sandinista revolution.<sup>93</sup>

In the *Nicaragua* case,<sup>94</sup> the International Court was prepared to rely upon the American plea to have acted in collective self-defence as an acceptance by the United States of the continued validity of the overriding proscription contained in Article 2.4 of the *Charter*. However, it seems to fly in the face of reality to suggest, as did the Court, that such reaffirmation of the rule had the effect of strengthening rather than weakening it, particularly when the openly avowed purpose of the American support of the Contras was to overthrow the Sandinista government of Nicaragua. Despite the Court's comments, the danger of the American actions was that, in complying with the pattern set by the Soviet view of the solidarity of like-minded states, they would be sanctioning not just the political acceptability of such conduct, but also laying the foundation for its reception into the legal order.

This danger is perhaps more real than is generally acknowledged. When mention was made<sup>95</sup> of the doctrinal distinction between hard and soft law, it was pointed out that some of the rules in the latter category were based upon standards of practice that did not satisfy the strict requirements prescribed by the International Court on the basis of Article 38.1.b of its *Statute*. Could it not be argued that some concept of spheres of influence has become accepted as soft law, bestowing upon each of the superpowers rights of intervention to preserve the stability of their own region in the greater interests of the preservation of global peace and the avoidance of nuclear war?

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<sup>93</sup>J.N. Moore, "The Secret War in Central America and the Future of World Order" (1986) 80 Am. J. Int. L. 43; J.P. Rowles, "'Secret Wars', Self-Defense and the Charter - a Reply to Professor Moore" (1986) 80 Am. J. Int. L. 568.

<sup>94</sup>See, *supra* note 22, [1986] I.C.J. 14 at 98.

<sup>95</sup>*Supra*, note 26.



The reason for rejecting this analogy is found in the nature of the rules which have been advanced on the ground that they constitute soft law. Hitherto, the rules of soft law have been essentially altruistic in nature, in that they have sought to redress the social and economic inequalities of the world.<sup>96</sup> They conform to notions of distributive justice. The same cannot be said of a "spheres of influence" doctrine. It is essentially egocentric, designed to serve the personal interests of the superpowers to the detriment of the rights of those states and peoples which fall, willingly or unwillingly, within the relevant sphere. Superpower dominance is the antithesis of the concepts of the equality and independence of states and of the notion of self-determination and of the rights of peoples. Bull, who saw principally a positivist world of *realpolitik*, was largely indifferent to such factors. The conflict is crucial to writers of a naturalist persuasion who see law as more than a hollow reflection of state conduct. It is a question of values, for it is values which, as "standards (criteria) for establishing what should be regarded as desirable, provide the grounds for accepting or rejecting particular norms."<sup>97</sup>

The Bull approach is to devalue law, or at least to ascribe to it values of a by-gone age. Speaking of the late nineteenth century phenomenon of colonization, Puchala and Hopkins had this to say:<sup>98</sup>

But much more important than the characteristic transaction flows of colonialism were the interaction patterns in relations among imperial powers ... There was a pronounced competitiveness amongst metropolises as each country sought to establish, protect, and expand its colonial domains against rivals. Yet there was also a sense of limitation or constraint in major-power relations, ... evidenced in periodic

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<sup>96</sup>One of the obstacles to progress has been the state centred view of the present international order. A weakness of the New International Economic Order was its insistence upon the rights of the developing states to receive the benefits of wealth redistribution without any means of ensuring that their people would actually share in those benefits. Hence redress of the existing inequalities through the implementation of such rights seems to be a distant prospect: see Bull, *supra*, note 1 at 90, citing J. Stone, "Approaches to the Notion of International Justice" in R.A. Falk & C. E. Black, eds, *The Future of International Legal Order: Trends and Patterns*, Vol. 1 (Princeton: Princeton University Press, 1969) at 372.

<sup>97</sup>R. M. Williams Jr., "The Concept of Values," *International Encyclopedia of the Social Sciences*, Vol. 16 (New York: The MacMillan Co. & The Free Press, 1968) 283 at 284.

<sup>98</sup>"International Regimes: Lessons From Inductive Analysis" (1982) 36 *Int. Org.* 245 at 252.

diplomatic conferences summoned to sort out colonial issues ... Constraint [was] ... also reflected in doctrines like "spheres of influence" ..., which endorsed the notion that sharing and subdivision were in order.

Overall, however, as these writers went on to point out:<sup>99</sup>

The legitimacy of colonization was collectively endorsed by the metropolitan governments and, after 1870, by overwhelming cross-sections of national populations - including Americans. It was this overriding sense of legitimacy, the conviction that imperialism and colonization were right, that all means towards colonial ends were justified, and that international management to preserve major-power imperialism was appropriate, that contributed to the durability of the system.

The contemporary climate in its attitude towards spheres of influence is vastly different. The superpowers do not hold the law-making and rule-making monopoly that the colonial powers held towards the end of the last century. Even McDougal, in his policy-oriented approach to international law and society, regarded the role of decision makers as constrained by an objective standard of reasonableness: "[f]or all types of controversies the one test that is invariably applied by decision-makers is that simple and ubiquitous, but indispensable, standard of what, considering all relevant policies and all variables in context, is *reasonable* as between the parties."<sup>100</sup>

The guardians of what is reasonable can hardly be the parties to a particular dispute. However much they should take account of that standard, they are unlikely to be able to judge objectively what is reasonable. The importance of their own interests is bound to give the subjective slant to their assessment of that criterion. Hence the application of the requirement is dependent upon the reactions of the decision-makers of states not personally involved in the situation.<sup>101</sup>

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<sup>99</sup>*Ibid.* at 254.

<sup>100</sup>M. McDougal & N. Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security" (1955) 64 Yale L. J. 648 at 660, quoting a passage from N. Smith, *The Law and Custom of the Sea* (London: Stevens, 1950) at 20 which included the following:

The law of nations which is neither enacted nor interpreted by any visible authority universally recognised, professes to be the application of reason to international conduct.

<sup>101</sup>*Supra*, note 21.

Given the size of the present international community as compared with the position in 1900, there is a greater chance of the objective standard being sufficiently endorsed to overcome the predilections of the superpowers and their most constant supporters. For this reason, it is more likely that the just demands of the third world for greater equity in the distribution of economic benefits will be received into international law than will the egocentric views of the superpowers as to their rights in relation to the countries and peoples subject to their hegemony.

Ultimately, therefore, international law can be seen as a vehicle for justice. The more unreasonable actions of states, however powerful, can be categorised as unlawful even if there may be no immediate possibility of redress to states affected by such conduct.<sup>102</sup>

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<sup>102</sup>The international community may thus be seen as in the process of moving away from the outmoded concept of world order based upon the balance of power so fundamental to Bull's thinking (*supra*, notes 3, 4) though it is as yet unclear what model is likely to replace it. It certainly will not be any concept of world government. As R.A. Falk has pointed out (R.A. Falk *et al.*, *International Law: A Contemporary Perspective* (Boulder, Colo.: Westview Press, 1985) at 668-669):

... the balance of power approach to world order is increasingly incapable of satisfying the needs of principal governments or their most powerful constituencies, whereas a utopian fantasy of world government is unconnected with any plausible transition scenario.

The other possibilities considered by Falk (*ibid.* at 673) are what he terms the "Concert of Multinational Corporate Elites" and "Global Populism". It is the latter, of course, which is in keeping with the philosophy behind such writings as S.S. Kim, *The Quest for a Just World Order* (Boulder, Colo.: Westview Press, 1984), see esp. Ch. 3 "In Search of a World Order Theory."

